

CANADA / JUDGMENT

## Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 917

COURT

Supreme Court of British Columbia

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2020 BCSC 917 Cowichan Tribes v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cowichan Tribes v. Canada (Attorney General),

2020 BCSC 917

Date: 20200619

Docket: 14-1027

Registry: Victoria

Between:

Cowichan Tribes,

Squtxulenuhw, also known as William C. Seymour Sr.,

Stz'uminus First Nation, Thòlmen, also known as John Elliott,

Penelakut Tribe, Suliisuluq, also known as Earl Jack, Halalt First Nation,

and Sulsimutstun, also known as James Thomas, on their own behalf and on

behalf of all other descendants of the Cowichan Nation

Plaintiffs

And:

The Attorney General of Canada,

Her Majesty the Queen in right of the Province of British Columbia,

the City of Richmond, the Vancouver Fraser Port Authority,  
the Musqueam Indian Band and the Tsawwassen First Nation

Defendants

Before: The Honourable Justice Young

Ruling on Objections to Dr. Brealey's

Supplemental Report

Counsel for Plaintiffs:

A. G. Murphy

and K. M. Lindsay

Counsel for Defendant

Attorney General of Canada

M. P. Seebaran

and P. Cassidy

Counsel for Defendant

Her Majesty the Queen in right of the

Province of British Columbia

G. R. Thompson

Counsel for Defendant

City of Richmond:

B. B. Olthuis

and T. Bant

Counsel for Defendant

Tsawwassen First Nation:

G. Plant Q.C.

and S. Gyawali

Place and Date of Trial/Hearing:

Victoria, B.C.

May 22 and 25, 2020

Place and Date of Judgment:

Victoria, B.C.

**June 19, 2020**

- [1] In this Aboriginal rights and title case, the plaintiffs rely on two expert reports authored by historical geographer and cartographer Dr. Kenneth Brealey. The first report, Historical Geography of Cowichan Land Use and Occupancy Lower Fraser River Map Series and Report, dated February 28, 2019 (the "Main Report") has been admitted into evidence. The defendants Tsawwassen First Nations ("TFN"), the Attorney General of Canada ("Canada") and the Province of British Columbia ("British Columbia") object to the admission of Dr. Brealey's second report entitled The Cowichan Village of Tl'uqtinus and the Reserve Allotment Process in British Columbia 1859-1880, dated February 28, 2019 (the "Supplemental Report"). Collectively, the main objection is that Dr. Brealey expresses conclusions of law which are inadmissible per se and outside the areas of expertise on which Dr. Brealey was qualified to give opinion evidence.
- [2] Dr. Brealey was qualified as an expert to testify in this trial in the areas of historical geography as well as cartography and cartology with specialization in aboriginal use and occupation of land and resources and qualified to express opinions in the interpretation and mapping of sites, areas, locations, place names, events, routes, boundaries and territories referred to in historical documents and maps and on the historical territoriality of aboriginal peoples.
- [3] Dr. Brealey testified by way of deposition in the spring of 2019 due to his illness and unfortunately passed away one week prior to the commencement of this trial.
- [4] Dr. Brealey was not cross-examined on his qualifications. The qualifications cited above were presented to the court by the plaintiffs and were accepted by the court without modification.

### **Position of the Parties**

- [5] TFN, Canada and British Columbia object to admission of the Supplemental Report on the basis that it contains conclusions of law and goes beyond the scope of evidence that an expert witness is permitted to provide. The defendants say that Dr. Brealey was not qualified as a legal expert and the opinion contained in the Supplemental Report is outside of his expertise.

### **Tsawwassen First Nation's Submissions**

- [6] TFN objects to the admissibility of the entirety of the Supplemental Report on the basis that it contains conclusions of law. TFN says that the whole of the report is in furtherance of a legal conclusion expressed in the introduction of the Supplemental Report:

More specifically I conclude that because there was an occupied Cowichan village and settlement at Tl'uqtnus on the south arm of the Fraser River on October 7 1859 when Governor James Douglas first communicated to the magistrates, gold commissioners and Chief Commissioner of Lands and Works (CCLW) that all Indian villages and settlements had been reserved from the operation of the proposed preemption law, the Cowichan settlement on the south arm of the Fraser River should have been included.

[emphasis added]

- [7] TFN submits that, as set out above, the fundamental opinion expressed in the Supplemental Report is that colonial officials were obliged to allocate a reserve for the Cowichan settlement on the south arm of the Fraser River, and had they done so, the Cowichan settlement would have been reserved. TFN says that this is a legal conclusion.
- [8] When counsel for TFN cross-examined Dr. Brealey, Dr. Brealey testified that Governor James Douglas had directed that Indian settlements were reserved from the operation of the preemption law, and if Governor Douglas's instructions had been followed the Cowichan settlement on the south arm of the Fraser River would have been reserved. Dr. Brealey said that his opinion "comes from a geographical perspective" and that he believed the nature of the obligation to reserve the Cowichan settlement was "political and legal".
- [9] TFN says that the role of an expert witness does not include opining on conclusions of law, and expert opinion that does so is inadmissible. TFN acknowledges that the balance of the Supplemental Report contains a great deal of historical material, but submits that material is marshalled in furtherance of a central opinion which is inadmissible legal argument. TFN submits that to the extent these underlying historical materials are relevant, the plaintiffs can seek their admission on the basis that they are public records, allowing the court the benefit of the documents without Dr. Brealey's legal gloss.
- [10] TFN says that findings of law are exclusively in the domain of the trial judge, and that this court has routinely held that expert opinions expressing conclusions of law are inadmissible. Argument in the guise of evidence is unnecessary and does not assist the court: *Emil Anderson Construction Co. v. British Columbia Railway Co.*, [1987] B.C.J. No. 1783 (S.C.) ("Emil Anderson").
- [11] TFN says that the question of whether the Lands of Tl'uqtnus should have been set aside as a reserve goes to an ultimate issue in the case; specifically, whether the Crown lacked statutory authority to make grants of fee simple interest in relation to the Lands of Tl'uqtnus because the lands were an Indian settlement.
- [12] TFN submits that even if expert legal opinion evidence was admissible, Dr. Brealey's opinion is irrelevant because he is not a lawyer and his opinion is outside the scope of his expertise. Dr. Brealey's qualifications as a historical geography, cartologist and cartographer do not qualify him to opine on colonial reserve policy.

