Federal Court  Cour fédérale

Date: 20161011

Docket: T-2579-91

Citation: 2016 FC 1132

Ottawa, Ontario, October 11, 2016

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

ROGER SOUTHWIND FOR HIMSELF, AND ON BEHALF OF THE MEMBERS OF THE LAC SEUL BAND OF INDIANS

Plaintiffs

and

HER MAJESTY THE QUEEN IN RIGHT OF CANADA

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Third Party

and

HER MAJESTY THE QUEEN IN RIGHT OF MANITOBA

Third Party

ORDER AND REASONS

[1] I have before me two objections relating to the proposed evidence of Ms. P.M. (Patt) Larcombe whom the Plaintiff seeks to have qualified as an expert witness.

[2] Ontario filed an objection on July 13, 2016, to the proposed expert witness regarding her qualifications to give opinion evidence, pursuant to Rule 52.5 of the *Federal Courts Rules*. Ontario has been joined and supported in its motion by both Canada and Manitoba. Prior to the *voir dire* with respect to the qualifications of Ms. Larcombe, Canada advised that it was objecting to the admissibility of a set of evidence called the Focus Group Transcripts. Canada indicated that if Ms. Larcombe is qualified to testify to some extent as an expert, then her evidence, in so far as it relies upon the Focus Group Transcripts, ought not to be received because the transcripts are not admissible evidence. Canada was supported in its motion by Ontario. Manitoba took no position with respect to this objection.

Ontario's Objection

[3] The *voir dire* was held over two days last week during which Ms. Larcombe's qualifications and expertise were explored in some detail by both the Plaintiff and Ontario. Despite the objection of Plaintiff's counsel, the Court permitted Ontario wide latitude in its cross-examination of Ms. Larcombe's report and her expertise. As noted in the Court's ruling at that time, this was permitted in large part because Ms. Larcombe's professed area of expertise, cultural geography, is not an area of expertise previously recognized by this Court or, based on my research, by any other court in this country. Moreover, as the Ontario Court of Appeal stated

in *R v Abbey*, 2009 ONCA 624 at paragraph 62: "Before deciding admissibility, a trial judge must determine the nature and scope of the proposed expert evidence."

[4] Ms. Larcombe testified that there are two streams of study in geography: physical geography and cultural geography. Physical geography deals with the study of processes and patterns in the natural environment like the atmosphere, hydrosphere, biosphere, and geosphere. Cultural geography was described by Ms. Larcombe as "looking at human community relationships to the landscape; how people relate; how they use the land; other patterns of land use."

[5] In opposing Ontario's motion, the Plaintiff submitted that Ontario had failed to comply in a timely manner with Rule 52.5, which provides, that "a party to a proceeding shall, as early as possible in the proceeding, raise any objection to an opposing party's proposed expert witness that could disqualify the witness from testifying." In this case, the objection to Ms. Larcombe as an expert was raised more than two years after her report was presented to the opposing parties.

[6] Rule 52.5 says nothing about any consequence of a failure to make a timely objection. It was suggested that the lateness of the objection prejudiced the Plaintiff as it would have to retain other experts and seek an adjournment of the trial if the evidence of Ms. Larcombe was not accepted. It was suggested that the conduct of Ontario in making this late objection was tactical and ought not to be rewarded.

[7] Ultimately, the qualification of an expert is a decision for the trial judge, whether or not there has been any objection to that proposed expert. While it would have been preferable if Ontario had raised its concerns with the Plaintiff long ago to avoid any possible disruption of what is scheduled to be a 100-day trial, I cannot let that stand in the way of what I find, in part, to be a valid objection to the expertise of this proposed witness.

[8] In calling Ms. Larcombe, counsel stated that the Plaintiff was looking to have her "qualified as an expert to give evaluation on loss of use." It was more specifically stated that the Plaintiff is seeking to have Ms. Larcombe qualified as an expert witness in "cultural geography with specialty in aboriginal traditional livelihood loss of use valuation; evaluating impacts on First Nations' livelihood and living conditions resulting from industrial and hydroelectric development projects; and evaluating mitigation measures aimed at reducing impacts on First Nations' livelihood and living conditions resulting from these projects."

