SUPREME COURT OF YUKON

Citation: *Ross River Dena Council v. The Attorney General of Canada*, 2011 YKSC 87

Date: 20111124
S.C. No. 05-A0043
06-A0092
Registry: Whitehorse

Between:

ROSS RIVER DENA COUNCIL

Plaintiff

And

THE ATTORNEY GENERAL OF CANADA
(on behalf of and as the representative for
Her Majesty the Queen in right of Canada)

Defendant

Before: Mr. Justice L.F. Gower

Appearances:

Stephen L. Walsh	Counsel for the Plaintiff
Suzanne M. Duncan and Maegan M. Hough	Counsel for the Defendant

REASONS FOR JUDGMENT
(Ruling on the Admissibility of an Expert Report)

INTRODUCTION

[1] This is a ruling on an objection to the admissibility of an expert's report prepared by Dr. P. McHugh ("the Report"), which was tendered by the defendant, the Attorney General of Canada ("Canada") at the outset of this trial. Pursuant to a previous agreement between counsel, confirmed in a case management order, counsel agreed

that the trial would commence by asking this Court to consider two specific threshold questions:

1. "Were the terms and conditions referred to in the *Rupert's Land and North-western Territory Order* of June 23, 1870 ["the *1870 Order*"] 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?"

Canada tendered the Report in support of its position that the answer to both facets of the first question must be "no".

[2] Counsel for the plaintiff, Ross River Dena Council ("RRDC"), Mr. Walsh, gave notice to Canada of his intention to object to the admissibility of the Report pursuant to Rule 34 (13) of the *Rules of Court*. Therefore, counsel for the parties attended the commencement of the trial armed with their respective written submissions on the issue of admissibility and a hearing on RRDC's objection was held. In his notice of objection, RRDC's counsel specified a number of grounds (one of which was abandoned by the time of trial) and I will set those out shortly, dealing with each in turn.

[3] Dr. McHugh describes his nationality as "New Zealand and Irish". He obtained his L.L.B. from the University of Wellington, New Zealand, in 1980. That was followed by an

L.L.M. from the University of Saskatchewan in 1981, and a Ph.D. from the University of Cambridge, England in 1988. He has been a teaching member of the Faculty of Law at Cambridge since 1986 and a Reader in Law since December 2004.

[4] Although Dr. McHugh's qualifications were not at issue, for the completeness of the record, I will note here that the Crown sought to qualify him:

> "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."

[5] Dr. McHugh indicated at para. 3 of his Report, dated September 21, 2011, that he has been asked by Canada "to review the historical documentation and context of the *1870 Order* to assist [this] Court in determining the intent of Parliament in issuing the *Order* and including the terms and conditions about Aboriginal peoples" which are at issue, specifically:

> "…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."

[6] Dr. McHugh also said that he has been asked to "address the legal understanding of the [Imperial] Crown's position at the time of the *Order* in and around 1870 and to provide an account of how the *Order* would have been understood as a legal instrument by those involved at that time."

[7] At para. 8 of his Report, Dr. McHugh clarified how he approached the questions asked of him by Canada:

> "… My position has been - and it is the one I take in this report - that an understanding of the legal past is an essentially historical exercise that must not be confused with contemporary interpretation and the formation of doctrine. To that end, this report is an historical one, looking at how the terms of the 1870 transfer would have been intended and understood in the setting and context of late-nineteenth century Canada. I am not making any comment on how those terms should be interpreted in contemporary legal proceedings."(my emphasis)

LAW

[8] I will begin my analysis with some discussion about the law of expert opinion evidence generally. The leading case in this area is *R. v. Mohan*, [1994] 2 S.C.R. 9. That case established, at para. 17, that admission of expert evidence depends on the application of the following criteria:

(a) relevance;

(b) necessity in assisting the trier fact;

(c) the absence of any exclusionary rule; and

(d) a properly qualified expert.

[9] Of these four criteria, the only one at issue in the case of bar is "necessity". In addressing that particular criteria, Sopinka J., at para. 21 of *Mohan*, quoted Dickson J., as he then was, in *R. v. Abbey* ,[1982] 2 S.C.R. 24, at p. 42:

> "With respect to matters calling for special knowledge, an expert in the field may draw inferences and state his opinion. An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate. "An expert's opinion is admissible to furnish the Court with scientific information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary

> (Turner (1974), 60 Crim. App. R 80 at p. 83 per Lawton L.J.)"
> (my emphasis)

[10] A more recent case from the Ontario Court of Appeal also indexed as *R. v. Abbey*, but cited at 2009 ONCA 624, helpfully reviewed *Mohan* and delved into a relatively detailed analysis of the admissibility of expert evidence. Doherty J.A. delivered the judgment of the Court and discussed the applicable principles and a suggested approach to admissibility, commencing at para. 71. There he noted that expert opinion evidence is "presumptively inadmissible" because of its potential to overwhelm the fact-finding function of the court "especially in jury cases."

> "It is fundamental to the adversary process that witnesses testify to what they saw, heard, felt or did, and the trier of fact, using that evidentiary raw material, determines the facts. Expert opinion evidence is different. Experts take information accumulated from their own work and experience, combine it with evidence offered by other witnesses, and present an opinion as to a factual inference that should be drawn from that material. The trier of fact must then decide whether to accept or reject the expert's opinion as to the appropriate factual inference. Expert evidence has the real potential to swallow whole the fact-finding function of the court, especially in jury cases. Consequently, expert opinion evidence is presumptively inadmissible. The party tendering the evidence must establish its admissibility on the balance of probabilities: Paciocco & Stuesser at pp. 184, 193; S. Casey Hill *et al.*, *McWilliams' Canadian Criminal Evidence*, 4th ed., looseleaf (Aurora, Ont.: Canada Law Book, 2009), at para. 12:30.10."
> (my emphasis)

[11] Doherty J.A. then referred to the four *Mohan* criteria and suggested a two-step process for determining admissibility (para. 76):

