SUPREME COURT OF YUKON

Citation: *Ross River Dena Council* v. *Attorney General of Canada*, 2014 YKSC 53

Date: 20141105
S.C. No. 05-A0043
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

ATTORNEY GENERAL OF CANADA

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh — Counsel for the Plaintiff
Suzanne M. Duncan
Geneviève Chabot — Counsel for the Defendant

RULING
(On Admissibility of Expert Evidence)

INTRODUCTION

[1] This is a ruling on objections to the admissibility of two expert reports tendered by the defendant, the Attorney General of Canada ("Canada") at the recommencement of this trial. The two experts are Dr. Paul G. McHugh and Dr. Theodore Binnema, and their reports are dated July 1 and 2, 2014, respectively.

[2] The first phase of this trial took place between November 16 and 24, 2011. At that time I was asked by counsel for both parties to answer two threshold questions

relating to the legal effect of the *Rupert's Land and North-western Territory Order (U.K.)*, June 23, 1870, reprinted in R.S.C. 1985, App.II, No. 9 (the "*1870 Order*"). Those two questions were as follows:

> "1. Were the terms and conditions referred to in the Rupert's Land and North-western Territory Order of June 23, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement" intended to have legal force and effect and give rise to obligations capable of being enforced by this Court?
>
> 2. If the terms and conditions referred to in the Rupert's Land and North-western Territory Order of June 23, 1870 concerning "the claims of the Indian tribes to compensation for lands required for purposes of settlement", gave rise to obligations capable of being enforced by this Court, are those enforceable obligations of a fiduciary nature?"

The terms and conditions referred to in each of these questions were part of an undertaking found in Schedule A to the *1870 Order*, as part of an Address to Her Majesty the Queen from the Senate and House of Commons of the Dominion of Canada, dated December 16 and 17, 1867 (the "*1867 Address*"):

> "And furthermore that, upon the transference of the territories in question to the Canadian Government, the claims of the Indian tribes to compensation for lands required for purposes of settlement will be considered and settled in conformity with the equitable principles which have uniformly governed the British Crown in its dealings with the aborigines."

I will refer to this as the "equitable principles undertaking".

[3] At the outset of the first phase of the trial, Canada sought to introduce expert opinion evidence from Dr. McHugh over the objection of the plaintiff, the Ross River Dena Council ("RRDC"). In a ruling cited at 2011 YKSC 87 ("my 2011 admissibility reasons"), I determined that Dr. McHugh's evidence, consisting of both his report dated September

21, 2011, and his testimony, was admissible. Following the end of the first phase of the trial, I released reasons for judgment cited at 2012 YKSC 4, answering both of the proposed threshold questions in the negative, which was an adverse outcome for RRDC.

[4] RRDC successfully appealed that part of my decision which answered the first of the two proposed threshold questions. The other part of my decision which answered the second proposed threshold question was not appealed by RRDC. The Court of Appeal quashed my order answering the first question and remitted the litigation back to this Court.

[5] There was some confusion between counsel as to whether the evidence introduced in the first phase of the trial was still part of the record (RRDC's position), or whether parties were required to begin the trial afresh (Canada's position). As a result, it is necessary for me to get into some detail here as to what the Court of Appeal actually decided in remitting the matter back to this Court.

[6] In its decision, cited at 2013 YKCA 6, the Court of Appeal allowed the appeal, holding that the first question did not materially advance the litigation and ought not to have been decided in isolation from other issues in the case. It remitted the litigation back to this Court, stating that neither my previous answer to the first question nor my analysis in reaching that answer should be considered binding in further proceedings. Specifically, the Court stated, at paras. 45 and 47:

> "45 The Order of the Supreme Court in answering the question that is the subject of this appeal should be quashed. The litigation should be returned to the Yukon Supreme Court with a direction that the question that was posed was not appropriately severed from other issues in the litigation.
>
> …

> 47 I would allow the appeal, with each party to bear its own costs, and remit the litigation to the Yukon Supreme Court. The question that the court purported to answer was not appropriately severed from other issues in the litigation. In the result, neither the answer provided by the court nor its analysis in reaching that answer should be considered binding in its further proceedings."

[7] At the appeal hearing, RRDC also asked the Court of Appeal to rule on whether Dr. McHugh's report was properly before me in the first instance. The Court declined to deal with that issue, stating, at para. 46:

> "46 The appellant has, on this appeal, strongly urged the Court to provide an opinion as to whether the McHugh report was properly admissible before the trial court. In light of our decision on the procedural issue, it is unnecessary for us to do so. Further, because the issues before the trial court in future proceedings in this action will differ, in some respects, from those that it addressed in the judgment appealed from, there is no utility in providing an opinion of the sort sought by the appellant. In the circumstances, I refrain from providing any opinion on the matter."