## Province of British Columbia's Submissions

- [13] British Columbia adopts the submissions of TFN and submits that the entirety of the Supplemental Report is inadmissible. Alternatively, British Columbia seeks an order striking portions of the Supplemental Report.
- [14] British Columbia urges the court to exercise its gate-keeping function to exclude evidence that is prejudicial and inadmissible. Even where expert evidence meets the criteria for admission as set out in *R. v. Mohan*, [1994] 2 S.C.R. 9 ("Mohan"), the court should exercise its discretion to exclude evidence when its admission would result in undue prejudice: *White Burgess Langille Inman v. Abbot and Haliburton Co.*, 2015 SCC 23 ("White Burgess") at paras. 53-54. British Columbia submits that expert evidence that strays into advocacy is prejudicial, and if the court fails to exercise its gate-keeping role, the fairness of the trial may be compromised.
- [15] British Columbia submits that Dr. Brealey was not qualified as a legal historian, or to provide opinions about colonial policy, and that in other cases where expert evidence touched on legal matters, it was within the scope of the expert's qualifications to do. For example, in *Daniels v. Canada*, 2013 FC 6 ("Daniels"), an expert was qualified as an expert in government policies toward Aboriginal peoples based on historical records. In *R. v. Fournier*, [2005] O.J. No. 2881 (S.C.J.) ("Fournier") an expert was qualified to provide evidence on the history and politics of constitutional relations between Aboriginal peoples and the Crown. British Columbia says Dr. Brealey lacks the specific qualifications to provide the opinions in the Supplemental Report.
- [16] British Columbia says that Dr. Brealey's central opinion is a conclusion of law, and that the Supplemental Report is generally infused with legal analysis. Dr. Brealey provides his opinion about the meaning of Governor Douglas's instructions and statements, as well as analysis and descriptions of ordinances and other legal instruments. British Columbia says that this is inadmissible evidence that cannot be excised from the Supplemental Report.

## Attorney General of Canada's Submissions

- [17] Canada adopts the submissions of TFN and the Province and says the Supplemental Report provides legal opinions that are irrelevant, unnecessary, and outside Dr. Brealey's expertise. Canada notes that the plaintiffs did not seek to qualify Dr. Brealey as an expert on the legal effect of historical documents and events, nor could the court qualify him to provide such evidence. Canada says that to the extent an expert is permitted to touch upon legal issues, the expert must be properly qualified to do so.
- [18] Canada echoes the submissions of TFN and British Columbia that Dr. Brealey's central opinion is that the Crown had a legal obligation to reserve the Cowichan settlement on the south arm of the Fraser River because it was an "Indian settlement". Canada argues that "Indian settlement" is a legal term, and whether the claim area was an "Indian settlement" is a question of law at issue in this action. Canada points to para. 15 of the plaintiffs' fourth

further amended notice of civil claim which pleads that "Governor Douglas appropriated the lands of Indian Settlements, such as the Lands of Tl'uqtinus, from the outset of the Crown's land preemption process" and para. 20 which pleads "the Lands of Tl'uqtinus were lands of an "Indian settlement" within the meaning of Land Act, 1874, Land Act (1888), Land Act (1908), as amended, and Land Act (1911)". Canada says this action will require an interpretation of colonial legislation and directives and their legal effect in creating or not creating Indian reserves, and that the court requires no assistance to understand and interpret these laws.

- [19] Canada submits that the onus is on the party opposing the admission of the expert report to demonstrate that there is a "realistic concern" that the expert is unable and/or unwilling to comply with the duty the expert owes the court be fair, objective and non-partisan: *White Burgess* at para. 48. If a realistic concern is demonstrated, the burden shifts to the party tendering the evidence to show on a balance of probabilities that the expert can fulfill their duty to the court. *White Burgess* was a case dealing with alleged partiality of an expert. Canada does not allege that Dr. Brealey lacked impartiality, but says the test in *White Burgess* applies equally in the circumstances.
- [20] Canada says the Supplemental Report is also flawed because Dr. Brealey's offers his opinion on the content of historical documents as opposed to the context surrounding their creation. Canada submits that experts must not provide their interpretation of historical documents and that only the court may construe the meaning of documents.
- [21] Finally, Canada says that admission of the Supplemental Report would be prejudicial to the trial process. Canada allows that the court can reach its own conclusions and disregard or give little weight to Dr. Brealey's opinion, but says any reliance on the Supplemental Report risks prejudicing the verdict because it would be based in part on an unqualified opinion about domestic law. Canada says that where inadmissible opinions appear on almost every page of an expert report, the Court should strike the whole report, rather than attempt to remove the inadmissible portions: *Emil Anderson* at para. 17.