> "Using these criteria, I suggest a two-step process for determining admissibility. First, the party proffering the evidence must demonstrate the existence of certain preconditions to the admissibility of expert evidence. For example, that party must show that the proposed witness is

> qualified to give the relevant opinion. Second, the trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence. This "gatekeeper" component of the admissibility inquiry lies at the heart of the present evidentiary regime governing the admissibility of expert opinion evidence…"

[12] In the second "gatekeeper" stage of the analysis, Doherty J.A. said that the trial judge engages in a "case-specific cost-benefit analysis" (para. 86), and it is at this stage that the *Mohan* criteria of necessity is considered (para. 93). He described the considerations in the "gatekeeper" phase of the admissibility inquiry as "more difficult and subtle" than those in the first phase (para. 78), requiring "an exercise of judicial discretion" (para. 79). Further, in assessing the potential benefit to the trial process, the trial judge is deciding "only whether the evidence is worthy of being heard… and not the ultimate question of whether the evidence should be accepted and acted upon" (para 89).

[13] At para. 90, Doherty J.A. discussed the risks inherent in the admissibility of expert opinion evidence:

> "The "cost" side of the ledger addresses the various risks inherent in the admissibility of expert opinion evidence, described succinctly by Binnie J. in *J.-L.J.* at para. 47 as "consumption of time, prejudice and confusion". Clearly, the most important risk is the danger that a jury will be unable to make an effective and critical assessment of the evidence…"

This discussion of risks was continued at para. 92, as follows:

> "All of the risks described above will not inevitably arise in every case where expert evidence is offered. Nor will the risks have the same force in every case…As when measuring the benefits flowing from the admission of expert evidence, the trial judge as "gatekeeper" must go beyond truisms about the risks inherent in expert evidence and come

> to grips with those risks as they apply to the particular circumstances of the individual case."

[14] It must be remembered that this *Abbey* decision was a first-degree murder case involving a jury, whereas the case at bar is being tried by a judge alone. Although Doherty J.A. did not comment on any difference in the risk of the trier-of-fact being overwhelmed when the trier is a jury as opposed to a judge, it would seem to be a logical factor to take into account in assessing the risk in the particular circumstances of an individual case. Judges are presumed to know the law and understand that they can accept some, all or none of any witness' evidence, including an expert witness. Judges are also familiar with the principle that an expert's opinion is only as good as the facts he or she relies upon, and these facts must ultimately be proven in evidence: see *Cameron v. Savory*, 2008 BCSC 1633 at para. 11. Further, trial judges hear from expert witnesses on a relatively routine basis and are less likely to be unduly impressed by a given witness' qualifications and expertise. Also, with a judge-alone trial, there would seem to be less risk regarding factors such as an undue "consumption of time" and "confusion" resulting from the expert's proffered opinion. All of these considerations should go some distance to negate the possibility of "prejudice" to the opposing party in the context of a judge-alone trial.

[15] Canada's counsel, Ms. Duncan, has informed me that she intends to rely chiefly on the expert's Report and that, if he testifies, it will only be for the purpose of clarifying any ambiguities or explaining any technical aspects therein. RRDC's counsel has indicated that he will object to the expert being called to give *viva-voce* evidence because of a lack of notice under the *Rules of Court*. If he is successful in that regard, then the risk that the trial will be unduly protracted is lessened even further.

[16] *Sawridge Band v. Canada*, 2005 FC 1501, stands for the general proposition that if evidence is logically probative, it should be admitted, subject to a separate and subsequent assessment of its weight. In *Sawridge*, Russell J., was dealing with the admissibility of expert reports tendered by the plaintiffs. Canada objected on the grounds of irrelevancy, necessity and argued that it would unduly increase the length and costs of the trial. At para. 48, Russell J. stated:

> "First of all, I agree with the Plaintiffs that, in applying the *Mohan* test, the Court should be mindful of the words of Dickson J. (as he then was) in *R. v. Corbett*, [1988] 1 S.C.R. 670 at 797:
>
> > I agree with my colleague, La Forest, J., that basic principles of the law of evidence embody an inclusionary policy which would permit into evidence everything logically probative of some fact in issue, subject to the recognized rules of exclusion and exceptions thereto. Thereafter the question is one of weight. The evidence may carry much weight, little weight, or no weight at all. If error is to be made it should be on the side of inclusion rather than exclusion and our efforts in my opinion, consistent with the ever-increasing openness of our society, should be toward admissibility unless a very clear ground of policy or law dictates exclusion." (my emphasis)

[17] It is also important to remember that litigation of aboriginal issues is quite different from other civil litigation, and that it often calls for different approaches to conventional court procedures. In *Kwakiutl Nation v. Canada (Attorney General)*, 2006 BCSC 1368, Santanove J., at para. 26, spoke to the need "to find a creative way to try the issues":

> "I think it must be recognized that just as aboriginal rights are *sui generis*, aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown. We cannot simply view aboriginal claims in the same light as other civil litigation. I believe

> effective case management of aboriginal litigation requires an effort on behalf of all parties and the court to find a creative way to try the issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants."

[18] I will turn next to the specific grounds of objection advanced by RRDC's counsel and will address each in turn.

GROUNDS FOR OBJECTION

1. Facts Not Stated

[19] RRDC's counsel submits that the expert's report does not conform with Rule 34(5)(b) which states:

> "The report shall set out or be accompanied by a supplementary report setting out…the facts and assumptions on which the opinion is based…"

[20] Rule 34(8) states that if a report does not conform with (5) "it is inadmissible… unless the court otherwise orders".

[21] RRDC's counsel points to paragraphs four and five in Dr. McHugh's Supplementary Report, which state:

> "4. The facts on which the report is based are the historical facts set out in the primary and secondary documents which I reviewed for the purpose of this report and which are described below. I have not been provided with any assumptions or made any assumptions and coming to my opinion.
>
> 5. The documents reviewed and relied on by me were provided by Justice Canada, a list of which is attached as Schedule C, as well as documents obtained independently by me and reviewed, a list of which is attached as Schedule D."