[8] I have concluded from all this that my order answering the first threshold question has been quashed and that my analysis in reaching that answer should not be considered binding, but that the continuation of this trial follows the evidence already entered into the record. That includes all of the documentary evidence entered thus far (eight volumes of documents), as well as Dr. McHugh's report of September 21, 2011, and Dr. McHugh's testimony.

[9] I also conclude that my ruling on the admissibility of Dr. McHugh's expert opinion evidence during the first phase of the trial continues to remain in effect, as it was not overturned by the Court of Appeal.

[10] Accordingly, many of the underlying facts, principles and case authorities referred to in my 2011 admissibility reasons are relevant to the current application by RRDC. As a result, I will attempt to avoid unnecessary repetition of much of what I said there, with a view to minimizing redundancy.

[11] In my 2011 admissibility reasons, at para. 4, I qualified Dr. McHugh as follows:

> "As an expert legal historian, qualified to do 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 period."

Dr. McHugh's qualifications as an expert in this area were not challenged by counsel for RRDC either in the first phase of the trial or on the recommencement.

[12] It may be important to note that there was some urgency in dealing with the admissibility of the expert opinion evidence on the recommencement of the trial. Only 11 days were reserved by the parties for the continuation of the trial, which was scheduled to commence on September 2, 2014. Counsel for both parties had previously filed written outlines of their respective arguments on the trial proper, as well as separate arguments on the issue of the admissibility of the expert opinion evidence. On the first day of trial, counsel for RRDC entered his client's case, which is largely based on admissions, within approximately half-an-hour. Canada then opened its case by tendering as exhibits for identification the new report of Dr. McHugh dated July 1, 2014 and the report of Dr. Binnema dated July 2, 2014, each of which were quite lengthy, dense and complex. Canada sought to qualify Dr. McHugh in much the same manner as it did during the first phase of the trial, i.e.:

> "… as an expert legal historian able to research and interpret historical documents from a historical perspective and express opinions on historical relations between Aboriginal people and the Crown and in particular the evolution of principles affecting the conduct of Crown relations with Aboriginal people leading up to and around the time of the 1870 Order."

As noted, RRDC did not question Dr. McHugh's qualifications to testify within this framework.

[13] Canada also sought to qualify Dr. Binnema as follows:

> "… as an expert historian able to research and interpret historical documents related to the history of indigenous peoples in western North America, and the history of Indian policy in Canada, with a focus on the facts surrounding the negotiations leading to the 1870 Order and its relationship to the development of treaties in Canada."

Again, RRDC took no issue with Dr. Binnema's qualifications to testify as above.

[14] I was not prepared to hear counsel's arguments on admissibility on the second day of trial, September 3, 2014, as I had not yet had sufficient time to review the lengthy proposed expert reports. Thus, I adjourned the arguments to Monday, September 8th (I had previously informed counsel that I would be unable to sit on September 4 and 5). On Monday, September 8, 2014, I was reminded by Canada's counsel that Dr. McHugh, who I understand traveled from his home in Cambridge, England to attend the trial, was scheduled to return on Thursday morning. That necessitated a rather hasty ruling by me, on September 9, 2014, with written reasons to follow. I determined that Dr. McHugh's second report of July 1, 2014 would not be admitted into evidence, but that I would allow Dr. McHugh to testify in response to an article filed by RRDC and authored by Professor Kent McNeil, of Osgoode Hall Law School, Toronto, Ontario, which I understand was

originally published in March 2014, although the filed copy is undated. That article was a criticism of certain opinions expressed by Dr. McHugh in his previous academic writings, as well as in his testimony during the first phase of this trial.

[15] Following Dr. McHugh's testimony, I ruled that Dr. Binnema's report was admissible, subject to certain phrases and sentences being excised. Again, I indicated that my written reasons for that decision would follow. Dr. Binnema also testified about matters arising from his report.

[16] These are my reasons for both of these rulings.

LAW - GENERAL PRINCIPLES

[17] As I noted in my 2011 admissibility reasons, at para. 8, *R. v. Mohan*, [1994] 2 S.C.R. 9 is the leading case in this area. It established, at para. 17, that the admission of expert opinion evidence depends on the application of the following criteria:

a) relevance;

b) necessity in assisting the trier of fact;

c) the absence of any exclusionary rule; and

d) a properly qualified expert.

[18] In their text, *The Law of Evidence in Canada*, 3rd ed., (Markham: Lexis Nexis Canada Inc., 2009), the authors, Alan W. Bryant, Sidney N. Lederman and Michelle K. Feurst, after referring to some post-*Mohan* jurisprudence from the Supreme Court of Canada, modified the *Mohan* criteria slightly at p. 791, as follows:

> "The criteria for the admissibility of expert opinion evidence are: (1) a properly qualified expert; (2) relevance; (3) necessity; (4) reliability; (5) prejudice/probative analysis; and (6) the absence of an exclusionary rule. The criteria of

> necessity, reliability or the prejudice/probative test are often interrelated and overlapping in their application."

