

Federal Court



Cour fédérale

**Date: 20170120**

**Docket: T-2579-91**

**Citation: 2017 FC 75**

**Ottawa, Ontario, January 20, 2017**

**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

### **Introduction**

[1] The Plaintiffs called Patt Larcombe as a witness and now, after the close of their case, seek to recall her or alternatively to strike portions of the evidence of Dr. Gwen Reimer, Canada's reply witness to Ms. Larcombe.

[2] Ms. Larcombe, a cultural geographer, was called by the Plaintiffs and was qualified by the Court as an expert witness. She prepared an expert report dated April 2013 [the Larcombe Report] marked as Exhibits 7769-7776 on the "lifestyle and livelihood impacts and losses experienced by the Lac Seul First Nation (LSFN) as a consequence of the use of Lac Seul as a reservoir for hydroelectric generation and water control purposes since 1929." The part of that report, relevant to this motion, was "Tab A3: Loss of Use - Trapping Income" [Exhibit 7772]. She provided an opinion on the loss of trapping income experienced by the Plaintiffs as a consequence of the flooding of Lac Seul. Canada delivered a reply to the Larcombe Report from its expert, Dr. Gwen Reimer, dated March 27, 2014 [the Reimer Report] marked as Exhibit 7982. Ms. Larcombe replied to the Reimer Report on June 30, 2014 [the Larcombe Reply Report] marked as Exhibit 7778, and further provided an addendum to the Larcombe Reply Report on July 4, 2014, directed specifically to the issue of loss of trapping income [the Larcombe Trapping Reply Report] marked as Exhibit 7779. Ms. Larcombe testified over 6 days and Dr. Reimer testified for 2 days.

[3] The Court, on the agreement of counsel, issued an Order permitting the experts to use and rely on an aide-mémoire when presenting their evidence. This was an efficient way of proceeding as nearly all of the reports submitted are quite voluminous. The Larcombe Report is 352 pages, the Reimer Report is 250 pages, the Larcombe Reply Report is 71 pages, and the Larcombe Trapping Reply Report is 20 pages.

[4] An aide-mémoire used by a witness is not an exhibit at trial or evidence. A pre-trial Order dated June 23, 2016, circumscribed it:

The Court grants leave to all parties to use an aide-mémoire when conducting an examination-in-chief of that party's expert witness. The aide-mémoire (1) shall not form part of the trial record; (2) shall be a summary or slide presentation which shall reflect what is set out in the expert's report and shall not contain any new information; and (3) any such summary or slide presentation is to be prepared by the expert and is to be shared with the other parties at least ten (10) days before the expert is to give evidence.  
[emphasis added]

[5] Counsel exchanged the aide-mémoire and any "new" documents to be put to the witness not already included in the Joint Book of Documents prior to a witness being called. After Dr. Reimer had been qualified, Canada informed the Court that there were additional documents that it wished to have entered as exhibits and that these had been provided to the parties the previous week. They were:

- a. An errata list, subsequently entered without objection as Exhibit 7993;
- b. Revised Table 6.1, subsequently entered without objection as Exhibit 7994;

- c. Supplemental Table 1 "HBC Muskrat, Beaver and Mink Pelts collected - 'Savanne Region Posts: Superior-Huron (1925-27, 1929-30, 1932-34) & James Bay - Line & Island (1945-56)" marked as Exhibit 5 for Identification;
- d. Supplemental Table 2.1 "Muskrat 'Expected Harvest' Model if 1925-1930 Average used as Pre-Flood Baseline," Supplemental Table 2.2 "Muskrat 'Expected Harvest' Model if 1925-1934 Average used as Pre-Flood Baseline," and Supplemental Table 2.3 "Muskrat 'Expected Harvest' Model if 1932-1934 Returns used as Pre-Flood Baseline" all of which were collectively marked as Exhibit 6 for Identification; and
- e. Trapline Supplement.

[6] Counsel for the Plaintiffs expressed concern that the latter three documents "are actually the product of some kind of estimate or additional analysis or calculation that was done by Dr. Reimer" outside her report. Canada responded that these documents contained data or information that was in her report, albeit presented in a different manner, and that there was no new data presented.

