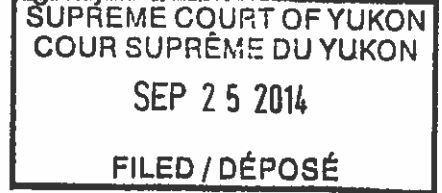


SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v.
The Attorney General of
Canada*, 2014 YKSC 49

Date: 20140909
S.C. No.: 05-A0043
Registry: Whitehorse



Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA

Defendant

Before the Honourable Mr. Justice L.F. Gower

Appearances:
Stephen L. Walsh
Suzanne M. Duncan
Geneviève Chabot

Counsel for the Plaintiff
Counsel for the Defence

RULING

(On the admissibility of Dr. McHugh's evidence)

[1] GOWER J. (Oral): I have had the written arguments and case authorities from counsel on the issue of the admissibility of the two expert reports and any further testimony from either or both experts since last week, including over the past weekend and last night, so I have had a chance to review those materials.

[2] However, the Crown reminded me yesterday when she began her submissions at 3:30 that Dr. McHugh, in particular, was only going to be available to potentially testify until the end of the day tomorrow and then would have to leave Whitehorse to

return to his destination overseas on Thursday morning. That has created some exigency and has given rise to me having to consider my position on the admissibility of his report, in particular, and any additional testimony that he may give, in a somewhat hurried fashion. Although, as I say, I have had a chance to consider the written materials and authorities from counsel for some time.

[3] I want to make it clear that my comments today are only with respect to Dr. McHugh's evidence. I have not yet made a decision with respect to Dr. Binnema. I hope to be able to do that in the next day or two, but I have given priority to my thinking about the McHugh material because of the time pressure.

[4] I also want to confirm that when this matter proceeded to what I call the "first phase" of this trial in 2011, there was a similar objection to the admissibility of Dr. McHugh's evidence. I made a ruling on that objection, which is cited at 2011 YKSC 87. I ended up concluding that all of the report would be admitted, subject to my determination of the weight to be given to any particular opinions expressed therein. That report is now Exhibit 3 on this trial.

[5] I also confirmed in my Reasons for Judgment, cited at 2012 YKSC 4, that Dr. McHugh had been qualified and I quote here from para. 3 of those Reasons:

"... as an expert legal historian, qualified to research and interpret historical documents from an historical perspective and to provide opinion evidence in the areas of the historical, political, legal and social context surrounding the creation of the *1870 Order*, and the historical Crown-Aboriginal relations during that time."

[6] The Court of Appeal overturned the Reasons just cited, but did not specifically overturn my ruling on the admissibility of Dr. McHugh's evidence for the first phase of the trial, and said nothing about his qualification and the limits to his qualification. I am

proceeding on the assumption that my ruling is still applicable and that the scope of his qualification as I have just read continues.

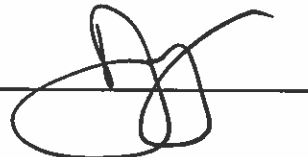
[DISCUSSION WITH COUNSEL]

[7] So for reasons to follow, I am declining to admit that report and consequently we will not be hearing further testimony from Dr. McHugh about that report either in direct or in cross-examination.

[8] However, for reasons to follow, I think it is appropriate to recall Dr. McHugh to respond to what has been referred to as the "McNeil Article", which is contained in the plaintiff's supplemental book of authorities filed August 29, 2014, at Tab 9. I do not have a specific date on it, but I gather that it was first released in March 2014 and has since become available in published form.

[9] So my intention here, counsel, is that Dr. McHugh will be given an opportunity to respond to the criticisms of Professor McNeil in that article of Dr. McHugh's methodology and testimony in the first phase of this trial, and that Mr. Walsh, for the Ross River Dena Council, will have an opportunity to cross-examine on anything arising, but that Dr. McHugh's evidence will be limited within that sphere and no further.

GOWER J.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right, positioned above a horizontal line.