[19] In *R. v. Abbey*, 2009 ONCA 624, Doherty J.A. delivered the judgment of the Ontario Court of Appeal, and suggested that the *Mohan* analysis could be approached as a two-step process (para. 76). The first is a threshold determination of whether the necessary preconditions to admissibility have been established (para. 80). These preconditions are:

> "*the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence;
>
> *the witness must be qualified to give the opinion;
>
> *the proposed opinion must not run afoul of any exclusionary rule apart entirely from the expert opinion rule; and
>
> *the proposed opinion must be logically relevant to a material issue."

This is a straightforward rules-based analysis that will yield "yes" or "no" answers (para. 78). However, expert opinion evidence must meet <u>all</u> of the preconditions to admissibility to avoid exclusion at this stage (para. 78).

[20] If the expert evidence survives the first-step analysis, then the court goes on to the second step, and exercises its "gatekeeper" function by performing a "case-specific cost-benefit analysis" (paras. 79, and 86 through 93). It is in the second step that the court compares the probative value of the expert opinion evidence with the potential costs of admitting it, such as consumption of time, confusion, prejudice and unduly protracting and complicating the proceedings (paras. 90 and 91).

ANALYSIS

[21] I repeat that RRDC does not disagree that each of Dr. McHugh and Dr. Binnema are properly qualified experts capable of testifying within the scope of the expertise identified by Canada's counsel for each of them. However, RRDC objects to the admissibility of the reports of both experts on the basis of relevance, necessity and reliability. RRDC also argued that both expert opinions pertain to questions of domestic law, and are therefore inadmissible for that reason as well.

Relevance

[22] RRDC's counsel referred here to *The Law of Evidence in Canada*, 3rd ed., at p. 792, where the authors state:

> "Opinion evidence must have some probative value to make the existence or non-existence of a material fact more probable or less probable than it would be without the evidence. Expert evidence that does not render the disputed material fact more probable or less probable than it would be without the evidence is immaterial and is not capable of assisting the trier of fact to decide an issue…." (my emphasis)

RRDC then argued that Canada has not identified any "disputed material fact" that either expert report would make "more probable or less probable". This would seem to be a threshold attack on the logical relevance of the reports (*Abbey*, para. 80).

[23] Canada's counsel submits, and I agree, that this argument mischaracterizes and oversimplifies the point being made by the authors in *The Law of Evidence in Canada*, 3rd ed., who also said at p. 792, immediately above the quote referred to by RRDC's counsel:

> "… In general, nothing is to be received which is not logically probative of some matter requiring to be proved and

> everything which is probative should be received, unless its exclusion can be justified on a ground of law or policy. If proffered opinion evidence is not tendered to prove the existence or non-existence of a fact or matter in issue, the proffered evidence is immaterial." (my emphasis)

[24] That relevance considers both facts and matters in issue is also reflected in the language used by Doherty J.A. in *Abbey*, i.e. that the proposed opinion "must relate to a subject matter that is properly the subject of expert opinion evidence" and "must be logically relevant to a material issue" (my emphasis) (para. 80).

[25] Here, the subject matter at issue is the meaning and interpretation of the equitable principles undertaking. In particular, whether it created a legal obligation upon Canada to make a treaty with RRDC before opening up the relevant lands for settlement. These lands are located within the boundaries of the Ross River group trap line and a smaller trap line, and are referred to in RRDC's statement of claim as "the Territory".

[26] RRDC also objected to the admissibility of both Dr. McHugh's second expert report and Dr. Binnema's report on the basis that each impermissibly contains opinions on questions of domestic law. This would also seem to be a threshold attack on the basis that neither report relates to subject matter that is properly the subject of expert opinion evidence (*Abbey*, para. 80).

[27] Canada did not challenge the general proposition that an expert cannot express an opinion on a pure question of law. Rather, Canada submitted that both opinions go to the original legislative intention, which is a legitimate and necessary component of the overall exercise of the statutory interpretation of the equitable principles undertaking. I agree.

[28] Canada further submitted that neither expert was opining on how the equitable principles undertaking or the *1870 Order* ought to be interpreted today. With respect to Dr. Binnema, I disagree. While I appreciate that Dr. Binnema is a historian and not a lawyer, there were a number of passages in his report which struck me as expressing an opinion on the contemporary legal effect of the equitable principles undertaking and the *1870 Order*. Although these passages were couched in language speaking of the intentions and understandings of the actors and institutions at the time, in my respectful view, they crossed the line into expressions of opinion which were capable of being seen as opinions on how the law, i.e. the equitable principles undertaking and the *1870 Order*, should be interpreted today. Thus, out of an abundance of caution, I excised those passages from the report upon admitting it into evidence.