[7] The Court was unable to determine whether the documents contained "new" information or analysis without the benefit of Dr. Reimer's testimony. Accordingly, it was ruled that the impugned documents could be put to Dr. Reimer and she could explain them. If the Plaintiffs then had an objection to the evidence, it would be addressed, including any request to recall Ms. Larcombe. Canada abandoned any attempt to rely on item e, the Trapline Supplement, and it is no longer in issue.

[8] Item c, Supplemental Table 1, was put to Dr. Reimer during her examination in chief. Item d, Supplemental Tables 2.1, 2.2 and 2.3, were never put to the witness, although she did speak to slide 24 of her aide-mémoire and did speak to the trends derived from those tables.

[9] At the conclusion of Dr. Reimer's cross-examination, the Plaintiffs renewed their objection and indicated that they wished to recall Ms. Larcombe because "we have some concerns about some of the new data or analysis that's being presented and we would like to have the opportunity ... to recall Ms. Larcombe to address those specific analyses." Canada objected, taking the position that the data was in the report and that if the Plaintiffs' witness was recalled it would be splitting its case.

[10] The Plaintiffs were directed to have Ms. Larcombe prepare a further report [the Larcombe Supplementary Reply Report] outlining the evidence she would tender if the Court permitted her to be recalled. The Larcombe Supplementary Reply Report dated December 12, 2016, consists of 13 pages of text and an additional 13 pages of charts and graphs. The proposed evidence is set out under five headings:

2.0 Reimer's Supplemental Table 1 Omits Key Data;

3.0 Reimer's Analyses and Errors in Supplemental Tables 2.1-2.3;

4.0 Reimer's New Aide Memoire Graphs Contain Errors;

5.0 Reimer's New "77 Trapline" Analysis is Flawed; and

Appendix A: Missing 3 Years of Pre-Flood HBC Data.

## The Law

[11] In support of its position, Canada relies on the rule against a party splitting its case. The law that a party is not permitted to split its case, except in very limited circumstances, is based on general principles of fairness and a recognition that prejudice to the opposite party arises if case-splitting is permitted. The rule and its application is summarized in the decision of the Supreme Court of Canada in *Krause v The Queen*, [1986] 2 SCR 466 [*Krause*] at 473-474:

The general rule is that the Crown, or in civil matters the plaintiff, will not be allowed to split its case. The Crown or the plaintiff must produce and enter in its own case all the clearly relevant evidence it has, or that it intends to rely upon, to establish its case with respect to all the issues raised in the pleadings; in a criminal case the indictment and any particulars. This rule prevents unfair surprise, prejudice and confusion which could result if the Crown or the plaintiff were allowed to split its case, that is, to put in part of its evidence -- as much as it deemed necessary at the outset -- then to close the case and after the defence is complete to add further evidence to bolster the position originally advanced. The underlying reason for this rule is that the defendant or the accused is entitled at the close of the Crown's case to have before it the full case for the Crown so that it is known from the outset what must be met in response.

The plaintiff or the Crown may be allowed to call evidence in rebuttal after completion of the defence case, where the defence has raised some new matter or defence which the Crown has had no opportunity to deal with and which the Crown or the plaintiff could not reasonably have anticipated. But rebuttal will not be permitted regarding matters which merely confirm or reinforce earlier evidence adduced in the Crown's case which could have been brought before the defence was made. It will be permitted only when it is necessary to insure that at the end of the day each party will have had an equal opportunity to hear and respond to the full submissions of the other. [emphasis added and cited case law omitted]

[12] The Plaintiffs acknowledge that this is an accurate statement of the law, but submit that they are not engaged in case-splitting. They also rely on the decision of Justice Stratas in *Amgen Canada Inc v Apotex Inc*, 2016 FCA 121 [*Amgen*], and particularly paragraph 10 thereof where he states that "considerations of procedural fairness and the need to make a proper determination can require the Court to allow the filing of reply evidence."