[9] In *White Burgess v Abbott and Haliburton Company Limited*, 2015 SCC 23 at paragraph 22, the Supreme Court of Canada adopted, with minor adjustments, the two-step inquiry for admitting expert opinion evidence as stated by the Ontario Court of Appeal in *R v Abbey*, 2009 ONCA 624.

[10] At the first step of the inquiry, the proponent of the evidence must establish the threshold requirements of admissibility. The threshold requirements of admissibility consist of the criteria set out by the Supreme Court of Canada in *R v Mohan*, [1994] 2 SCR 9. Evidence that does not meet these criteria should be excluded. The criteria are:

(a) Relevance;

(b) Necessity in assisting the trier of fact;

(c) The absence of any exclusionary rule; and

(d) A properly qualified expert.

[11] The logical relevance of expert evidence is determined by asking whether it relates to a fact in issue and whether it tends to prove the fact in issue. I agree with the Plaintiff, that the proposed evidence is relevant to the claim as framed by the Plaintiff. Indeed, this was not challenged in the memorandum submitted by Ontario or in its oral submissions.

[12] Similarly, there was no suggestion that the proposed opinion evidence ought to be excluded because it offends another rule of evidence.

[13] Ontario's challenge was that the proposed witness is not a properly qualified expert and her evidence is not necessary to assist the trier of fact.

[14] Let me first address whether the proposed evidence meets the test of necessity in assisting the trier of fact.

[15] The Supreme Court of Canada at paragraph 14 of *Mohan* emphasized that the necessity requirement is not met where the proposed evidence is merely "helpful" to the trier of fact. The necessity of the opinion in this case requires that it provides information which is likely to be outside the experience and knowledge of the trial judge.

[16] I am satisfied that this condition is also met. The losses to which the expert speaks that resulted from the flooding of Lac Seul and the valuation of those losses are not matters within my knowledge or experience.

[17] This brings me to the final question: Is Ms. Larcombe a properly qualified expert?

[18] The Supreme Court of Canada at paragraph 17 of *Mohan* observed that an expert witness must possess "special or peculiar knowledge through study or experience in respect of the matters on which he or she undertakes to testify."

[19] The Supreme Court of Canada in *R v Marquard*, [1993] 4 SCR 223, quoted with approval the following passage from Sopinka, Lederman and Bryant, *The Law of Evidence in Canada* (Markham: Butterworths, 1992), at 536-37:

> The admissibility of [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject-matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

[20] Ms. Larcombe has an undergraduate degree, a bachelor of science in geography and a graduate degree, a master of science in geography. It was during her graduate studies that she began to focus on the area of cultural geography. She has had some very limited experience teaching courses which generally can be said to fall within the rubric of cultural geography. She has no publications that have been peer reviewed on the area of cultural geography. She has, however, as part of her work over the past 29 years, prepared a number of reports some of which

have been accepted for publication by her clients on their websites. It would appear from her evidence that none of these published documents contain an assessment of economic or financial loss such as that contained in her report in this litigation.

[21] Ms. Larcombe has never been qualified by a court as an expert witness. She has limited experience testifying as a witness before one arbitrator and two tribunals. Although she describes herself as having been called as an expert witness for one of the parties, her qualifications were not challenged and there is no evidence that her testimony was accepted by the arbitrator or tribunal, or even found to be of use.

[22] During her 29 years as a consultant, Ms. Larcombe has performed a number of studies and authored a number of reports for her clients some of which are described in her curriculum vitae which was entered as Exhibit 7152. She has performed retrospective loss of use evaluation studies. As she explained, these are studies where she has looked backwards to determine the impact a past event had from a contemporary point of view. She described these as typically being situations where First Nation communities have been impacted by hydroelectric projects, loss of reserve lands, and impacts from other industries. She described her work as "after the fact, looking backwards to evaluate and put a monetary value on what the effects were from past experiences." The other aspect of her work was described as predictive impact assessments. This is where she is called upon to provide an assessment of the future impact of an event which is planned or proposed to take place.