## Plaintiffs' Submissions

- [22] The plaintiffs submit that Dr. Brealey was qualified to provide the opinions in the Supplemental Report and that it does not contain inadmissible legal opinion. The plaintiffs submit that excluding the Supplemental Report would deprive the court of insight into the following three historical matters:
- i. facts about nonindigenous land settlement and the reserve allotment processes in colonial and post-confederation British Columbia in the lower Fraser River area;
  - ii. the ways in which colonizing forces were implemented, or not implemented, at the Lands of Tl'uqtinus; and
  - iii. the impacts of colonizing forces on Cowichan use and occupation of those lands.

- [23] The plaintiffs say that in Aboriginal cases courts have consistently emphasized the essential role of expert opinion to a proper determination of the trial on its merits. Experts are necessary to help the court understand and interpret the complex historical landscape that is inherent in proving the existence of Aboriginal rights in circumstances where there are no surviving eye-witnesses.
- [24] In the area of Aboriginal law and the history of the relationship between First Nations and the Crown, the plaintiffs say that experts may provide opinion evidence related to legal issues, provided the Mohan criteria are met: *Alderville First Nation v. Canada*, 2014 FC 747 ("Alderville") at para. 45. The law is essential context for almost any discussion about government actors, and that when interacting with First Nations and their lands, the Crown acts through the legal structure in place at the time.
- [25] The plaintiffs say the historical geography of Cowichan land use and occupancy in mainland British Columbia cannot be understood without analyzing Crown systems of reserve allocation and land alienation. To try and do otherwise ignores the reality of colonization and would inhibit expert evidence about government conduct.
- [26] The plaintiffs say Dr. Brealey's opinion that if Governor Douglas's instructions had been followed, there would have been a Cowichan reserve at Tl'uqtinus, is a causal conclusion which flows from his opinion that there was a Cowichan settlement at Tl'uqtinus, and his conclusion that Governor Douglas had reserved Indian settlements from the preemption process. The plaintiffs say the question of whether there was an Indian settlement is not a question of pure law, but of mixed historical fact and law.
- [27] The plaintiffs submit that courts have allowed expert evidence that touches on legal issues from experts who are not qualified as legal experts or legal historians: *Daniels*. The plaintiffs also rely on a decision of the Specific Claims Tribunal, *?aq'am v. Canada* (Minister of Indian Affairs and Northern Development), 2018 SCTC 1 in which the tribunal concluded expert evidence about the history of the preemption process in British Columbia and the reserve creation process was necessary to allow the Tribunal to understand the historical context in which these processes unfolded. The plaintiffs submit that the Tribunal's admission of this expert evidence is particularly instructive given the special expertise the Tribunal has in adjudicating historical claims.
- [28] The plaintiffs say that Dr. Brealey is qualified to provide the opinions contained in the Supplemental Report, noting his specialized focus in Aboriginal use and occupation of land and resources, experience researching the reserve creation process in British Columbia, teaching university-level courses on colonial and post-confederation settlement of British Columbia, and experience with the geography of law and jurisprudence. The plaintiffs submit these are specializations or subsets of his qualifications as a historical geographer and that his expertise is uncommon and unique in these proceedings.

- [29] The Supplemental Report is the second part of Dr. Brealey's opinion regarding the historical geography of Cowichan land use and occupancy in the lower Fraser River and the history of Tl'uqtnus during the reserve creation and land distribution processes in British Columbia. Without it, the plaintiffs say the court may be required to reconstruct the significance of certain events from the historical record alone, including the Crown reservation process, Crown knowledge about the village of Tl'uqtnus, and the process that was followed in relation to the village of Tl'uqtnus. With only the Main Report in evidence, the plaintiffs submit that the court will be deprived of Dr. Brealey's full opinion.
- [30] The plaintiffs say that the courts rarely find an entire expert report inadmissible when grappling with Aboriginal rights and other historically complex cases, unless its defects are clear and pervasive. The plaintiffs submit that if the court concludes that some parts of the Supplemental Report are inadmissible, the court should disregard or redact the inadmissible portions.

### The Law of Expert Evidence

- [31] The legal framework for the admissibility of expert evidence is set out in the Supreme Court of Canada decisions in *Mohan* and *White Burgess*.
- [32] The expert evidence analysis is divided into two stages. First, the party tendering the evidence must demonstrate on a balance of probabilities that the four *Mohan* factors are met: (1) relevance; (2) necessity; (3) absence of an exclusionary rule; and (4) properly qualified expert. If the *Mohan* requirements are not met, the evidence is inadmissible. Second, if the preconditions for admissibility are met, the trial judge must consider whether to exercise discretion to exclude the evidence because the potential risks posed by its admission outweigh the benefits: *White Burgess* at para. 24.
- [33] Expert evidence must be logically relevant to a fact in issue, meaning the evidence tends as a matter of experience and logic to make the existence or non-existence of a fact in issue more or less likely: *R. v. Abbey*, 2009 ONCA 624 ("*Abbey*") at para. 82. It must be necessary to allow the trier of fact to appreciate the matters in issue by providing information outside of the experience and knowledge of the trier of fact: *Mohan* at p. 23. Inherent in the application of this criterion is that experts must not be permitted to usurp the functions of the trier of fact: *Mohan* at p. 24. Expert evidence will be excluded if it runs afoul of an exclusionary rule of evidence apart from the opinion rule itself: *Mohan* at p. 25. Expert opinion evidence must be given by a witness with special knowledge or expertise: *Mohan*, at p. 25.
- [34] At the second stage, the trial judge retains discretion to exclude evidence that meets the threshold requirements for admissibility if the prejudicial effect of the evidence outweighs its probative value. The court considers whether admission of the expert evidence sufficiently benefits the trial process to warrant its admission, despite any potential harms which may result from its admission: *White Burgess* at para. 24; *Abbey* at para. 76.