[29] RRDC also argued that, as the central issue in this trial is the correct interpretation today of the equitable principles undertaking, and that both of the expert reports are heavily focused on the intentions of the Canadian and Imperial Parliaments in 1867 and 1870, the opinions are not relevant. Although RRDC's counsel failed to clarify the point, I understand this to be an attack on the legal relevance of the reports, which is to be considered in the second (gatekeeper) step of the *Abbey* analysis. In any event, I disagree.

[30] In her text, *Sullivan on the Construction of Statutes,* 5th ed. (Markham: Lexis Nexis Canada Inc., 2008), at p. 1, Professor Ruth Sullivan referred to the modern principle of statutory interpretation originally posited by Elmer Driedger more than 30 years ago:

> "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the

> scheme of the Act, the object of the Act, and the intention of Parliament."

[31] Professor Sullivan also emphasizes the importance of the external context, including the historical context in interpreting the meaning of legislation. At p. 561 of her text, she states:

> "The meaning of legislation must be gathered from reading the words in context, and this includes the external context. The external context of a provision is the setting in which the provision was enacted, its historical background, and the setting in which it operates from time to time. In the case law of the Supreme Court of Canada, external context is sometimes referred to as "social context". It encompasses any facts that are judged to be relevant to the conception and operation of legislation, whether social, political, economic, cultural, historical or institutional.…" (my emphasis)

[32] It is undisputed that the *1870 Order* forms part of the *Constitution Act*, 1982, R.S.C. 1985, Appendix II, No. 44. Accordingly, the interpretation of the equitable principles undertaking will be an exercise in constitutional statutory interpretation. In this regard, Professor Peter Hogg, in his text, *Constitutional Law of Canada*, 5th ed. Supplemented, looseleaf, (Toronto: Carswell, 2007), at p. 15-50, similarly noted the importance of historical context in interpreting constitutional language:

> "Needless to say, the doctrine of progressive interpretation does not liberate the courts from the normal constraints of interpretation. Constitutional language, like the language of other texts, must be "placed in its proper linguistic, philosophical and historical contexts" [referring here to *R. v. Big M Drug Mart* [1985] 1 S.C.R. 295, at 344]. Nor is the original understanding (if it can be ascertained) irrelevant. On the contrary, the interpretation of a constitutional provision "must be anchored in the historical context of the provision" [referring here to *R. v. Blais*, [2003] 2 S.C.R. 236].…" (my emphasis)

[33] Indeed, the Yukon Court of Appeal, in its decision overturning my reasons answering the first threshold question, did "not doubt that the intentions of the Canadian Parliament and the British government in 1867 and [1870] are of some moment in the interpretation of the 1870 Order" and that those intentions are important as they shed light "on how the *Order* should be interpreted today" (2013 YKCA 6, at paras. 43 and 39).

[34] In my view, the evidence of the experts going to the historical context of the equitable principles undertaking and the *1870 Order*, and the intentions of the Canadian and Imperial Parliaments at that time, is relevant to the determinations the Court is being asked to make.

[35] RRDC's counsel further argued here that Dr. Binnema in particular placed considerable reliance on what he perceived were the intentions of the individuals who drafted the *1867 Address* and subsequently negotiated on behalf of Canada on the terms for the surrender of Rupert's Land by the Hudson's Bay Company (see para. 49 below). Counsel relied on an earlier addition of *Construction of Statutes* (2nd ed., 1983) by Professor Elmer Driedger, which suggested that the intention of the draftsmen of legislation could not be probative of the intention of Parliament. Notably, that passage, at p. 107, also suggested that the "intention of Parliament is, in a sense, a fiction". However, this suggestion has been overtaken in *Sullivan on the Construction of Statutes*, 5th ed., where Professor Sullivan states at p. 265:

> "The "mind" of the legislature. In analyzing the purpose of legislation, the legislature is spoken of as it if were a person, with a mind capable of choosing goals and devising plans to bring them about. However, the mind that formulates legislative purposes must be distinguished from the minds of individual participants in the legislative process, whether drafters, members of Cabinet or voting members of the legislature. Although the desires and intentions of these

> individuals obviously determine the content and form of bills, the "mind" that approves the content and form of a bill and enacts it into law is the corporate mind of the legislature.
>
> Some commentators object to imputing intention to a corporate entity like a legislature on the grounds that any such "mind" is obviously a fiction; an institution is incapable of forming actual intentions. However, this objection misses an important point. People never have direct access to the content of other people's minds; we are always in the position of inferring what others must have intended based on what was said and the context in which it was said. This inference-drawing process is the same regardless of whether the text to be interpreted issues from Shakespeare in the form of a play, from an acquaintance in the form of an email or from an entity such as a legislature in the form of official texts." (my emphasis)

[36] Thus, as I understand it, the law presently is that the intention of the drafters of legislation, and indeed other parliamentary officers engaged in the passage of the legislation may indeed be relevant to the question of the original intention of Parliament. Accordingly, RRDC's argument here must also fail. See also para. 59 below.