[13] I agree with Canada that *Amgen* has no application to the issue before me. *Amgen* dealt with whether, and if so when, a moving party on a motion in writing might tender reply evidence - something not specifically dealt with in the *Federal Courts Rules*, SOR/98-106. It offers no assistance when considering the well-established rule against case-splitting.

[14] The question to be addressed is whether Dr. Reimer has advanced evidence that was not in her report, such that the Plaintiffs have not had the opportunity to deal with it, thus justifying the request to recall Ms. Larcombe.

[15] The Plaintiffs submit that during the trial "the Court has consistently ruled that if evidence was not set out in the original expert report, it will not be admitted into the trial record" and they reference rulings made during the testimony of five witnesses: Trevor Falk, Norris Wilson, Peter Zuzek, Cliff Hamal, and Alan McCullough.

[16] While Canada accepts that "numerous objections to new evidence (not found in the expert report) were made by counsel and ruled upon by the Court" it says that not all evidence tendered by the experts was actually in their reports. It points particularly to the testimony of Ms. Larcombe and "new" evidence that she provided regarding Hudson Bay Company [HBC]

post closures prior to 1945 and an analysis of trapline records. No objection made by any of the opposing parties to that evidence at the time it was tendered, unlike the situation here.

[17] The proposed evidence that the Plaintiffs wish to elicit from recalling Ms. Larcombe fall under five headings, each of which is discussed and analyzed below.

### **The Proposed Evidence**

#### *A. Section 2.0 of the Larcombe Supplemental Reply Report*

##### (1) The Issue

[18] Section 2.0 of the Larcombe Supplemental Reply Report, including Appendix B (Tables B-1 to B-4), relates to Dr. Reimer's Supplemental Table 1.

[19] The Plaintiffs submit that Dr. Reimer introduced a new analysis about how the effects of HBC post closures were "shared" among all posts in the Lac Seul section and selected others. This "shared-effect" analysis was not in the Reimer Report and thus they say that the analysis could not have been anticipated. Moreover, the Plaintiffs submit that Dr. Reimer extended the "shared-effect" analysis beyond muskrat (to include Beaver and Mink), and she incorrectly transcribed the historical mink data. The Plaintiffs submit that admitting further examination of Ms. Larcombe and the Larcombe Supplemental Reply Report allows the Court to properly adjudicate the issue of the impact of HBC post closures.



[20] Canada submits that in section 2.0, Ms. Larcombe provides an analysis on the HBC posts in existence in 1945 in support of her view that the returns for Lac Seul and Hudson Posts in 1945 do not reflect trapping harvest "recovery" post-flooding. Instead, Ms. Larcombe claims that increases in fur returns at the two posts in 1945 reflect additional collection from the regional posts that closed in the prior period. Canada submits that Ms. Larcombe raised the issue of the impact of HBC post closures in the Larcombe Trapping Reply Report but she failed to do the follow-up analysis that she now seeks to do. This, it submits, violates the rule against case-splitting.

(2) Discussion and Analysis

[21] Using the HBC Fur Reports, the Reimer Report set out the fur returns for a number of seasons for the Lac Seul post and Hudson post in Table 5.5. Table 5.7 of the Reimer Report depicts the fur returns for the Lac Seul post and Hudson post in 1945/46. In the Reimer Report, Dr. Reimer discusses Ms. Larcombe's use of the Cowan report data, which Ms. Larcombe relied on to calculate her expected harvest and impacted harvest for muskrat. Dr. Reimer refers to Table 5.7 in her discussion to indicate that muskrat populations were recovering. Finally, Dr. Reimer uses the Cowan report data as well as the longer term pre- and post-flood muskrat data (found in Table 5.5 and Table 5.7) to illustrate that pre- and post-flood muskrat collection decreased by 43-44% as opposed to Ms. Larcombe's assumed decrease of 85%.