[22] RRDC's counsel notes that Schedule C consists of some 536 documents from Canada, that Schedule D consists of a further 33 documents, and that, cumulatively, the documents in both Schedules amount to thousands of pages.

[23] RRDC's counsel relies on a number of cases which generally stand for the proposition that an expert's vague reference to having reviewed numerous documents or learned articles does not comply with the requirement that the facts on which the opinion is based must be specified. For example, in *Sebastian v. Neufeld*, [1995] B.C.J. No. 1684 (S.C.), Preston J. was adjudicating a motor vehicle accident case where the plaintiff's psychologist, one Dr. Posthuma, claimed to have reviewed 34 documents, many of which were medical reports and medical/legal reports of other doctors in preparation for his opinion. An issue arose under Rule 40A of the *Rules of Court* of the British Columbia Supreme Court, which is virtually identical to our Yukon Rule 34. At para. 15, Preston J. stated at:

> "…Counsel should not encourage experts to undertake a broad review of voluminous material and make a vague statement that the opinion is based on that material. It is simply an unacceptable manner in which to present an expert opinion."

He then went on to rule that Dr. Posthuma's report was inadmissible (para. 17). See also: *MacEachern (Committee of) v. Rennie*, 2009 BCSC 941; *Croutch (Guardian ad litem of) v. B.C. Women's Hospital & Health Care Centre*, 2001 BCSC 995 (para. 17); *Mazur v. Lucas*, 2010 BCCA 473 (para. 34); *ter Neuzen v. Korn*, [1996] B.C.J. No. 2246 (paras. 18 and 21).

[24] As for the court's discretion under Rule 34(8), RRDC's counsel referred to the case of *Hayes (Guardian ad litem of) v. Brown*, 2001 BCSC 1046, which appears to be a

medical negligence case. There, Hood J. noted, at para. 26, that the British Columbia equivalent of our Rule 34(5) had been found by the British Columbia Court of Appeal to be “mandatory” and “not simply a technical matter”. Further, Hood J. referred to the statement of facts and assumptions required by the Rule as “vital to the process and a fundamental condition to the admissibility” of the expert opinion (para. 27). Finally, Hood J. noted that although the court has “an unfettered discretion” to allow an expert opinion into evidence notwithstanding that the statement of facts has not been provided, “it would be an exceptional case” in which that should be done.

[25] Canada’s counsel submits that, although the facts on which Dr. McHugh relied are not specifically set out in his Supplementary Report, in the Report itself, the facts upon which his various inferences and opinions are based are interwoven with his opinion.

[26] I agree with Canada that Dr. McHugh has made it relatively clear in his analysis which facts (in the form of events or documents) he is discussing and relying upon. Indeed, this is the case in virtually every paragraph, except those which summarize his inferences or conclusions. Many of these factual references are footnoted. Some representative examples include Dr. McHugh’s references to:

- The Hudson's Bay Company Charter of 1678;
- The amalgamation of the Hudson’s Bay Company and the North-western Company in 1821;
- The renewal of the Hudson’s Bay Company License in 1838;
- Chief Justice Draper's mission to London in 1857;

- The establishment of a Special Committee of the House of Commons to address the conflict between the Hudson's Bay Company and the province of Canada;
- Section 146 of the *British North America Act*, 1867;
- The 1867 Address from the first session of the Canadian Parliament;
- The House of Commons Parliamentary papers from 1868;
- Correspondence between Her Majesty's Government and the Hudson's Bay Company regarding events from approximately 1863-1868;
- Numerous academic articles and texts; and
- Various references to case law.

[27] These factual references relate to Dr. McHugh's descriptions of:

(a) The 1870 transfer of Rupert's Land and the North-western Territory to the Dominion of Canada;

(b) The relations between the Crown and the Indian tribes in British North America around the time of the 1870 transfer;

(c) The legal history of Aboriginal-Crown relations in New Zealand in the late 1800's; and

(d) The relations between the First Nations of Upper Canada and the Crown during the 19th century.

[28] It is also my understanding that all of the documents upon which Dr. McHugh has relied are contained within exhibit #2, being the eight-volume Common Book of Exhibits tendered by the parties into evidence.

[29] Thus, the case at bar is very distinguishable from the type of “exceptional case” referred to in *Hayes v. Brown*, cited above, where Hood J. emphasized “the complete lack of facts and assumptions on which the opinions are based” (para. 30). Here there are numerous facts stated and footnoted by Dr. McHugh in support of his expert opinion. Accordingly, I give no effect to this ground of objection.

2. Necessity

[30] RRDC’s counsel submits that the necessity criterion set out in *Mohan* has not been established by Canada on a balance of probabilities. In particular he relies upon the case of *R. v. D.D.*, 2000 SCC 43, where Major J., speaking for the majority, summarized the general approach to “necessity” as follows (para. 57):

> “In summary of the general principles expressed above, I adopt the following passage by Professor Paciocco:
>
> > As the Mohan Court explained, the four-part test serves as recognition of the time and expense that is needed to cope with expert evidence. It exists in appreciation of the distracting and time-consuming thing that expert testimony can become. It reflects the realization that simple humility and a desire to do what is right can tempt triers of fact to defer to what the expert says. It even addresses the fact that with expert testimony, lawyers may be hard-pressed to perform effectively their function of probing and testing and challenging evidence because its subject matter will often pull them beyond their competence, let alone their expertise. This leaves the trier of fact without sufficient information to assess its reliability adequately, increasing the risk that the expert opinion will simply be attorned to. When should we place the legal system and the truth at such risk by allowing expert evidence? Only when lay persons are apt to come to a wrong conclusion without expert assistance, or where access to important information will be lost unless we borrow from the learning of experts. As Mohan tells us, <u>it is not enough that the expert evidence be helpful</u> before we will be prepared to run these risks. <u>That sets</u>

> too low a standard. It must be necessary. (D. Paciocco, Expert Evidence: Where Are We Now? Where Are We Going? (1988), at pp. 16-17)" (my emphasis)

[31] RRDC's counsel submits that this Court can come to its own conclusion as to whether the relevant provisions of the *1870 Order* were intended to have legal force and effect and that an expert's opinion is not required for that analysis.