[37] The final argument put forward by RRDC on the issue of relevance is that both Dr. McHugh's and Dr. Binnema's reports focus heavily on the negotiations leading to the transfer of Rupert's Land from the Hudson's Bay Company, but that this evidence is not relevant to the case at bar, because it concerns the transfer of the old North-western Territory (in which the Yukon was formerly situated) to Canada. RRDC therefore says the equitable principles undertaking in the *1867 Address* can have no application whatsoever to the transfer of Rupert's Land. Conversely, what RRDC seems to be saying is that, because the equitable principles undertaking is only situated in the *1867 Address*, and did not form part of the terms and conditions of the transfer of Rupert's Land, which were found elsewhere in the *1870 Order*, the expert evidence relating to the

negotiations for the transfer of Rupert's Land is irrelevant. I understand this to be a threshold attack on the logical relevance of the negotiations.

[38] In my view, this is another example of RRDC oversimplifying an issue. I agree that the negotiations occurring after 1867 were focused on Rupert's land, but it seems inconceivable that the North-western Territory would have been transferred to Canada without the concurrent transfer of Rupert's Land, since there would have been a huge geographic and jurisdictional hole in the country without Rupert's Land, likely rendering it impossible to govern. In addition, the fact that the *1867 Address* is now part of the Constitution of Canada is directly the result of being included as a Schedule to the *1870 Order*. Therefore, to suggest that the evidence of the experts about the negotiations between 1867 and 1870 is completely irrelevant is, with respect, an extreme and artificial position.

Necessity

[39] RRDC argues here that this Court can come to its own conclusion on the interpretation of the equitable principles undertaking without the assistance of either of the expert opinions. Indeed, RRDC relies on *R. v. Century 21 Ramos Realty Inc.*, (1987), 58 O.R.(2d) 737 (C.A.), for the proposition that, "questions of statutory interpretation are in the sole province of the trial judge and are not matters on which an expert can give an opinion".

[40] Canada argues, and I agree, that RRDC's use of *Century 21* oversimplifies the case and does not take into account its modern-day circumstances. That case involved an interpretation of s. 15(1) of the *Income Tax Act*, and expert evidence was called to determine when an "appropriation" occurred under that section. The Court of Appeal

ruled that this was a question of law involving the interpretation of a contemporary, domestic law. However, in the case at bar, we are dealing with provisions that were drafted and enacted in 1867 and 1870, and have remained unamended since then. Thus, it seems to me that the evidence of historical context that each of these experts can provide, and which is beyond the expertise of this Court, is necessary to determine the original intention of the Canadian and Imperial Parliaments. Further, while the original intention of Parliament is not determinative of the interpretation that I must give to the equitable principles undertaking today, it remains a necessary part of the overall analysis.

[41] Having said that, I am cognizant of the fact that the necessity analysis takes place in the context of this Court exercising its "gatekeeper" function and is part of the "cost-benefit" analysis. In *Abbey*, cited above, Doherty J.A. confirmed this at para. 93:

> "93 The cost-benefit analysis demands a consideration of the extent to which the proffered opinion evidence is necessary to a proper adjudication of the fact(s) to which that evidence is directed. In *Mohan*, Sopinka J. describes necessity as a separate criterion governing admissibility. I see the necessity analysis as a part of the larger cost-benefit analysis performed by the trial judge. In relocating the necessity analysis, I do not, however, depart from the role assigned to necessity by the *Mohan* criteria."

In carrying out my "gatekeeper" function, I am to have due regard to the "cost" side of the ledger, which includes such risks inherent in the admissibility of expert opinion as consumption of time, confusion, prejudice, and unduly protracting and complicating proceedings (*Abbey*, at paras. 90 and 91).

[42] It is in this regard that I have concluded that Dr. McHugh's report of July 1, 2014 is not necessary. I view that report as principally relating to the issue of the original

intention of Parliament in issuing the *1870 Order*. However, this Court already has a good deal of evidence from Dr. McHugh on that topic, both in the form of his original report of September 21, 2011 and his rather extensive testimony during the first phase of this trial. Further, I have been reminded by our Court of Appeal that, while the original intention of Parliament is "of some moment" in assessing the "modern effect" of the *1870 Order*, I must not assume that the original intention forever governs the interpretation of the *Order*. Thus, while the original intention of Parliament is indeed an important issue, it is not the only issue that this Court needs to be concerned about. Finally, while Dr. McHugh's second report may have been "helpful" in dealing with the historical issues, that is too low a standard for its admission. Rather, it must be "necessary" to admit the evidence: *R. v. D.D.*, 2000 SCC 43, at para. 57; *R. v. Mohan*, cited above.

[43] In particular, I note that Dr. McHugh stated in his report of September 21, 2011, at para. 3, that he had been asked by Canada to assist the Court in determining the intent of Parliament in issuing the *1870 Order* and including the terms and conditions about Aboriginal peoples. He had also been asked to provide an account of how the *Order* would have been understood as a legal instrument by those involved at that time. These questions were answered in the context of an overall assessment of the history of Crown-Aboriginal relations around the time the *1870 Order*, both in North America and elsewhere in the British Empire.