[22] In the Larcombe Trapping Reply Report, Ms. Larcombe, in response to Dr. Reimer, suggested that the data on which she based her opinion may be affected by possible HBC post closures:

Reimer (pg. 112, para 3) suggests the post-flood baseline number (average muskrat/year) should be 2,570 almost double the figure (1,340) indicated by Cowan. Annual data to support Cowan's average (1,340) for the period 1935-1940 (i.e. 1934/35-1939/40) appear to be lost from the archival record. Reimer's number (2,570) is calculated by averaging Cowan's number (1,340) and a single year report by the HBC (her Table 5.7) for the year 1944/45 (3,800). She suggests the higher number for this single year is an indication that muskrat production at Lac Seul/Hudson was "recovering." Reimer does not indicate if the other HBC posts listed in her Table 5.5 remained operational in the year 1944/45. If one or more of these other posts were closed by that year, then production from those posts may be included in the combined total for the Lac Seul and Hudson post. [emphasis added and footnotes omitted]

It should be noted in the quoted paragraph above that Ms. Larcombe is responding to 1944/45 data that Dr. Reimer subsequently corrected to be 1945/46 data.

[23] During Dr. Reimer's testimony, she referenced Supplemental Table 1 in relation to the issue raised by Ms. Larcombe that HBC post closures could have inflated the fur returns at Lac Seul and Hudson posts. Ms. Larcombe provides no specific data or evidence regarding post closures or their impact, although it was available to her. Dr. Reimer testified that despite two posts closing, the benefit to the other four remaining posts were shared (an increase is observed at all four posts).

[24] Dr. Reimer's Supplemental Table 1 sets out the fur returns of muskrat, beaver, and mink for HBC posts at Lac Seul, Hudson, Red Lake, Grassy Narrows, Sioux Lookout, and Pine Ridge posts as well as percentage calculations. While the data for the Lac Seul and Hudson posts appears in Table 5.5 and Table 5.7 of the Reimer Report, the data for Red Lake, Grassy Narrows, Sioux Lookout, and Pine Ridge posts did not appear and was not discussed in the Reimer Report.

On its face, as the Plaintiffs suggest, this is new, notwithstanding that the data was extracted from source materials referenced in the Reimer Report.

[25] In her proposed Supplementary Reply Report, Ms. Larcombe reaches a similar conclusion to her conclusion in the Larcombe Trapping Reply Report: that the closure of HBC posts increased the furs traded and recorded at the Lac Seul and Hudson posts.

[26] Ms. Larcombe correctly asserts in the Supplementary Reply Report that Supplemental Table 1 was used by Dr. Reimer to support that "the closure of HBC posts did not inflate fur returns at the Lac Seul and Hudson Posts in 1945/46; and therefore ... the 1945/46 fur returns for Lac Seul and Hudson HBC posts continue to demonstrate harvest recovery from Lac Seul flooding and regulation by the mid-1940s."

[27] I accept that Dr. Reimer's Supplementary Table 1 was, as she testified, a direct response to the suggestion by Ms. Larcombe that her data may have been skewed by post closures. That response required a detailed examination of all of the fur returns at all of the nearby HBC posts including those two closed prior to the 1945/46 year (namely Sioux Lookout in 1937, and Pine Ridge in 1938). I agree with the submission of Canada that the evidence of Dr. Reimer in this respect could reasonably have been anticipated by Ms. Larcombe either in her Reply Report or her oral evidence:

This issue is not just one that could reasonably have been anticipated: it was actually raised by Ms. Larcombe herself in her Trapping Reply Report, in response to the Reimer Report. Ms. Larcombe could have followed through on her own query, researched and opined on this issue and made these points at the time of her Trapping Reply Report. She chose not to.

[28] Having speculated about the impact of post closure on Dr. Reimer's opinion, it was plain and obvious that Dr. Reimer would respond. It is unfair and prejudicial to Canada that rather than conduct a thorough analysis of this speculative statement and address it when first called, Ms. Larcombe waited to do so after Dr. Reimer has addressed her concern. As it was an area that should have been anticipated by the witness, having raised it herself, it does not fall within the exception in *Krause* and thus Ms. Larcombe cannot be recalled to address it now.

B. *Section 3.0 of the Larcombe Supplemental Reply Report*

(1) The Issue

[29] Section 3.0 of the Larcombe Supplemental Reply Report, including Appendix C, relates to Dr. Reimer's Supplemental Tables 2.1, 2.2, and 2.3 as well as slide 24, bullet 4 of her aide-mémoire.