[32] As I understand him, RRDC's counsel views this case largely as one of statutory interpretation. For example, he relies heavily on the following legislation and legislative events:

(a) the closing words of s.146 of the *British North America Act, 1867*, which expressly state that the provisions of the *1870 Order* "shall have effect" as if they had been enacted by the Imperial Parliament;

(b) s. 42 of the *Dominion Lands Act* of 1872, which states:

> "None of the provisions of this Act respecting the settlement of agricultural lands, or the lease of timberlands, or the purchase and sale of mineral lands, shall be held to apply to territory the Indian title to which shall not at the time have been extinguished;"

(c) evidence showing that the Federal Government disallowed British Columbia provincial land legislation in 1875 on the grounds that it failed to respect the legal or equitable rights of the Indians of that province; and

(d) the enactment of the *Quebec Boundaries Extension Act* in 1912, which provided in s. 2(c) that the extension of the boundaries of Québec was made subject to the condition that:

> "…the province of Quebec will recognize the rights of the Indian habitants in the territory above described to the same extent, and will obtain surrenders of such rights in the same manner, as the Government of Canada has heretofor recognized such rights and has obtained surrender thereof, and the said province shall bear and satisfy all charges and expenditures in connection with or arising out of such surrenders."

[33] RRDC's counsel submits that this evidence, coupled with the evidence of the post-Confederation treaty process initiated by the Canadian Government following the acquisition of Rupert's Land and the North-western Territory, is sufficient to allow this Court to come to its own determination as to the correct interpretation of the provisions at issue and, therefore, the expert opinion evidence tendered by the Crown is unnecessary.

[34] RRDC's counsel notes that *R. v. Sparrow*, [1990] 1 S.C.R. 1075, which was the first decision from the Supreme Court of Canada following the enactment of s. 35(1) of the *Constitution Act, 1982*, was a case where the ultimate decision on the interpretation of s. 35(1) was made without the assistance of expert evidence, except with respect to the historical right to fish asserted by the Musqueam Indian Band.

[35] Canada's submissions on this issue begin with a reminder of what I said in a pre-trial application by RRDC to have a point of law set down for determination; that being whether the terms and conditions of the *1870 Order* "have force as constitutional provisions capable of being enforced by [an] order of this court". My decision is cited at *Ross River Dena Council v. Canada (Attorney General)*, 2008 YKSC 45. There, I

considered the Supreme Court of Canada decision in *R. v. Blais*, 2003 SCC 44, where the court was deciding whether "Indian" in paragraph 13 of the *Manitoba Natural Resources Transfer Agreement* included the Métis. The Court stated in para.16:

> "…The starting point in this endeavour is that a statute -- and this includes statutes of constitutional force -- must be interpreted in accordance with the meaning of its words, considered in context and with a view to the purpose they were intended to serve: see E. A. Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87. As P.-A. Côté stated in the third edition of his treatise, "Any interpretation that divorces legal expression from the context of its enactment may produce absurd results" (*The Interpretation of Legislation in Canada* (3rd ed. 2000), at p. 290)." (my emphasis)

At para. 27 of my reasons at 2008 YKSC45, I noted the importance of the contextual history to the question of law posed by RRDC:

> "While not prejudging the matter, I agree that even if the terms and conditions at issue from the 1867 Address, are "part of the Constitution of Canada" by virtue of their connection to the 1870 Order, it does not necessarily follow that the subject provision has constitutional force and is capable of being enforced. Rather, it seems to me, in order to make that determination, one must consider the intention of Parliament. Further, although I accept that interpretation of a constitutional or statutory instrument begins by examining the language of the provision at issue, if the language or meaning is unclear, then courts must look to extrinsic material. In this case, that would likely include reference to the legislative history leading up to the 1867 Address and the *1870 Order*." (my emphasis)

[36] The need for historical contextual evidence in aboriginal law cases has been repeatedly noted by several courts. In *Tsilhqot'in Nation v. British Columbia*, 2004 BCSC 1237, Vickers J. was addressing an application by the plaintiff First Nation to call an expert in the fields of anthropology and ethnohistory. The issue in the case was whether the Tsilhqot'in people have aboriginal rights and title in certain lands in British Columbia.

Vickers J. noted that one of the difficulties was that no living person could be called to give direct evidence about what was happening at the relevant time and that the parties would be relying on historical documents in the proof of their cases. At para. 10 Vickers J. said:

> "…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."…"

[37] While I generally try to avoid lengthy quotations from case law, the following comments and the conclusion of Vickers J. on the question of admissibility are, to my mind, very applicable to the case at bar:

> "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.
>
> …
>
> 20 If Dr. Hudson has drawn wrong inferences from the historical records or has engaged in speculation, his

> evidence will be given little weight. The former Chief Justice, in *Delgamuukw v. B.C.* (1989), 38 B.C.L.R. (2d) 165 (B.C.S.C.), properly pointed out that historians will draw inferences from what they read in the historical documents. Some of those inferences will be right, others will be wrong. Some opinions expressed may stand or fall on the correctness of the inferences upon which they are based. It will be my task to decide, on the whole of the evidence, if inferences drawn by historians, anthropologists, and ethnohistorians are correct and whether the opinions expressed by these expert witness can by relied upon to make the findings of fact that are necessary in this case."