- [35] Before engaging in this two-step analysis, the trial judge must first determine the nature and scope of the proposed expert opinion. The boundaries of the proposed expert opinion must be carefully delineated to ensure that any harm to the trial process is minimized: see *Abbey* at para. 62; *R. v. Sekhon*, 2014 SCC 15 ("Sekhon") at para. 46. The trial judge must ensure that an expert stays within the bounds of his or her expertise and that the evidence is properly the subject of expert evidence: *Sekhon* at para. 47. If the expert evidence strays beyond its proper scope, the trial judge must not assign any weight to the inadmissible parts: *Sekhon* at para. 48.

## Historical Expert Evidence

- [36] This court has previously considered the role of experts in providing evidence about historical documents. In *William et al v. British Columbia et al* (also referred to as *Tsilhqot'in Nation v. British Columbia*), 2004 BCSC 1237 ("William") Justice Vickers described the importance of expert evidence in helping the court to understand and interpret historical documents. Justice Vickers reviewed the approach to expert evidence adopted in *Delgamuukw v. British Columbia*, (1989) 38 B.C.L.R. (2d) 165 (S.C.) ("Delgamuukw") at p. 175, where McEachern C.J.B.C. (as he then was) said that historians could provide useful evidence in placing historical events into context but experts cannot usurp the function on the court in construing written material.
- [37] Justice Vickers noted that historian Robin Fisher was critical of the approach to expert evidence taken in *Delgamuukw*, citing Fisher's article entitled *Judging History: Reflections on the Reasons for Judgment in Delgamuukw v. B.C.*, *BC Studies*, No. 95, Autumn 1992 at p. 44:

The real work of the historian begins with reading the documents and evaluating them for internal consistency as well as establishing the context in which they were written. Individual documents must be compared to the rest of the written record and, where appropriate, non-written sources. Then the historian develops an interpretation of the past that is logical and consistent with all of the available evidence. The final steps are to write an account of the past in clear, accessible prose, and to point out to the reader, through footnotes and bibliography, the sources that formed the basis for the conclusions.

- [38] Justice Vickers considered Robin Fisher's statements in the context of assessing whether expert evidence about historical documents was necessary in *William* because no living person could be called to give eyewitness evidence. He accepted Robin Fisher's view of the role of the expert historian in interpreting historical documents and concluded that expert evidence was necessary because the written historical record did not speak for itself. He noted that the meaning contained in historical documents might only be understood in context. In order to critically evaluate historical documents Justice Vickers said that he required expert assistance.

- [39] Accordingly, Justice Vickers was of the view that expert interpretation of some historical documents was necessary, expanding upon the approach to historical expert evidence in *Delgamuukw*. To the extent the expert draws an incorrect inference or engages in speculation, the evidence will be accorded little weight. It is the job of the court to decide on the whole of the evidence whether inferences drawn by experts are correct, and whether the opinions expressed by these expert witness can be relied upon or not: *William* at para. 20.
- [40] In *Anderson v. Canada (Attorney General)*, [2015] N.J. No. 401 (S.C.) ("*Anderson*"), the court admitted opinion evidence from an expert in political history that addressed, in its historical context, the nature and extent of an agreement between Newfoundland and Canada regarding the funding and operation of services for Aboriginal people. The court found the expert opinion was necessary because the evidentiary basis for the proceedings was largely premised on historical documents. The court noted that it was important to bear in mind that while the expert historical evidence was admissible, it remained the function of the trial judge to decide the facts of the case: para. 9.
- [41] In *Anderson*, Canada objected to the admission of the expert's evidence on the basis that it strayed into legal opinion. The court found that the expert's background in political history necessarily overlapped with an understanding of government institutions and familiarity with constitutional law: para. 15. The court noted at para. 14:

Law, too, can be examined through at least two lenses: one as a technical system of rules that are enforced through the courts, studied as jurisprudence; the other as a system of social institutions that governs behaviour, the study of which falls within the bailiwick of social science.

The court concluded the expert was qualified to opine on the constitutional relationship between Newfoundland and Canada.

- [42] In *Fournier*, the court qualified an expert to provide an opinion on the history of politics and constitutional relations between Aboriginal peoples and the Crown in Canada and beyond. In doing so, the court provided directions to the expert, including to avoid generalizing "upon the broad sweep of history", engaging in advocacy and usurping the court's function by providing legal opinions. The expert was permitted to provide evidence about constitutional and legal topics such as the Royal Proclamation, 1763, section 35 of the Constitution Act, 1982, treaty federalism and the British North America Act, 1867 and the Indian Act over time. At paras. 36-38, the court noted the importance of expert evidence in Aboriginal cases:

It was only 15 years ago that Justices Dickson and LaForest noted, in *Sparrow*, *supra*, that "there was a virtual absence of discussion of any kind of Indian rights to land even in academic literature". 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.