[30] The Plaintiffs submit that Dr. Reimer's testimony is about using the numbers on slide 24 as a starting point to model a column of numbers representing the baseline for each of her supplemental tables. The Plaintiffs allege that Dr. Reimer compared the numbers from the baseline column against the numbers in the "actual return" columns during the 1940s and 1950s. They say that Canada confirmed that Dr. Reimer's testimony respecting slide 24 is in direct reference to her Supplemental Tables 2.1, 2.2, and 2.3. It is alleged that Canada is attempting to introduce new information and analysis after the Plaintiffs have closed their case. The Plaintiffs request that Dr. Reimer's testimony with respect to slide 24 and Supplemental Tables 2.1-2.3 be struck.

[31] Canada accepts that in the Larcombe Supplemental Reply Report, Ms. Larcombe takes issue with and offers a correction of Dr. Reimer's calculations and figures in Supplemental Tables 2.1, 2.2, and 2.3 which relate to bullet 4 on slide 24 of Dr. Reimer's aide-mémoire. Canada notes that Supplemental Tables 2.1, 2.2, and 2.3 were never put to Dr. Reimer in her examination, and that only three adjusted "alternative muskrat baseline" figures were cited by Dr. Reimer when speaking to slide 24. Canada submits that Ms. Larcombe's evidence is "trivial and collateral to the Plaintiff's case" as she does not rely on these three numbers to ground her muskrat model. Instead, it notes that Ms. Larcombe maintains her reliance on the 1940 Cowan figures set out in the Larcombe Report.

(2) Discussion and Analysis

[32] Supplemental Tables 2.1, 2.2, and 2.3 were never directly put to Dr. Reimer during her examination in chief or her cross-examination; they are not exhibits; and form no part of the evidence at trial. Nonetheless, Dr. Reimer's testimony with respect to bullet 4 on slide 24 of her aide-mémoire is in reference to her Supplemental Tables 2.1, 2.2, and 2.3. During Dr. Reimer's examination in chief, counsel for Canada stated as follows:

I'll just note at this point that Dr. Reimer just referred to Supplemental Table 2.1, 2.2, and 2.3 on the bottom of slide 24. ... As Dr. Reimer explained, this is the math behind the three alternative baselines that were proposed ... by Ms. Larcombe in her reply report.

[33] The following is bullet 4 of slide 24 of Dr. Reimer's aide-mémoire:

- Larcombe reply report (2014, Part II, p. 6) presents 3 alternative baselines as per 1925-34 returns:

- Supplemental Table 2.1 (1925-30, 4 seasons): Pre-flood muskrat avg. 2,777 (adjusted to 3,537) = *expected* harvest lower than *actual* returns in 1945-46 & 1950s.
- Supplemental Table 2.2 (1925-34, 6 seasons): Pre-flood muskrat avg. 4,551 (adjusted to 5,796) = *expected* harvests somewhat higher than *actual* returns in 1945-46 & 1950s.
- Supplemental Table 2.3 (1932-34, 2 seasons): Pre-flood muskrat avg. 8,098 (adjusted to 10,313) = *expected* harvests much higher vs. *actual* returns in 1945-46 & 1950s (but lower than Cowan).

[34] The Plaintiffs' complaint about the evidence given by Dr. Reimer is that her "adjusted" figures are not accurate (see the Larcombe Supplementary Reply Report at page 8); however, Ms. Larcombe does not provide the Court with accurate "adjusted" numbers from which the Court can determine whether, as Dr. Reimer testified, regardless of these three baseline figures, as adjusted, the baseline Ms. Larcombe used - Cowan's figure - is much higher, thus supporting her opinion that it is not an appropriate baseline to use.

[35] Ms. Larcombe further says that Dr. Reimer "erroneously starts modelling in 1930/31 to 1933/34 when the actual harvests for those years were known." However, the years used to develop a baseline were not chosen by Dr. Reimer. They were the years expressed by Ms. Larcombe in the Larcombe Trapping Reply Report. All Dr. Reimer did, was to extrapolate from Ms. Larcombe's illustrations of the annual average muskrat production for different groupings of seasons in the pre-flood period. This hardly requires further comment from Ms. Larcombe who could have anticipated that the various possible baselines would be examined in this manner.