[38] The *Delgamuukw* case referred to by Vickers J. is also helpful on the admissibility issue. *Delgamuukw* was also a lengthy land claims case, in which the trial took place over approximately 374 days and involved numerous binders of documentary exhibits. At p. 7 of that decision, McEachern C.J.B.C., as he then was, discussed the need for expert historical evidence to make inferences from the documents in order to explain matters at issue. He also recognized that there would likely be disagreements between counsel about whether a particular opinion or inference goes beyond what the Court might be able to conclude on its own, or whether it might stray into generalizing about the broad sweep of history. However, in the result, McEachern C.J.B.C. preferred to admit the expert evidence, subject to his careful analysis about which inferences, opinions and conclusions were permissible and which were not. In other words, which would be given weight and which would be disregarded. Once again, because of the usefulness of his comments in this regard, I am quoting from his reasons at some length (p. 7):

> "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.
>
> It is accordingly my judgment that qualified experts may give many useful opinions, based upon inferences from the documents about recorded facts of history in order to explain matters in issue, but they may not, in my view, either construe a written document which is the province of the court, or generalize upon the broad sweep of history which is so often subject to learned disagreement and revision.
>
> It is inevitable that there will be disagreements between counsel about whether a particular opinion or inference falls on one side of the line or the other. Although my task in this connection will be a difficult one (which may not be possible of precise definition, even in argument if careful consideration should be required after the trial is completed), I shall have to do the best I can.
>
> Generally speaking, therefore, I can have regard to the opinions the historians have expressed about the facts they think the documents are describing, and in some cases why they think such things were happening, and the consequences of these historical events even though their evidence will in most cases be based upon inferences drawn from statements found in the ancient documents. Impermissible opinions and the conclusions they wish me to reach in connection with the subject matters of their opinion will undoubtedly be interwoven with permissible opinion, and it will be my responsibility to disregard the former while profiting from the latter."

[39] *R. v. Fournier*, [2005] O.J. No. 2881 (S.C.), is a criminal case where the accused were charged with three counts related to the forgery and sale of status cards for a non-

existent Indian band. The accused raised several constitutional issues that challenged the validity of the *Criminal Code* and the *Indian Act*, and the jurisdiction of the police and courts in relation to the charges. They also sought to adduce expert opinion evidence from a witness on the history and politics of constitutional relations between aboriginal peoples and the Crown, which was opposed. At paras. 36-38, O"Neill J. stated as follows:

> "…It is true that this case does not involve an issue with respect to "Indian rights to land". But it certainly involves issues relating to aboriginal peoples, their relationship to the Crown, and the constitutional propriety or otherwise of specific legislation relating to them.
>
> We know from *Sparrow, supra*, at p. 286 that "The nature of s. 35(1) itself suggests that it be construed in a purposive way." Accordingly, in a case where the court may have to decide the constitutionality of certain statutes relating to aboriginal peoples, surely the court can benefit from obtaining or hearing evidence with respect to some of the history that predates the 1982 constitutionalization of treaty and aboriginal rights.
>
> I think it is fair to say that even at the present time, 15 years after the Sparrow decision, the area of Crown/aboriginal relations remains complex, and is often misunderstood…In my view, it is important for the court to understand, within a defined framework, the historical context and the nature of the relationship between the Crown and aboriginal peoples in Canada, given the issues raised in this case." (my emphasis)

[40] *Benoit v. Canada*, 2002 FCT 243, is a case in which the plaintiff and others sought a declaration that the application of federal taxation provisions to beneficiaries of *Treaty 8* in Alberta was unconstitutional. That treaty, made in 1899, involved the surrender of vast amounts of land by the aboriginal people in northern British Columbia, Alberta, Saskatchewan, and the southern Northwest Territories. At para. 138, Campbell J., was addressing the need for expert evidence and stated as follows:

> "…In interpreting a treaty, first consideration is to be given to the facial meaning of the words, and then second, consideration is given to the facial meaning against the treaty's historical and cultural backdrop. Thus, within this framework, it is unnecessary to have expert evidence about the facial meaning, but it is crucial to have expert evidence about history and culture." (my emphasis)

See also: *Keewatin v. Ontario (Minister of Natural Resources)*, 2011 ONSC 4801, at paras. 31-34; and *Montana Band v. Canada*, 2006 FC 261, at para. 30.

[41] Canada submits that the evidence provided in Dr. McHugh's Report is necessary because it provides the historical context and background critical to understanding both the *1870 Order* and the Crown–Aboriginal relationship around that time. Canada's counsel further submits that this information will assist me in drawing inferences about the intention of Parliament with respect to the *1870 Order*, and therefore the Report has significant probative value.

[42] It is apparent from the wording of the questions that they refer to both past and present interpretations and obligations. The first part of question one asks "were the terms and conditions….intended to have legal force and effect…". The second part of the question asks if these terms and conditions "give rise to [presently enforceable] obligations". Question two similarly asks whether these obligations are presently capable of being enforced by the Court. Thus, it is possible to interpret this wording as an inquiry into whether the terms and conditions had legal force and effect from the time of their enactment in 1870 and, if not, whether they are nevertheless enforceable in this Court today.

[43] As I understand the submissions of RRDC's counsel thus far, his position is that the terms and conditions of the *1870 Order* have had legal (and constitutional) force and

effect from the time of their enactment. In any event, in order to decide the first question posed by counsel, it will be necessary to explore what the intention of Parliament was at the time of the enactment of the *1870 Order*. It is to this issue which the Report of Dr. McHugh is principally focused.

[44] While I am quite aware of my obligation to undertake the statutory interpretation of the relevant provisions in their legislative context, I also feel that any such analysis would be incomplete if it did not take into account the historical, political and cultural context of the relationship between the Aboriginal people of Canada and the Imperial Crown at the time of the enactment of the *1870 Order*. However, the field of study of the political and legal history of the time is not one from which I find myself able to draw inferences and conclusions without the assistance of an expert such as Dr. McHugh. To paraphrase the 1982 *Abbey* decision, Dr. McHugh's function is to provide this Court with "a ready-made inference", which due to the historical nature of the political, legal and social facts of the time, I am unable to formulate on my own. At the same time, I must also be cognizant of my duty to make my own conclusions of law and fact at the end of the day, and not allow Dr. McHugh's function to usurp my own. Thus, if I conclude that Dr. McHugh has made impermissible inferences, or inferences which are unsupported by facts and evidence, then I am free to disregard them or give them little weight, depending on the circumstances.