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.

- [43] The courts have qualified legal historians to provide expert opinion evidence in Aboriginal rights cases. The court in *Ross River Dena Council v. Canada (Attorney General)*, [2011] Y.J. No. 121 (S.C.) ("Ross River") affirmed the court's role in interpreting the law while admitting opinion evidence from a legal historian about "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 the time": para. 6. The court noted that while it is the court's obligation to undertake statutory interpretation about the provisions of the Order, the court's analysis would be incomplete without taking into account the historical, political and cultural context of the relationship between the Crown and Aboriginal people at the time the Order was enacted: para. 44. While the expert made "several conclusions of fact and law", they were within the scope of expert's historical expertise and assisted the court in determining what the Imperial Parliament intended when it enacted the Order: para. 61.
- [44] In *Alderville*, the Federal Court considered the extent to which it is permissible for experts (in that case, an ethnohistorian) to give evidence that may approach legal opinion. The court considered the decision of Justice Gower in *Ross River*, as well as *Samson Indian Nation and Band v. Canada*, [2001] F.C.J. No. 50 and found that those cases suggested that "in the area of Aboriginal law dealing with the history and ethnography of First Nations and their relationship with the Crown, properly qualified experts may be permitted to provide opinion evidence which may relate to legal issues" where necessary to assist the court: para. 46.

#### Application of the Law

- [45] In this case, the first Mohan factor, relevance, has been established.
- [46] The defendants submit that the second Mohan factor, necessity, has not been met because the court will have the benefit of the historical documents to review and interpret. Counsel for TFN submit that Dr. Brealey has exceeded his area of expertise and accordingly the entire report must be declared inadmissible. That would mean that I would lose the benefit of Dr. Brealey's expertise in explaining the historical context of the purchase or preemption of Crown land and the reservation of Indian settlements or villages in British Columbia in the 1800s.

- [47] I agree with the comments made by Justice Vickers in Williams that historical documents do not always speak for themselves and I find it necessary to receive some explanation of the context in which those historical documents were created.
- [48] I agree with the plaintiffs' submission that Dr. Brealey as a historical geographer can contextualize Crown and Aboriginal relations regarding Indian settlement land as that term was understood during the reserve allotment process in British Columbia between 1859 and 1880. Without interpreting the law, he can provide evidence of the legal framework in which government actors acted were required to act. There is a fine line and sometimes overlap between historical and legal context.
- [49] For example, Governor Douglas had great powers during his tenure as the first governor of British Columbia and was a central figure in the history of Crown and Aboriginal relations of British Columbia. The discussion of colonization in this province would be incomplete without a discussion of Governor Douglas's instructions regarding preemption, reserve allotment processes in colonial and post-Confederation British Columbia and the creation of treaties in some parts of British Columbia. These instructions have overlapping geographical, political and legal dimensions which are impossible to separate.
- [50] Dr. Brealey should be able to discuss the views of government about non-Indigenous and Indigenous rights and interests in land as a matter of fact to provide the court with the necessary historical context.
- [51] The court must understand the colonization forces in order to contextualize the Cowichan's use and occupation of lands in British Columbia. I agree that the reserve creation process should be considered part of historical geography. Dr. Brealey has taken the context of reserve creation in British Columbia and explained how it applied at relevant times. He then contrasted it to what happened to the Lands of Tl'uqtnus.
- [52] There is a live issue as to whether Dr. Brealey is qualified to give the opinions he does in the Supplemental Report because he is not qualified as a legal historian. In certain areas of the Supplemental Report, which I will review in detail below, Dr. Brealey has ventured into legal analysis beyond the scope of his expertise. However, in other areas of the report Dr. Brealey provides a historical overview of events which have legal significance. In my view the latter does not exceed his expertise.

[53] I agree with Justice Stack in Anderson who said at para. 14:

Social science disciplines do not exist in unassailable silos. To the extent that they comprise the study of human society they necessarily overlap. To understand history, therefore, one must have at least some understanding of politics, economics, geography, sociology and more. Each discipline is interrelated with and informs the others.

[54] I accept the plaintiffs' submission that items in history that have legal significance are not in the exclusive purview of courts and lawyers. I will allow some latitude in having Dr. Brealey explain the historical events that had affected Indigenous use of land. The exercise of my

discretion is fact specific to this case; however, I am guided by the rulings in other cases. For example, in *Fournier* the court permitted expert opinion evidence on history and politics, the constitutional relations between Aboriginal people and the Crown in Canada and a number of constitutional legal topics such as the Royal Proclamation, 1763, the Constitution Act, 1982 and treaty federalism. Justice O'Neill said "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": para. 38.

- [55] I do draw the line however at legal interpretation. Dr. Brealey should not be permitted to advise the court on the enforceability of legal documents.
- [56] The defendants submit that the legal opinions in Dr. Brealey's Supplemental Report are so intertwined in the report that they cannot be extracted and their inclusion would be prejudicial. They say the potential risks posed by admitting the Supplemental Report outweigh the benefits.
- [57] I disagree with this submission. I find that the Supplemental Report is necessary to assist me in interpreting historical events between 1859 and 1880. Where Dr. Brealey has ventured into legal opinion I have concluded that those sections can be easily redacted without affecting the meaning or benefit of the Supplemental Report. I also find that the defendants did not establish a realistic concern that Dr. Brealey was unwilling or unable to fulfill his duty to the court to provide fair and objective evidence.
- [58] In the introductory paragraph where Dr. Brealey says that the Cowichan settlement in the South arm of the Fraser River should have been reserved from the operation of preemption law, the word "should" implies that the communication by Governor Douglas was mandatory. That may be the case but it is the job of the court alone to determine whether this meant that any Cowichan Indian settlement on the south arm of the Fraser River should have been excluded from preemption.
- [59] I also find that Dr. Brealey exceeded his area of expertise when he said at p. 1 of the Supplemental Report:

but that it would have, at all times, been subject to the terms of the reserve process as envisioned and initiated by Douglas no matter how narrow its application may have later become in practice.