[36] In light of that, the Court must agree with Canada that the proposed evidence of Ms. Larcombe on this section is irrelevant and inconsequential or should have been anticipated. Her other criticisms and proposed evidence relates to the Supplemental Tables 2.1-2.3, which do not constitute evidence in this trial.

[37] I am not prepared to recall Ms. Larcombe to simply point out that Dr. Reimer's adjusted figures are inaccurate, when that point can be made effectively by counsel in closing submissions.

C. *Section 4.0 of the Larcombe Supplemental Reply Report*

(1) The Issue

[38] Section 4.0 of the Larcombe Supplemental Reply Report relates to slides 25, 27, and 29 of Dr. Reimer's aide-mémoire.

[39] Canada submits that the graphs depicted on slides 25, 27, and 29 of Dr. Reimer's aide-mémoire are merely graphic depictions of data that was included in the Reimer Report. It submits that this material does not meet the test of being "not reasonably anticipated", and that Ms. Larcombe provided evidence previously similar to the evidence proposed in the Larcombe Supplemental Reply Report. As a result, Canada contends that it is unnecessary to recall Ms. Larcombe or accept this section of the Larcombe Supplemental Reply Report as it is a re-iteration of evidence already given before the Court.

[40] The Plaintiffs accept that Section 4.0 of the proposed recall evidence relates to previously discussed data; however, they submit that the proposed analysis addresses how Dr. Reimer manipulated that data to create a new dataset found only in her aide-mémoire. The Plaintiffs submit that this evidence could not have been anticipated and they request that Dr. Reimer's evidence respecting these slides be stricken from the record. If so, they say that Ms. Larcombe's additional evidence would not be required.

(2) Discussion and Analysis

[41] Dr. Reimer's testimony is with respect to Ontario-wide harvest trends, the harvest trends at Lac Seul based on data she provided in the Reimer Report, and Ms. Larcombe's expected harvest baseline. She comments on Ms. Larcombe's choice of using the Cowan data with respect to muskrat, and recovery of beaver and mink by the 1950s.

[42] Ms. Larcombe's specific proposed evidence in the Larcombe Supplemental Reply Report relates to Dr. Reimer having "filled in" missing data in the graphs, comparing adjusted expected harvest levels with un-adjusted HBC trends, and mixing three sets of unrelated data on the graphs. However, as none of the graphs are in evidence and neither the oral testimony nor the Reimer Report focuses on the matters complained of, the proposed corrections are irrelevant and unnecessary.

D. *Section 5.0 of the Larcombe Supplemental Reply Report*

(1) The Issue



[43] Section 5.0 of the Larcombe Supplemental Reply Report relates to Dr. Reimer's "77 trapline" Analysis.

[44] The Plaintiffs submit that Dr. Reimer's analysis on slide 21 of her aide-mémoire did not exist when Ms. Larcombe completed the Larcombe Reply Report or testified. They say that Dr. Reimer's new analysis including slide 21, her testimony, and the correction made on her errata list became necessary because Dr. Reimer never investigated whether the 77 traplines were licensed to Lac Seul band members, until after Ms. Larcombe testified. The Plaintiffs contend that the new analysis could not have been anticipated as it was not set out in the Reimer Report.

[45] The Plaintiffs also submit that Dr. Reimer's 77 LSFN trapline analysis respecting both trapline licensee affiliation and activity are incorrect, and the Court should accept Ms. Larcombe's evidence in this regard to have the benefit of Ms. Larcombe's corrections.

[46] Canada submits that Ms. Larcombe's proposed reply in section 5.0 is purely rebuttal evidence on the trapline cards that could have been provided in the Larcombe Trapping Reply Report. Canada alleges that Ms. Larcombe's testimony demonstrates that she failed to conduct an analysis of the trapline cards, and only conducted this analysis following Canada's case. It submits that it is also too late at this stage to propose corrections to Dr. Reimer's Appendix B.1 Table, which was included in the Reimer Report. Canada contends that Ms. Larcombe could have presented her analysis with respect to trapline licensee affiliation and activity in the Larcombe Trapping Reply Report, and as a result the Plaintiffs are violating the rule against case-splitting.