[45] Ultimately, as Vickers J. said in *Tsilhqot'in* case, it will be my task to decide, on the whole of the evidence, and after hearing full submissions from counsel, if the inferences drawn by Dr. McHugh are correct and whether his opinions can be relied upon to make the findings of fact that are necessary in this case.

[46] In short, Canada has persuaded me on a balance of probabilities that Dr. McHugh's expert report is necessary to decide the first threshold question to be tried at the outset of this case.

3. Encroaching on the Function of the Trial Judge

[47] RRDC's counsel relies on the following cases for the general proposition that it is within the province of the trial judge, and not the expert, to make findings of fact and rulings of law: *Quintette Coal Ltd. v. Bow Valley Resource Services Ltd.*(1988), 29 B.C.L.R. (2d) 127 (S.C.); *Cogar Estate v. Central Mountain Air Services Ltd*. (1992), 16 B.C.A.C. 134; and *Neudorf v. Nettwerk Productions Ltd.*, [1998] B.C.J. No. 2690 (S.C.); *Syrek v. Canada*, 2009 FCA 53; *Emil Anderson Construction Co. v. British Columbia Railway Co. No. 1*, (1987), 15 B.C.L.R. (2d) (S.C.). Further, RRDC's counsel submitted that questions of statutory interpretation are a form of legal conclusion which is to be made solely by the trial judge. See, for example, *Niagara River Coalition v. Niagara-on-the-Lake (Town)*, 2010 ONCA 173.

[48] RRDC's counsel submits that the entirety of Dr. McHugh's report amounts to little more than a legal opinion about whether the relevant provisions of *1870 Order* "were intended to have legal force and effect", and that opining as he has, Dr. McHugh has usurped the role of this Court by directing his conclusions to the ultimate issue at this phase of the trial.

[49] With respect to this last point, I prefer Canada's position that it is no longer the law that a witness may never give direct evidence about the ultimate issue in a case or state conclusions on issues to be decided by the court. As the Ontario Court of Appeal said in *R. v. Graat* (1980), 30 O.R. (2d) 247 (C.A.), at p. 14:

> "… The admission of evidence on the ultimate issue can be justified on the basis that the witness is an expert and the judge…requires his assistance… In the final analysis, even with the benefit of the expert's evidence the [court] still has to make the final determination of the issue, so that the expert is not really usurping the [court's] function…"

[50] *Graat* was cited with approval by the Supreme Court of Canada in *R. v. Burns*, [1994] 1 S.C.R. 656, at para. 25:

> "…While care must be taken to ensure that the judge or jury, and not the expert, makes the final decisions on all issues in the case, it has long been accepted that expert evidence on matters of fact should not be excluded simply because it suggests answers to issues which are at the core of the dispute before the court: *Graat v. The Queen*, [1982] 2 S.C.R. 819. See also *Khan v. College of Physicians and Surgeons of Ontario* (1992), 9 O.R. (3d) 641 (C.A.), at p. 666 (per Doherty J.A).

[51] RRDC's counsel cited a number of passages from the Report which he said were objectionable in this regard. While he qualified these submissions by indicating that his representative examples were not exhaustive, I will deal with those which were specifically raised.

[52] The first passage which RRDC's counsel objected to is found at para. 9 of the Report:

> "…The conclusion I reach is that there is no evidence to show that the legal form of the transfer was intended or even thought to affect the legal position of the First Nations in respect of whom the standard approach of the period was perceived to continue to apply. In the late-nineteenth century (and for most of the twentieth), the Crown's relations with tribes in respect of their land 'rights' were conceived as a matter of non-justiciable executive grace in the sense that the 'trust' and 'guardianship' duties avowed by the Crown, including the practice of obtaining formal cessions of their land, were regarded as having a high moral character not enforceable directly through court process. It was not until the courts developed the common law doctrine of aboriginal

> title from the 1970s onward that those collective land rights and associated Crown obligations became justiciable. There is no evidence that the 1870 transfer was designed to or seen at the time as changing that position."

[53] I agree that, on their face, these statements appear conclusory of both matters of fact and law. However, that is not particularly surprising, given that Dr. McHugh was asked to address the legal understanding of the Crown's position at the time of the *1870 Order* and to provide an account of how the *Order* would have been understood as a legal instrument by those involved at that time. Although he referred to his Report as "an historical one", his examination of how the 1870 transfer of Rupert's Land and the North-western Territory was intended and understood in the legal and political context of the time indicates to me that he could hardly avoid drawing certain factual or legal inferences or conclusions which might appear objectionable at first glance. Nevertheless, he was asked to provide those inferences and conclusions precisely because they are within his area of his expertise. Further, as I have already concluded above, it is an area of expertise beyond that of this Court and his opinion is therefore necessary for me to consider in order to answer the first question posed by the parties at this stage of the trial. Furthermore, Dr. McHugh specifically stated at para. 8, "…I am not making any comment on how those terms [the relevant provisions of *1870 Order*] should be interpreted in contemporary legal proceedings." In addition, it is apparent from a review of the Report in its entirety that para. 9, although it immediately precedes the section entitled "Executive Summary", is itself a summary of Dr. McHugh's essential thesis and major conclusions. Thus understood, it is once again not surprising that the statements in para. 9 appear conclusory. Finally, it would seem to be appropriate for such an expert, having reviewed

the relevant documentation, to be able to say whether there is an absence of historical evidence on one point or another.