- [60] I agree with the submission of Canada that at p. 3 of the Supplemental Report, Dr. Brealey's interpretation of Governor Douglas's purchase agreements as recognizing an Indigenous proprietary interest in land is a legal conclusion that is inadmissible. For the same reason, the excerpts in footnote 7 on p. 3 and footnote 10 on p. 4 are inadmissible.
- [61] At p. 4 of the Supplemental Report Dr. Brealey discusses a July 31, 1858 directive from the UK Secretary of State to Douglas which made reference to a "cession of lands in possession" by the Natives. In the following paragraph Dr. Brealey repeats his opinion from the Main Report that there were lands in possession by the Cowichan at Tl'uqtinus on the south arm of the Fraser as of July 31, 1858. I recognize that originally his opinions were contained in

one report and then were bifurcated. The repetition of the opinion is for clarity and does not infringe any rules of admissibility.

[62] British Columbia takes issue with footnote 24 at p. 7, arguing that Dr. Brealey gives conclusory opinions including legal analysis or interpretation of statutes. In footnote 24, Dr. Brealey provides his interpretation of a dispatch Governor Douglas sent on March 14, 1859 responding directly to Secretary of State Edward Lytton's December 30, 1858 dispatch. He reproduces paras. 6-9 of Governor Douglas' correspondence which summarizes his proposed Indian land policy. Paras. 8 and 9 are particularly relevant:

8. Anticipatory Reserves of Land for the benefit and support of the Indian Races will be made for that purpose, in all the Districts of British Columbia inhabited by Native Tribes. Those reserves, should in all cases include cultivated fields, and village sites, for which from habit and association they invariably conceive a strong attachment, and prize more, for that reason, than for the extent or the value of the land.
9. In forming settlements of Natives, I should propose, both from a principle of justice to the State, and out of regard to the well-being of the Indians themselves, to make such settlements entirely self-supporting, trusting for the means of doing so, to the voluntary contributions in labour or money of the natives themselves; and secondly, to the proceeds of the sale or lease of a part of the land reserve, which might be so disposed of, applied towards the liquidation of the preliminary expenses of the settlement.

[63] In footnote 24, Dr. Brealey discusses the debate historians have over why Governor Douglas did not continue the process of treaty making. Dr. Brealey says that there is some support in Governor Douglas' own correspondence for the theory that Governor Douglas lacked the funds to buy out Aboriginal title. Dr. Brealey outlines the view of Paul Tennant from 1990 *Aboriginal People and Politics* (Vancouver: University of British Columbia Press, 37) who discussed the views of Herman Merivale, Permanent Undersecretary of the Colonial Office in London. In the final part of this long footnote Dr. Brealey says:

He did, however, share Merivale's views, and thought that if treaties were not the answer (whether for economic reasons or not), the provision of sufficient tracts of land would function as 'way stations' on which indigenous people could be slowly 'weaned off' their traditional ways, and eventually decide to become British subjects just like everyone else. The important point is that if Douglas no longer accepted that treaties were the most efficacious way to proceed, he did believe that the provision of generous reserves were the next best, and ultimately most desirable, option in any case.

[64] Counsel for British Columbia submits that this is Dr. Brealey's legal analysis or interpretation of statute which is inadmissible. With respect, I disagree. I interpret this footnote to explain Proclamation No. 13, issued February 14, 1859, in context of the historical times with reference to Britain's experiences in New Zealand and some reference to Britain's move away from benevolent imperialism to a harsher administrative colonialism. Placing Proclamation No. 13 in context is of assistance to the court and is not in

my view inadmissible legal analysis.

[65] At p. 8, Dr. Brealey says "'anticipatory reserves' will include the already existing villages with which, 'from habit and association [the Indians] invariably conceive a strong attachment.'" I do not view this as an inadmissible interpretation of the law but merely a paraphrasing of para. 8 of Governor Douglas' dispatch to Lytton which I reproduced above.

[66] On p. 8 at footnote 26, Dr. Brealey offers his opinion as to the meaning of "Indian settlement":

The second point is that an 'Indian settlement' does not stop being an 'Indian settlement' if it happens Indians are not there at certain times of the year.

[67] The issue of what constitutes an "Indian settlement" is a legal question. At para. 15 of their fourth further amended notice of civil claim, the plaintiffs plead that Governor Douglas appropriated the lands of Indian settlements, including the Lands Tl'uqtinus, from the Crown's land sale and preemption processes. I find Dr. Brealey's conclusions about the meaning of an "Indian settlement" to be inadmissible legal opinion.