[23] Specifically, Ms. Larcombe's report in this action provides a loss of use analysis with respect to six items under Tabs A1-A6 of her report: Hay for livestock, food from gardens, trapping income, food from wildlife, food and income from manomin (wild rice), and food from fishing.

[24] She described her methodology in estimating the quantity of each of these that was lost from the Lac Seul First Nation economy. She looked for information with respect to these goods prior to the flooding in 1929 and thereafter. Where there was no such information she looked to what she described as "credible literature" which may have been studies done for other First Nations in the same or different decades in history. The difference between the pre-flooding number and the post flooding number, she explains, gives you the loss realized as a result of the flooding. She then attaches a value to each animal or kilogram based on either an imputed or replacement cost and she explained the process she uses in determining that. Lastly when she was looking at the current value she would adjust that value to its 1929 value using cost-of-living information. That, as she described it is the accepted approach in her field of expertise.

[25] Based on her years of work in this field, I accept that Ms. Larcombe is an expert in the field of cultural geography and is qualified to provide expert opinion evidence on the specific loss of use by the Lac Seul First Nation as specified in Tabs A1-A6 of her report.

[26] The second section of Ms. Larcombe's report, Tabs B1 to 4, describe "avoidable losses" to houses, cabins and campsites, community and agricultural property and access infrastructure, and interment sites. Ms. Larcombe testified that in assessing avoidable costs, she was "looking

at what would it have cost in 1929 to avoid the flooding of houses, to avoid the flooding of cabins – or not to avoid it, to address the loss of those by reconstructing new ones in locations that would not be flooded or in the case of, for example fencing, what was the value of those fences that were flooded and in the case of docks what would it cost to construct docks in the year 1929" and evidence regarding interment sites and costs. She testified that in determining avoidable costs she relied on data where it was available that was specific to Lac Seul, but where no such data was available she relied on her "own analysis and interpretation of other data sources that provided an indication of the cost of building or replacing things circa 1929."

[27] The Plaintiff submits that Ms. Larcombe is not "being proposed to give appraisal evidence respecting the reasonable cost of housing in 1929 [rather] she is being proposed as an expert qualified to give an opinion on the reasonableness of the mitigation measures, adopted or not by Canada, with respect to the First Nation's housing loss."

[28] Her "reasonableness" evaluation is based on her opinion of the cost of replacing houses and other structures. I do not accept that Ms. Larcombe is qualified to provide an opinion as to the value of any of these avoidable losses in 1929 as set out at Tabs B1 to B4. Ms. Larcombe has no expertise in this area whatsoever. Specifically, she has no expertise permitting her to offer an opinion as to the valuation of comparable housing, cabins, other structures, fencing and docks, and interments in 1929. There are experts in this area who can offer evidence of assistance to the Court.

[29] Although Ontario was prepared to accept her evidence with respect to interment on the basis that there were no experts on this, the Court is not prepared to accept all of her evidence in this regard. The Court will accept her evidence of historical facts, including, for what it may be worth, the views of the Lac Seul First Nations from the transcripts discussed below, in Tab B4 sections 1 to 4 of her report, but not the opinion she expresses in section 5 as in the Court's view this is not retrospective loss of use evaluation. The Court is in as good a position as Ms. Larcombe to make an assessment of the costs of relocating graves set out in section 5 of her report. She has no expertise in this area that assists the Court and her estimate is made on personal, rather than her expert opinion.

[30] Finally, with respect to those areas of the proposed evidence that meet the first step of the inquiry enunciated in *Abbey*, I turn to the second step of inquiry. At the second step, the judge performs a "gatekeeping" function by balancing "the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks."

[31] In *Masterpiece Inc v Alavida Lifestyles Inc*, 2011 SCC 27 at para 76, Justice Rothstein stated that "Courts must fulfill their gatekeeper role to ensure that unnecessary, irrelevant and potentially distracting expert and survey evidence is not allowed to extend and complicate court proceedings." The balancing exercise has been described in many ways by the Courts. In *R v J (J)*, 2000 SCC 51 at para 47, Justice Binnie outlined the criteria for reception to be relevance, reliability, and necessity and the counterweights to be consumption of time, prejudice, and confusion.