[54] The next passage in the Report which RRDC counsel takes issue with is the entirety of para. 10, which states:

> "Executive Summary
>
> 10. In this report I take the position that the legal basis of Crown relations with aboriginal peoples was formed in the imperial era and carried over to colonial and early-national times when jurisdictional competence was transferred from London. The Crown recognised the land rights of tribes and negotiated for their cession but these practices were undertaken as a matter of executive grace rather than from any legal imperative compelling this treaty-making. These relations engaged Crown beneficence and guardianship but they were never regarded as justiciable or enforceable by legal process - a possibility that the state of legal art could not admit (until the late-twentieth century). The reference to those 'equitable principles' in the Addresses and instrumentation for the transfer of Rupert's Land and the Northwestern Territories in the 1870 Order in Council was not intended or contemplated at that time to change the received position of non-justiciability."

Once again, this is obviously a summarized version of Dr. McHugh's overall thesis and conclusions, and for the reasons I just set out above, it is relevant and should not be excluded simply because it suggests answers to issues which are at the core of the dispute between the parties: see *R. v. Burns* (cited above).

[55] The next passage of concern to RRDC is found at para. 26 of the Report:

> "The conclusion that the relevant historical actors did not regard the protection of the tribes as engaging a legally enforceable obligation strikes me as the plain and inescapable conclusion from a reading of the relevant documents surrounding the 1870 transfer. I will now put that conclusion into a broader historical context so that it can be

> seen as wholly consistent with the driving themes of imperial and colonial relations with tribes in the Victorian era."

Here, I agree with Canada's counsel that this is an opinion about the understanding the relevant historical actors would have had at the time of the 1870 transfer, based upon the expert's reading of the historical documents. Accordingly, it is a matter within his expertise, which is *prima facie* admissible, subject to weight.

[56] The next passage of the Report which RRDC's counsel objected to is found at para. 34:

> "…Given that such direct and express incorporation of native title into the formal constitution of colonies was not regarded at that time as having a legal impact, it is certain that the indirect incorporation of the 1870 transfer was also not so regarded at the time..."

Once again, I agree with Canada's counsel that this is an opinion based on Dr. McHugh's comparison of the Canadian context with the historical legal context in Australia and New Zealand in relation to land and Aboriginals. There is no issue that Dr. McHugh's specialized knowledge of the law of Australia and New Zealand is within his expertise.

[57] The next passage at issue for RRDC is found at para. 40:

> "Throughout the nineteenth century, the management of relations with tribes (land cessions most notably) were treated as a dimension of the non-justiciable prerogative. This was the received position in the two jurisdictions with the most developed experience in this sphere - Canada and New Zealand."

This is the same opinion as that expressed in the Executive Summary and is also a segue to the next portion of the Report which is entitled "A contemporaneous New Zealand comparison".

[58] The next passage objectionable to RRDC is found at para. 46:

> "…Unlike the Native Land Acts in New Zealand, the 1870 transfer, with no more than an indirect reference to the 'equitable principles' surrounding cession of aboriginal lands, was not specifically framed as a legal transposition and transmutation of the original title. It was not framed as a code for the management of those lands."

Once again, this is an opinion based on a comparison of the legal, political and historical context in New Zealand with the expert's overall understanding of the *1870 Order*, based on his review of the relevant documents. It is a conclusion within the scope of his expertise and one which this Court would be unable to draw on its own.

[59] The next passage at issue is found at para. 47:

> "…These tribal petitions to the Crown (rather than a court), asking for the favourable exercise of its executive power usually with regard to protection of the petitioners' interests, were a frequent feature of colonial political history, not only from Canada but other colonies like New Zealand and those in southern Africa. This makes it highly improbable that a reference to 'equitable principles' in the 1870 transfer, especially one framed so indirectly, would have been regarded at that time as transforming that embedded position. There is no documentary evidence to show that this result was contemplated, much less intended…"

Once again, this opinion is based upon Dr. McHugh's review of the documentation and his finding that there is an absence of documentary evidence showing that the inclusion of the relevant provisions in the *1870 Order* were expected to change the practice that complaints by aboriginals were dealt with by tribal petitions to the Crown, rather than by court action. This is an opinion within the scope of Dr. McHugh's expertise.

[60] The last passage objected to by RRDC's counsel is also in para. 47 of the Report:

> "…The case-law shows native peoples were regarded as holding all the legal capacities of the settlers so far as protection of their individual person and personal property were concerned. Where, however, they claimed certain collective rights - to land most especially - the legal

> enforcement of those rights (against squatters or trespassing stock, to give the strongest examples) was a matter for the Crown. That is, the Crown acted as legal protector of native peoples collective or, to use the modern term, aboriginal rights."

This is a further opinion on the nature of the Crown-Aboriginal relationship at the time of the *1870 Order*, based upon a review of the case-law from a historical perspective.

[61] In summary, I agree with Canada's counsel that, while Dr. McHugh makes several conclusions of fact and law, they are made for the purpose of establishing the historical, legal and political context of the relationships between Aboriginal people and the Imperial Crown around the time of the *1870 Order*, in Canada, Great Britain and the colonies of Australia and New Zealand. These conclusions are within the scope of Dr. McHugh's historical expertise and are provided for the purpose of assisting this Court in deciding what the intention of the Imperial Parliament was when the relevant provisions of the *1870 Order* were enacted. Accordingly, I am satisfied on a balance of probabilities that this ground of objection cannot succeed.