(2) Discussion and Analysis

[47] In the Reimer Report, Dr. Reimer stated at page 120 "Fur production returns from 77 LSFN licensees in the Lac Seul, Sioux-Hudson and Ear Falls-Goldpines Band areas in the Patricia West District are recorded..." [emphasis added].

[48] While, slide 21 and Dr. Reimer's testimony provided more information regarding the 77 licensees than is in the Reimer Report, Ms. Larcombe had a full opportunity to investigate these licensees and their affiliations after reviewing the Reimer Report, which referenced "77 LSFN licensees" (albeit incorrectly and corrected in Dr. Reimer's errata sheet to reflect that the 77 licensees were comprised of 73 Band identifications and additional four who were unidentified).

[49] Ms. Larcombe could have investigated the "77 LSFN licensees" in her Trapping Reply Report, but chose not to do so and it is too late for her now to say that this is required. The active season analysis that Ms. Larcombe purports to correct was presented in the Reimer Report, and any reply to this information at this stage is not appropriate and is case-splitting.

E. *Appendix A of the Larcombe Supplemental Reply Report*

(1) The Issue

[50] In Appendix A to the Larcombe Supplemental Reply Report Ms. Larcombe provides data that was not previously discovered by either expert. This data is the HBC return data for three years (Outfit 258 or 1927/28, Outfit 260 or 1929/30, and Outfit 262 or 1930/31). Table A-1

provides the full data set from 1925/26 to 1933/34 for muskrat returns for HBC posts in the Lac Seul Region. Figure A-1 is an updated version of Dr. Reimer's aide-mémoire Slide 25 with the "missing" data years and Ms. Larcombe's adjustments.

[51] Canada submits that Ms. Larcombe is seeking to introduce new documents, opine on them, and to revise her previously given evidence. It submits that this is case-splitting as Ms. Larcombe could have provided this data and relevant analysis and opinion from the outset.

## (2) Discussion and Analysis

[52] It is not disputed that the data provided in Appendix A of the Larcombe Supplemental Reply Report is new evidence that has not been referred to previously by either Ms. Larcombe or Dr. Reimer. It is not reply to Dr. Reimer's testimony or evidence as Dr. Reimer did not refer to these documents. At best it might be viewed as a reply to Dr. Reimer's "shared effect" analysis. In Appendix A's commentary, Ms. Larcombe responds to Dr. Reimer's testimony that HBC Cowan's two-year average estimate (1932/33 and 1933/34) was extremely high compared to previous years. Ms. Larcombe states that "the missing year data indicate that the 1932/33 and 1933/34 trapping seasons were not in fact anomalous." Dr. Reimer did speak to Ms. Larcombe's use of Cowan's two-year average in the Reimer Report at page 112, and Ms. Larcombe did not uncover the data in Appendix A in a timely manner when writing any of her reports. The commentary Ms. Larcombe proposes to give responds to the analysis in the Reimer Report; however, that report was delivered years ago and Ms. Larcombe has previously responded to it. I agree with Canada's submission that permitting Appendix A to be entered through the recall of Ms. Larcombe would constitute unwarranted case-splitting.

## **Conclusion**

[53] Having reviewed the areas the Plaintiffs wish Ms. Larcombe to testify about, if she is recalled, I find that recalling Ms. Larcombe would amount to case-splitting, would address matters not currently in evidence, would address matters Ms. Larcombe had every opportunity to address in her reports or oral evidence, or elicit irrelevant or inconsequential testimony.

**ORDER**

**THIS COURT'S ORDER IS that** the Plaintiffs' motion to recall Ms. Larcombe to address the matters set out in her Proposed Supplementary Reply Report is denied.

"Russel W. Zinn"

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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:** JANUARY 20, 2017

**WRITTEN REPRESENTATIONS BY:**

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