[44] In his report of July 1, 2014, Dr. McHugh again indicated, at para. 1.11, that he had been asked to assist the Court in determining the intent of Parliament in issuing the *1870 Order* and how the order would have been understood as a legal instrument at that time. He added that he had also been asked to provide an opinion on the meaning of

Royal Proclamation in the context of the *1870 Order*. Finally, he stated that he had been asked to review the context of several historical statutes to determine their relationship, if any, to the *1870 Order*.

[45] Thus, it is immediately apparent to me that there is a significant overlap between the content of the first and second reports. That is perhaps not surprising, given that it was the understanding of Canada's counsel that the trial was to begin afresh following the Court of Appeal's decision in remitting the litigation back to this Court. While there is additional historical detail in the second report going to both to the issue of the intention of Parliament and how the *1870 Order* would have been understood at that time, I did not view it as sufficiently probative to justify its admission. Overall the second report was very lengthy, over twice the length of the first report, and replete with detail.

[46] In ruling Dr. McHugh's second report inadmissible, I also had in mind the limited number of trial days which had been set aside, and the amount of time that such evidence might take to deal with, both in direct and cross-examination. I was particularly mindful here of my experience with Dr. McHugh from the first phase of the trial. While I do not mean this disrespectfully, it is fair to say that he is not a man of few and simple words.

[47] To the extent that Dr. McHugh's second report was also to have considered the meaning of the Royal Proclamation within the context of the *1870 Order*, I note that his first report dealt with this topic in several paragraphs, for example 28 through 34. In addition, a good deal of Dr. McHugh's original testimony addressed the Royal Proclamation.

[48] Finally, to the extent that Dr. McHugh's second report lastly addressed the context of several other historical statutes to determine their relationship, if any, to the *1870 Order*, I view that evidence as principally relating back to the central issue of Parliamentary intention.

[49] In conclusion, in ruling his second report inadmissible, I was concerned that allowing it to be admitted into evidence and giving Dr. McHugh the opportunity to testify further about it, would have unduly protracted and complicated the trial. In other words, the cost of allowing the evidence would have been greater than its probative value.

[50] On the other hand, I was concerned about the propriety of RRDC's reliance upon the article by Professor McNeil. I acknowledge that courts in matters of statutory interpretation routinely refer to scholarly articles such as this. Professor Sullivan, in her text, *Sullivan on the Construction of Statutes*, 5th ed., states, at p. 618:

> "When it comes to technical matters outside the scope of judicial expertise, the courts require the assistance of expert testimony. With respect to matters of law or of general information, however, the courts may inform themselves by consulting scholarly or professional publications. In interpretation cases the courts consult a wide variety of such publications including textbooks, monographs, studies, reports and articles.
>
> Scholarly materials sometimes form part of the legislative history of an enactment and may be admissible as evidence of the understanding on which the enactment was passed. More often, however, these materials are admitted as evidence of external context or as persuasive opinion on the interpretive issues facing the court. Reliance on scholarly opinion is common in Charter cases and has become increasingly prevalent in ordinary statutory interpretation."

However, my concern about Professor McNeil's article in this instance is that it is a direct challenge to the reasoning and methodology employed by Dr. McHugh in his first report

dated September 21, 2011 and his testimony during the first phase of the trial. In my view, Professor McNeil's criticisms of Dr. McHugh would have been more appropriately adduced by having Professor McNeil testify as a witness on behalf of RRDC. Canada would then have had an opportunity to challenge Professor McNeil, through cross-examination, on his assumptions and reasoning. Since that was not going to be possible, it seemed to me that the fair thing to do in the circumstances was to give Dr. McHugh an opportunity to testify in response to Professor McNeil's criticisms, and I so ordered.

[51] Dr. Binnema's report, as I have previously noted, is relevant to the issue of the interpretation of the equitable principles undertaking and the question of original Parliamentary intent. However, Dr. Binnema's approach is slightly different from that of Dr. McHugh. He focuses on three general areas. The first is the existence or non-existence of Crown-Aboriginal treaties throughout Canada and other British colonies both before and after 1870, and the reasons or factors that determined whether treaties would be entered into. This evidence is directly relevant to the interpretation of the phrase "equitable principles which have uniformly governed the British Crown in its dealings with aborigines". RRDC argues that this phrase can only refer to the *Royal Proclamation of 1763*, which means in turn that Canada was legally obliged to enter into a treaty with the Kaska tribe of Indians, now represented by RRDC, before opening up the Kaska's Territory for settlement. Dr. Binnema's evidence of this history is beyond my general knowledge or expertise and is therefore necessary in order for me to address RRDC's argument in this area.