[32] The assessment of reliability within the second step of the inquiry utilizes a flexible approach. In *Abbey* at para 117, the Ontario Court of Appeal stated that the proper question to be answered when addressing the reliability of non-scientific theories is whether an expert's research and experiences has permitted the expert to develop a specialized knowledge that is sufficiently reliable to justify placing the opinion before a judge or jury.

[33] Mr. Marsello for Ontario, in his cross-examination of Ms. Larcombe pointed out a number of potential weaknesses or deficiencies or concerns with respect to her evaluation including the reasonableness of the assumptions that she makes in reaching her estimated loss. The Plaintiff submits that these go to the weight to be given to her evidence, not to the reliability of her evidence.

[34] If I was able to say with certainty at this stage that her opinion evidence on the value of these losses was of no or very little weight, then it would be appropriate to exclude it as being unreliable and of little or no value to the trial judge. However, although Mr. Marsello has raised significant concerns in that regard, I find that I cannot reach any conclusion in the absence of a full examination of Ms. Larcombe's and other witnesses' testimony. Accordingly, at this point I cannot say that Ms. Larombe's evidence is unnecessary, irrelevant and potentially distracting such that it should not be allowed.

[35] For these reasons, I find that Ms. Larcombe is qualified as an expert witness in cultural geography with specialty in:

1. aboriginal traditional livelihood loss of use valuation; and

2. evaluating impacts on First Nations' livelihood and living conditions resulting from industrial and hydro development projects.

[36] She is permitted to provide the Court with an expert opinion on loss of use of the Lac Seul First Nation's traditional economy, in relation to losses it experienced on reserve lands and traditional territory as a result of the construction of the Ear Falls Dam and flooding of Lac Seul, specifically with respect to:

a. decreased opportunity and success in Lac Seul First Nation's traditional harvesting practices;

b. lost opportunity to harvest wild rice for human nutritional needs and income;

c. decreased opportunity and success in trapping aquatic furbearer species;

d. lost opportunity to grow vegetable products for human nutritional needs; and

e. lost opportunity to feed cattle that were maintained for human nutritional needs.

[37] She is also permitted to provide factual historical evidence relating to interment sites of the Lac Seul First Nation that were lost or damaged.

[38] In sum, the Court accepts that Ms. Larcombe is an expert and may offer the opinions she advances in Tabs A1 to A6 inclusive, as well as the facts from historical records set out in Tab

B4 sections 1 to 4, and her opinion on interment sites of the Lac Seul First Nation that were lost or damaged based on the historical record.

Canada's Objection

[39] Canada is seeking a ruling on the admissibility of the Focus Group Transcripts. It submits that Ms. Larcombe in parts of her report relied "fairly extensively" on them. Canada acknowledges that its expert, Dr. Reimer also relied, in part, on these transcripts.

[40] The Focus Group Transcripts are a series of seven transcripts of focus group discussions held between 1994 and 1997.

[41] Canada submits that this evidence is compromised as a consequence of the way it was collected. It was collected by the Lac Seul First Nation specifically for statements made by those interviewed about the losses occasioned by the flooding. This is a central issue in the litigation and the statements made by those interviewed appears to have been used by Ms. Larcombe (I cannot speak to Ms. Reimer as I have not yet read her report) as statements of fact as to the losses experienced by members of the Lac Seul First Nation.

[42] Canada submits that this evidence is compromised because of the manner in which it was collected – having been collected from members of the Lac Seul First Nation, by the Lac Seul First Nation specifically for the purposes of providing evidence to be used in this action. It is not disputed that the evidence was not given under oath, and that there has been no cross-

examination or testing of that evidence. Moreover, where the evidence was provided in the first language of the member, it was translated by a member of the Lac Seul First Nation.

[43] It is unknown to the Court whether there are living potential witnesses who can speak to the matters addressed in these transcripts, but that is not relevant in assessing Canada's objection.