[68] At pp. 9-10, Dr. Brealey interprets the Colonial Secretary William Young's correspondence to the Chief Commissioner of Lands and Works (CCLW), Richard Moody dated January 10, 1860. The letter was written in relation to Proclamation No. 15 issued January 4, 1860, which Dr. Brealey says reflected the Imperial policy under Governor Douglas that Indian settlements including villages, cultivated fields and several hundred acres around each village were to be protected from preemption or purchase outright. Colonial Secretary Young wrote to CCLW Moody:

... that a belt of 5 chains in width should be reserved, beyond the extreme limit of suburban lots Ten acres of Town Land His Excellency deems sufficient for the Sites of Indian Villages, and 1000 acres of Country Land in places where they may make selection.

[69] Dr. Brealey says that "Whether the reference to '1000 acres' was intended as a maximum or minimum is not clear from this passage alone, but the important point is that it was consistent with Douglas's 'several hundred acres round each village', and the Cowichan village and settlement at Tl'uqtinus was then located in an area that qualified as country land".

[70] Canada takes issue with the last part of the sentence which interprets Proclamation No. 15 and its application to Tl'uqtinus and says that this is a legal argument.

[71] Proclamation No. 15 does not address what an Indian settlement should look like but provides that an Indian settlement is exempt from preemption. Colonial Secretary Young gave these directions about reserving "country land" to CCLW Moody six days after Proclamation No. 15 is issued, but he did not get this interpretation from Proclamation No. 15. I interpret what Dr. Brealey is saying as a geographical opinion that the Lands of Tl'uqtinus could be considered "1000 acres of Country Land in places where they may make

selection".

[72] I find that the portion of the sentence I have underlined is admissible.

[73] At p. 12 at footnote 41, Dr. Brealey says:

Neither Moody nor anyone else in the colony had the lawful authority to alter gubernatorial directives.

I agree with counsel for Canada that this is a legal opinion and should be redacted from footnote 41.

[74] On p. 17 at footnote 60, Dr. Brealey discusses the August 27, 1862 repeal of Proclamation No. 15:

The important point is again that it was incumbent on the claimant and magistrate to make sure that the preemption did not include any land that might have been part of an Indian settlement.

Canada objects to Dr. Brealey providing his legal interpretation of the obligations of the magistrate. I agree that this is a legal opinion is inadmissible and should be redacted from footnote 60.

[75] At p. 20, Dr. Brealey discusses what Governor Douglas intended "Indian settlements" to include. He says Governor Douglas always intended "Indian settlements" to not include just "village sites", "cultivation fields", or "burial grounds", but "favourite places of resort" as well. These are quotes from previous directives that Governor Douglas gave, as well as statements that he made to the Legislative Council on January 21, 1864. Dr. Brealey goes on to say:

In my opinion, therefore, that directive and the process flowing from it clearly included the entire complex of houses and other built infrastructure at, the waterfront ashore of, and the extended land management area around the Cowichan village at Tl'uqtnus.

[76] I agree with counsel for British Columbia that Dr. Brealey is providing the court with his view of the legal effect of Governor Douglas's directives and applying it to the case at bar. This is more appropriately done through legal argument rather than through the opinion of a historical geographer who is not qualified to give legal opinions. Accordingly, I direct that the underlined portion above be redacted from the Supplemental Report.

[77] Counsel for Canada says that in the following passage at pp. 22-23, Dr. Brealey provides a legal interpretation of Joseph Trutch's correspondence to Colonial Secretary Young and Governor Douglas's instructions:

The important point is that Trutch was clearly being disingenuous. There was a 'system', if inadequately enforced, going back to Douglas's instructions of October 7 1859. The rights of the Indians had been defined, and if the matter had been 'kept in abeyance' it was more Trutch's doing after 1864 than Douglas's before.

- [78] I find this comment to be within the expertise of a historical geographer who is pointing out the inconsistencies between positions taken by historical figures. There is a similar objection at p. 26 where Dr. Brealey says in his opinion "the important point is that Trutch did not break with Douglas in terms of determining what kinds of Indian villages or settlements qualified 'as reserves'". I find this passage fits within Dr. Brealey's area of expertise.
- [79] Returning to p. 25, British Columbia takes issue with the following paragraph on the basis that it is legal analysis and conclusion and beyond the expertise of Dr. Brealey. By way of background, in a letter dated June 19, 1868 stipendiary magistrate Peter O'Reilly asked Joseph Trutch what to do about settlers "clamoring for land '[t]he Indians have been in the habit of cultivating' around Nicola Lake". After reviewing Joseph Trutch's response, Dr. Brealey said:
- The important point - just as had Douglas intended in 1859, and as he would later confirm in 1874 - is that the criterion of 'permanency' was not whether use or occupancy was 'partial', or, in what amount to the same thing, 'seasonal'. The criterion of permanency was whether or not Indians revisited, re-used and re-occupied the same places as part of an annual cycle or on a year-round basis, and that this applied equally to settlements in existence when Douglas issued his instructions October 7 1859 specifically, to settlements that continued after that date, and to settlements to which Indians had subsequently gravitated and established themselves as a response to colonization and settlement since then.
- [80] I agree with British Columbia's argument that Dr. Brealey has taken the details of this letter between two historical figures and applied a legal interpretation to what is meant by "permanency" and "occupancy". I direct that the quote above be redacted from the Supplemental Report.
- [81] British Columbia takes issue with the section of the Supplemental Report on Confederation and the Joint Indian Reserve Commission on the basis that Dr. Brealey's analysis of the terms provides legal conclusions based on self-referenced determinations in his Main Report.
- [82] I find that section of Dr. Brealey's Supplemental Report falls within that area of overlap described by the plaintiffs. Dr. Brealey provides a summary of historical events, many of which have legal significance but also historical and geographical significance. For that reason, I decline to redact any portion of this section of the Supplemental Report.
- [83] Both British Columbia and Canada take issue with portions of the conclusion of the Supplemental Report which were also summarized in the introduction.
- [84] It is acceptable for Dr. Brealey to reference his Main Report and observe that, in his opinion, the Cowichan village was occupied at the same time as Governor Douglas confirmed Indian settlements were reserved. As a geographer, he can opine that the village settlement fell within the geographical scope of Governor Douglas's instructions. I also find his statement:

"in my opinion had Douglas's instruction been followed, there would have been a Cowichan reserve at Tl'uqtnus of several hundred acres in size" is admissible (emphasis added). Dr. Brealey does not say in this conclusion that Governor Douglas's direction should have been followed. His opinion that if the direction had been followed then Tl'uqtnus would have been reserved is an admissible hypothetical statement.

- [85] Further, Dr. Brealey's observation that, based on a review of historical records, Governors William Seymour and Anthony Musgrave must have known "full well there was still a standing occupied Cowichan village and settlement at Tl'uqtnus after 1864" is admissible and is not a legal conclusion.
- [86] The Supplemental Report can stand as opinion evidence with the redactions because I find that it is necessary to inform the court of historical events affecting reserve creation and the lack of reserve creation in British Columbia.
- [87] Appendix A to these reasons sets out the underlined, inadmissible passages of the Supplemental Report. The plaintiffs may make those redactions following which the Supplemental Report will be admitted into evidence.

"B. M. Young, :J."

The Honourable Madam Justice Young

#### APPENDIX A

Report Page

Number

Supplemental Report Extract

and Underlined Passage for Redaction

#### Page 1

More specifically I conclude that because there was an occupied Cowichan village and settlement at Tl'uqtnus on the south arm of the Fraser River on October 7 1859 when Governor James Douglas first communicated to the magistrates, gold commissioners and Chief Commissioner of Lands and Works (CCLW) that all Indian villages and settlements had been reserved from the operation of the proposed preemption law, the Cowichan settlement on the south arm of the Fraser River should have been included. In addition I further conclude that there were several separate occasions subsequent to that date when either the colonial or its successor provincial or federal administrations would have known there was not only still a standing village and settlement at Tl'uqtnus, but that it would have, at all times, been subject to the terms of the reserve process as envisioned and initiated by Douglas no matter how narrow its application may have later become in practice.

**Page 3**

The important point is that the policy of reserving lands occupied by Indians for their exclusive use began with what came to be called the Fort Victoria Treaties, and within the text of which there seems to be a recognition of some kind of Indian proprietary interest in the soil.

**Page 3, footnote 7**

As Harris notes (in *Making*, op. cit., 20-6), there has been considerable debate not only over what Douglas actually intended these purchases to represent, but the degree to which Native signatories even understood what they were agreeing to. Beyond that, there is yet the question of how Douglas himself then would have defined 'village sites' or 'cultivated fields' on Vancouver's Island. What does seem clear is that, contra Barclay, Douglas recognized a form of Indigenous proprietary interest that went beyond a mere 'right of usufruct' to the soil, and that this interest had to be somehow acquired or superseded before settlement could take place.

**Page 4, footnote 10**

Exactly what Lytton had in mind in terms of 'subsistence... in some other shape' is unclear. He was aware of the Fort Victoria Treaties, but also that Douglas had arranged no more of them since. What does seem plain is not only that the home government, [had] its own growing doubt over the efficacy of treaties aside - see, in this connection Harris, C. *Making*, op. cit., 11-4 - still recognized some kind of indigenous proprietary interest in land, but that it would be up to Douglas to use his own experience to figure out the best way to address it.

**Page 8, footnote 26**

The second point is that an 'Indian settlement' does not stop being an 'Indian settlement' if it happens Indians are not there at certain times of the year.

**Page 12, footnote 41**

It has to be remembered that Douglas is responsible for a huge stretch of territory in which a non-Aboriginal communication and transportation infrastructure is virtually non-existent, and where his responsibility to 'reserve tracts of land for Indians' is but one of many. It is admittedly exceedingly difficult for him to physically monitor what the Engineers and magistrates are actually doing in the field. This point, however, is a valid one. Neither Moody nor anyone else in the colony had the lawful authority to alter gubernatorial directives.

**Page 17, footnote 60**

The important point is again that it was incumbent on the claimant and magistrate to make sure that the preemption did not include any land that might have been part of an Indian settlement.

**Page 20**

In my opinion, therefore, that directive and the process flowing from it clearly included the entire complex of houses and other built infrastructure at, the waterfront ashore of, and the extended land management area around the Cowichan village at Tl'uqtinus.

**Page 25**

The important point - just as had Douglas intended in 1859, and as he would later confirm in 1874 - is that the criterion of 'permanency' was not whether use or occupancy was 'partial', or, in what amount to the same thing, 'seasonal'. The criterion of permanency was whether or not Indians re-visited, re-used and re-occupied the same places as part of an annual cycle or on a year-round basis, and that this applied equally to settlements in existence when Douglas issued his instructions October 7 1859 specifically, to settlements that continued after that date, and to settlements to which Indians had subsequently gravitated and established themselves as a response to colonization and settlement since then.

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