[52] The second area Dr. Binnema focuses on is the historical factual background leading up to the negotiation of the surrender agreement that gave rise to the *1870*

Order. In this regard, he referred to additional and different facts than Dr. McHugh, and particularly stressed the contributions of Canada's negotiators, William McDougall and George-Etienne Cartier, both of whom were lawyers and ministers in the Canadian government at the time. Mr. McDougall was Minister of Public Works (he had previously been Commissioner of Crown Lands (and thus *ex-officio* the Superintendent General of Indian Affairs)) and Mr. Cartier was Minister of Militia and Defence, as well as Prime Minister John A. MacDonald's principal lieutenant in Lower Canada. It is Dr. Binnema's expert opinion that Mr. McDougall and Mr. Cartier were the likely authors of the equitable principles undertaking. Again, this historical evidence is beyond my general knowledge or expertise.

[53] The third focus of Dr. Binnema's report is on Crown-Aboriginal relations post-Confederation, and in particular the practice of concluding treaties, or not doing so, and the factors involved in those determinations. He also makes specific reference to what was happening in the Yukon, post-Confederation, and compares that with Canada's practice generally north of the 60th parallel, as well as with what was happening in British Columbia. Once more, I acknowledge that this historical evidence is beyond my general knowledge or expertise.

[54] As an expert historian, Dr. Binnema grounds his opinions and inferences on his review and interpretation of historical documents, case law and academic articles. These have been entered into evidence in two volumes of binders containing a total of 110 documents comprising thousands of pages.

[55] The importance of an expert's knowledge and understanding the context of such historical documents, particularly in Aboriginal cases, has been stressed by a number of

courts. In *Tsilhqot'in Nation v. British Columbia*, 2004 BCSC 1237, at paras. 10-12, Vickers J. stated:

> "10 One of the difficulties in this case is that no living person can be called to give eye witness evidence of what was happening in the claim area before, at the time of, and for many decades after first contact with European settlers. It is abundantly apparent the parties must rely on historical documents, oral history and traditions, ethnography and archaeology in the proof of their cases. The meaning of documents is not always self evident and can only be understood in context. That is particularly true of historical documents where, as stated by historian Robin Fisher "[a] document cannot be properly evaluated until we know who wrote it, for whom it was written, and, most importantly, why it was written." Judging History: Reflections on the Reasons for Judgment in *Delgamuukw v. B.C.*, supra, page 46.
>
> 11 I am satisfied after a limited reading of the historical documents relied upon by Dr. Hudson that his report and evidence is necessary because it is not possible to understand and evaluate the historical documents without expert assistance. In short, I accept what was said by Robin Fisher. Historical documents need to be read and evaluated for internal consistency as well as established in the context in which they were written. I require explanations of the historical documents and I need to know if the historical documents can be relied upon in making findings of fact. All of the evidence relied upon to prove or understand past events must be critically evaluated. In my view, that evaluation requires professional assistance.
>
> 12 Dr. Hudson's evidence is necessary because the written historical record does not speak for itself. The meaning and importance of some historical documents are far from self evident. Some require interpretation; all require evaluation for internal consistency and some explanation of the context in which they were written." (my emphasis)

Although Vickers J. was overturned on appeal, his decision was recently restored by the Supreme Court of Canada in its decision cited at 2014 SCC 44.

[56] The approach of Vickers J. was also followed by Garson J. in *Ahousaht Indian Band v. Canada (Attorney General)*, 2008 BCSC 768, at para. 33:

> "33 I agree with Justice Vickers. In respect to the Records before me, some of them require expert evidence for an understanding of the context in which they were written. In cases where there is more than one version of a Record, I may require expert evidence to decide which version is most reliable. In some cases I require expert evidence to understand what the Record is, who wrote it and why." (my emphasis)

[57] In *Delgamuukw v. British Columbia*, (1989), 38 B.C.L.R. (2d) 165 (S.C.) McEachern C.J.B.C., stated at p. 9:

> "In this case the parties wish to establish many historical details such as the context in which the Royal Proclamation of 1763 was issued, when Alexander MacKenzie and Simon Fraser first travelled through and established trading posts in northern British Columbia, the state of social organization, if any, in the claim territories at the time of contact with other civilizations, the interaction of natives with whites since such contact, the attitude of the imperial, dominion and provincial governments, and many other multi-dimensional facts, most of which are recorded or described in the collections of documents which have been tendered.
>
> It is neither sensible nor possible to prove every fact individually and separately from other related contemporaneous or serial events. I still have the view that, for the purposes of litigation, historians cannot usefully pronounce on matters of broad inference which may be open to serious disagreement or to subsequent revision. But I think they can give much useful evidence into which some opinions and inferences will be interwoven with references to admissible documentary declarations. Such opinions will be most useful, if not invaluable, in placing historical events or occurrences in context, and in explaining how some of these matters relate or do not relate to others.
>
> I agree with Mr. Willms, however, and I do not understand Mr. Adams to disagree, that experts cannot usurp the function of the court in construing written material. What a document says is for the court, but in this process the court

> not only needs but urgently requires the assistance of someone who understands the context in which the document was created." (my emphasis)

[58] In short, it is my view that Dr. Binnema's report is necessary in this trial because it is not possible for me to otherwise understand and evaluate the historical documents and other materials, or to understand the context in which they were written, without his expert assistance. Having said this, there are a few phrases and sentences in the report that I excised when ruling on its admissibility, for reasons stated above.