[44] The Plaintiff submits, and I agree, that Canadian jurisprudence holds that experts are entitled to rely on hearsay or out-of-court evidence or statements when forming their opinions. It is a question of the weight to be accorded to the opinion when it relies on such hearsay evidence.

[45] An expert may have formed his or her opinion on the basis of information that is not in evidence before the Court. For example, the expert may have relied on interviews, reports of others, or results from tests administered by others. What is essential is that the trier of fact knows on what basis the expert formed his or her opinion. The evidence used in this way is inadmissible as hearsay in proof of the facts asserted, but is admissible as the basis upon which the opinion was formed.

[46] The Plaintiff submits that the transcripts are admissible as the basis on which Ms. Larcombe formed her opinion. It appears to accept that the weight to be given to her opinion evidence may consider the fact that it was based, in whole or part, on evidence collected in the manner objected to by Canada.

[47] Where, as here, an expert bases her opinion on hearsay statements made by persons who are members of one of the litigants, Justice Sopinka in *R v Lavallee,* [1990] 1 SCR 852 at page 898, cautioned that it ought not to be accepted without independent support:

> Where, however, the information upon which an expert forms his or her opinion comes from the mouth of a party to the litigation, or from any other source that is inherently suspect, a court ought to require independent proof of that information. The lack of such proof will, consistent with Abbey, have a direct effect on the weight to be given to the opinion, perhaps to the vanishing point. But it must be recognized that it will only be very rarely that an expert's opinion is entirely based upon such information, with no independent proof of any of it. Where an expert's opinion is based in part upon suspect information and in part upon either admitted facts or facts sought to be proved, the matter is purely one of weight.

[48] In the matter before the Court it is unclear whether in all cases where Ms. Larcombe relies on the transcripts there is other independent proof of the “facts” asserted by the First Nation’s members. Absent such support, it is likely that the weight given to her opinion will be close to the “vanishing point” noted by Justice Sopinka.

[49] Accordingly, while I agree with Canada that the Focus Group Transcripts are not admissible for the truth of their contents, the experts are permitted to provide an opinion based on them, provided that opinion is otherwise within the scope of their expertise. In the case of Ms. Larcombe, that is restricted to the retrospective loss evaluation set out in her opinion at Tabs A1 to A6. The weight accorded that opinion will depend, in part, on the existence of other corroborative evidence.

ORDER

THIS COURT ORDERS that:

1. Ms. Larcombe is qualified as an expert witness in cultural geography with specialty in:

    a. aboriginal traditional livelihood loss of use valuation; and

    b. evaluating impacts on First Nations' livelihood and living conditions resulting from industrial and hydro development projects.

2. Ms. Larcombe is permitted to provide the Court with an expert opinion on loss of use of the Lac Seul First Nation's traditional economy, in relation to losses it experienced on reserve lands and traditional territory as a result of the construction of the Ear Falls Dam and flooding of Lac Seul, specifically with respect to:

    a. decreased opportunity and success in Lac Seul First Nation's traditional harvesting practices;

    b. lost opportunity to harvest wild rice for human nutritional needs and income;

    c. decreased opportunity and success in trapping aquatic furbearer species;

    d. lost opportunity to grow vegetable products for human nutritional needs; and

    e. lost opportunity to feed cattle that were maintained for human nutritional needs.

3. Ms. Larcombe is also permitted to provide factual historical evidence and her opinion relating to interment sites of the Lac Seul First Nation that were lost or damaged.

4. In sum, the Court accepts that Ms. Larcombe is an expert and may offer the opinions she advances in Tabs A1 to A6 inclusive, as well as the facts from historical records set out in Tab B4 sections 1 to 4, and her opinion on interment sites of the Lac Seul First Nation that were lost or damaged based on the historical record.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2579-91
STYLE OF CAUSE:	ROGER SOUTHWIND ET AL v HER MAJESTY THE QUEEN IN RIGHT OF CANADA ET AL

MOTION DEALT WITH IN WRITING WITHOUT APPEARANCES OF THE PARTIES

ORDER AND REASONS:	ZINN J.
DATED:	OCTOBER 11, 2016

WRITTEN REPRESENTATIONS BY:

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