4. Argument in the Guise of Evidence

[62] The next ground of objection by RRDC's counsel to the admissibility of the expert reports is that argument or advocacy in the guise of expert opinion evidence is not admissible. In particular, counsel points to phrases used by Dr. McHugh throughout the Report such as "there is no evidence to show that…" or "I take the position that the legal basis of Crown relations with aboriginal peoples was formed in the Imperial era..." or, "the case law shows that...". Counsel submits that such phrases are the language of advocacy and not an impartial expert. Three cases are relied on by RRDC in this regard: *Bedford v. Canada*, 2010 ONSC 4264, at paras. 100 and 101; *Warkentin v. Riggs*, 2010

BCSC 1706, paras. 78-81; and *Sengbusch v. Priest* (1987), 14 B.C.L.R. (2d) 26 (S.C.). RRDC's counsel also relied on a case provided by Canada, *Squamish Indian Band v. Canada* (1998), 144 F.T.R. 106 (F.C.T.D.), which similarly involved an application to exclude expert reports from evidence. The Squamish Indian Band had brought an action against Canada regarding the alienation of reserve lands. It sought to introduce two expert reports into evidence. The first related to the kind of advice a reasonably diligent Indian client would have received from a competent lawyer in the 1940s and 50s with respect to fiduciary duty claims against the Crown. The Federal Court ruled that this report was inadmissible in its entirety because it was largely comprised of statements of the law which would not assist the trier-of-fact (para. 12). At para. 10, Simpson J. stated:

> "The Berger Report illustrates the difficulty that may arise when a legal expert files an expert report providing an opinion directed to an ordinary practitioner's perception of the law. When, as in this case, the expert concludes that the case law and statute law of the time would be the law relied on by an ordinary practitioner, the opinion will be of little assistance to the Court because it is grounded entirely in the law. It is also inevitable that such an opinion will take on the characteristics of a legal argument." (my emphasis)

Thus, *Squamish* is distinguishable from the case at bar because the expert opinion at issue there was entirely grounded in the law, whereas Dr. McHugh's Report is focused on historical context, some of which is legal, some political, and some cultural.

[63] Dr. McHugh has expressed his opinion as a legal historian providing the context of the times. The purpose and intent of his opinions are not in the nature of a legal analysis of case law, nor are they in the form of traditional legal argument. He does not make any assertions or statements at all about what the state of the law is today in relation to the relevant provisions of the *1870 Order*. His usage of the case law is not to engage in legal

argument, but rather to describe the nature of Crown-Aboriginal relations around the time of that *Order*. His Report makes no attempt at all to delve into the precise words in the relevant provision, but confines his analysis to the general historic relationship between the Crown and Aboriginal people and how that is probative of the probable intention of the Imperial Parliament in drafting the *1870 Order*.

[64] In short, Canada has persuaded me that this is not a sustainable ground to prevent the admission of the Report.

5. Alleged Internal Inconsistencies

[65] RRDC's counsel challenged the admissibility of the Report on the basis that it contains serious internal inconsistencies in respect of the important issue of whether the relevant provisions of the *1870 Order* could have been enforceable in the courts by the Crown on behalf of the Indians. He quotes Dr. McHugh, at para. 20 as follows:

> "…The conclusion that I will reach is that these various recognitions of the position of the Indian tribes in the circumstances and formality of transfer would not have been understood in 1870 as rendering any obligation justiciable or enforceable in the courts by or on behalf of aboriginal people of the annexed territory…"

[66] RRDC's counsel says that Dr. McHugh contradicted himself, first at para. 38, where he stated:

> "…Inside the colonial legal systems, before and after the imperial era, the tribes were not regarded as holding any collective identity or rights that could be enforced in colonial courts. The Crown protected these rights for them, and <u>if recourse to the courts was needed then the Crown (including its duly commissioned protectors and superintendents) initiated any such steps on their behalf</u>." (my emphasis)

And further, at para. 47, were Dr. McHugh stated:

> "…The case-law shows that native peoples were regarded as holding all the legal capacities of the settlers so far as protection of their individual person and personal property were concerned. Where, however, they claimed certain collective rights - to land most especially – the legal enforcement of those rights (against squatters or trespassing stock, to give the strongest examples) was a matter for the Crown. That is, the Crown acted as legal protector of native peoples collective or, to use the modern term, aboriginal rights." (my emphasis)

And finally, at para. 50, where Dr. McHugh stated:

> "…The Indian tribes were not regarded as holding distinct legal status and any legal steps to protect their aboriginal title were taken through the Crown…" (my emphasis)

[67] The single case relied on by RRDC's counsel this regard is *RDA Film Distribution Inc. v. British Columbia Trade Development Corp.*, [1999] B.C.J. No. 1516 (S.C.)("*RDA")*. In that case, the plaintiffs tendered an expert witness who was a California lawyer. The plaintiffs had brought an action against British Columbia Trade Development Corporation for damages for its refusal to provide them with a guarantee. From my reading of the case, it appears that part of the expert's evidence was tendered as an expert opinion which he had given to the plaintiffs prior to trial as well as his *viva voce* evidence at trial. At para. 203, Owen-Flood J. commented on a number of inconsistencies in the expert's testimony which weakened its credibility. For instance:

> "… Much of his testimony as to what his opinion was at the time is inconsistent with his statements and correspondence and written opinions at the time, and is contradicted by other witnesses."

However, the "most serious difficulty" the trial judge had with the expert's testimony in *RDA* was a direct contradiction between two opinions written by him approximately three

months apart. At para. 207, Owen-Flood J. concluded that this was “a fundamental error which, in my view, renders the opinion worthless.”

[68] In the case at bar, the apparent inconsistencies between what Dr. McHugh said about any Aboriginal obligations arising under the *1870 Order* not being “justiciable or enforceable in the courts” by or on their behalf, and his subsequent statements set out above, are much less clear. To my mind, they are certainly not the type of blatant inconsistency described in the *RDA* case. Further, even if the challenged passages are truly inconsistent (and that will likely be addressed if Dr. McHugh testifies), they do not strike me as so problematic that they are capable of rendering Dr. McHugh’s entire opinion “worthless”.

[69] Therefore, this ground of objection is not sustainable either.

CONCLUSION

[70] I do not find any parts of the expert Report to be inadmissible. Therefore, there is no need, as Canada suggested in the alternative, for excising any portions of it. All of the Report will be admitted, subject to my determination of the weight to be given to any of the particular opinions expressed therein.

Gower J.