Reliability

[59] The bulk of RRDC's argument here reiterated Professor McNeil's criticisms of Dr. McHugh's methodology and reasoning. RRDC's counsel argued that Professor McNeil's criticisms demonstrate that Dr. McHugh's expert opinion evidence is unreliable. Since I have already ruled Dr. McHugh's second expert report inadmissible on the basis that it is not necessary, I need not also resolve the reliability objection. However, I note that in their text, *The Law of Evidence in Canada*, 3rd ed., under the heading of "Reliability", the authors suggest, at p. 801, that a party who challenges a well-established area of expertise, such as legal history, as being unreliable, has an evidentiary burden to provide a foundation for that challenge. RRDC has not met its burden here. The legal arguments raised by Professor McNeil in criticizing Dr. McHugh's methodology go to weight and not admissibility.

[60] In assessing the reliability of Dr. Binnema's report, *Abbey*, cited above, directs that I must again engage in the performance of my "gatekeeper" function and undergo a "cost-benefit" analysis. RRDC submitted that Dr. Binnema's expert opinion is unreliable because of the importance he attaches to what he perceives were the intentions of the

individuals who drafted the *1867 Address* and subsequently negotiated on the terms for the surrender of Rupert's Land by the Hudson's Bay Company, i.e. McDougall and Cartier. RRDC's counsel's implicit submission is that the probative value of Dr. Binnema's evidence in this regard is not great enough to offset the time and effort that will be required in this trial to address it.

[61] As I noted above, at para. 31, Professor Sullivan has made it clear that drawing inferences from the words of the historical participants in the legislative process and the context in which those words were used, is an accepted method of determining the original intention of the legislature. Indeed, there are several examples of cases where courts have relied upon the statements and documents of historical actors as probative of the probable intention of the legislature concerned: *Calder v. British Columbia (Attorney General)*, [1970] B.C.J. No. 632; *R. v. Caron*, 2009 ABQB 745, aff'd 2014 ABCA 71; *Manitoba Métis Federation Inc. v. Canada (Attorney General)*, 2007 MBQB 293; and *Will-Kare Paving & Contracting Ltd. v. Canada*, 2000 SCC 36.

[62] Before leaving this point, it is important to note that RRDC's reliance upon *R. v. J.-L.J.*, 2000 SCC 51 is misguided. That was a case involving a novel scientific theory or technique and the four factors identified by the U.S. Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), which are used to assess evidential reliability, i.e.:

1) whether the expert's theory can be or has been tested;
2) whether the theory has withstood peer review and publication;
3) whether there is a known or potential rate of error or the existence of standards to test the application of the theory or technique; and

4) whether the relevant scientific community has generally accepted the theory.

[63] Those factors are not in play in the case at bar. As Doherty J.A. observed in *Abbey*, at para. 114, not all expertise can be considered as science or involving the scientific method. For example, the witness in *Abbey* had expertise in the well-recognized professional disciplines of sociology, criminology and anthropology (para. 121). However the *Daubert* factors were not appropriate to assess the reliability of the witness' expert opinion evidence arising out of those fields of study (para. 118). Rather, Doherty J.A. suggested a non-exhaustive list of factors and questions that may be relevant to the reliability inquiry where the expert opinion proffered is of a non-scientific variety (para. 119):

> "119 As with scientifically based opinion evidence, there is no closed list of the factors relevant to the reliability of an opinion like that offered by Dr. Totten. I would suggest, however, that the following are some questions that may be relevant to the reliability inquiry where an opinion like that offered by Dr. Totten is put forward:
>
> * To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?
>
> *To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?
>
> *What are the particular expert's qualifications within that discipline, profession or area of specialized training?
>
> *To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored and available?
>
> *To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?

> *To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?
>
> *To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?
>
> *To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?
>
> *To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?"

[64] In the case at bar, Dr. Binnema was qualified as an expert historian. Thus, his field of study, history, is non-scientific and not amenable to assessment using the *Daubert* factors. Further, his qualifications were not challenged by RRDC nor was his methodology. Indeed, counsel for RRDC did not seek to cross-examine Dr. Binnema on any of the above points at the admissibility hearing. Accordingly, RRDC's objection on the basis of reliability cannot succeed.

CONCLUSION

[65] I rule Dr. McHugh's second report inadmissible. Dr. Binnema's report will be admitted, subject to certain passages being excised.

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GOWER J.