Federal Court  Cour fédérale

Date: 20140728

Docket: T-195-92

Citation: 2014 FC 747

Ottawa, Ontario, July 28, 2014

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ALDERVILLE INDIAN BAND NOW KNOWN AS MISSISSAUGAS OF ALDERVILLE FIRST NATION, AND GIMAA JIM BOB MARSDEN, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MISSISSAUGAS OF ALDERVILLE FIRST NATION

BEAUSOLEIL INDIAN BAND NOW KNOWN AS BEAUSOLEIL FIRST NATION, AND GIMAA RODNEY MONAGUE, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE BEAUSOLEIL FIRST NATION

CHIPPEWAS OF GEORGINA ISLAND INDIAN BAND NOW KNOWN AS CHIPPEWAS OF GEORGINA ISLAND FIRST NATION, AND GIMAANINIIKWE DONNA BIG CANOE, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CHIPPEWAS OF GEORGINA ISLAND FIRST NATION

CHIPPEWAS OF RAMA INDIAN BAND NOW KNOWN AS MNJIKANING FIRST NATION, AND GIMAANINIIKWE SHARON STINSON-HENRY, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MNJIKANING FIRST NATION

CURVE LAKE INDIAN BAND NOW KNOWN AS CURVE LAKE FIRST NATION, AND GIMAA KEITH KNOTT, SUING ON HIS OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE CURVE LAKE FIRST NATION

HIAWATHA INDIAN BAND NOW KNOWN AS HIAWATHA FIRST NATION, AND GIMAANINIIKWE LAURIE CARR, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE HIAWATHA FIRST NATION

MISSISSAUGAS OF SCUGOG INDIAN BAND NOW KNOWN AS MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION, AND GIMAANINIIKWE TRACY GAUTHIER, SUING ON HER OWN BEHALF AND ON BEHALF OF THE MEMBERS OF THE MISSISSAUGAS OF SCUGOG ISLAND FIRST NATION

Plaintiffs

And

HER MAJESTY THE QUEEN

Defendant

and

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO

Third Party

ORDER AND REASONS

Introduction

[1] Counsel for the Defendant Canada objected to the admissibility of a statement by Dr. Michael J. Thoms, the expert witness for the Plaintiff First Nations.

[2] Dr. Thoms had been giving evidence about the First Nations' historical regard for their hunting grounds. He made reference to an excerpt from the 1838 book titled *Six Years In The Bush* by Thomas Need, an English visitor who wrote about his observations of Upper Canada at the time.

[3] The relevant portion of the trial transcript is:

> [Dr. Thoms:] In his memoirs, Need also emphasized customary Mississauga enforcement of their laws against trespass in a quotation that actually precedes the above one.
>
> > "On one point alone, that of hunting furs, they --" that's the Mississauga, particularly the Curve Lake "-- they are said to be as tenacious as English landholders of their game, and as some white man who have gone out for that purpose have never returned. There are grounds for suspecting that they do not always confine their remonstrance to angry words or sulky looks."
>
> So what I find fascinating about this passage is several things.
>
> One, we're going to talk later -- I wish to speak later -- about English game law. And this is an analogy in which he is saying the Mississaugas are just like English lords. They are the owners and occupiers of hunting chases, of private fisheries, which is the case in England at this period. And also he says the laws aren't just binding on the Mississauga or the Chippewa or the Algonquin.

> They appear to be binding on non-native settlers (Transcript of Trial Proceedings, Phase II, Vol. 51 at 6105).

[4] Canada objected on the basis that Dr. Thoms was providing a legal opinion which is impermissible as being both unnecessary and beyond his expertise.

[5] Counsel for the Third Party Ontario similarly objected to Dr. Thoms' evidence as providing a legal opinion.

Issue

[6] The issue is whether or not Dr. Thoms' statement that:

> And this is an analogy in which he [Need] is saying the Mississaugas are just like English lords. They are the owners and occupiers of hunting chases, of private fisheries, which is the case in England at this period. And also he says the laws aren't just binding on the Mississauga or the Chippewa or the Algonquin. They appear to be binding on non-native settlers.

is inadmissible because it is a legal opinion and is both unnecessary to assist the Court and beyond Dr. Thoms' qualifications as an expert witness.

Submissions of the Parties

[7] Canada characterizes Dr. Thoms' evidence as opining that:

a. non-Aboriginal settlers or Crown subjects recognized Anishinaabe ownership of their hunting grounds in terms that were equated with common law concepts of ownership; and

b. non-Aboriginal settlers or Crown subjects were bound by Anishinaabe customary laws of trespass.

[8] First, Canada argues the evidence in question is not necessary, citing *R v Graat*, [1982] 2 SCR 819 [*Graat*] for the proposition that a trial judge does not require the assistance of legal expertise or legal opinions from witnesses. Rather, the Court is considered to have the requisite expertise, and legal opinions are to come in the form of submissions from counsel and not from the witness.

[9] Second, Canada submits that Dr. Thoms was not trained as a lawyer and is not qualified to give opinions as to the interpretation or application of the common law or statute law. Canada acknowledged that Dr. Thoms can provide opinion evidence as to the origin or practical effect of laws, statutes, and Anishinaabe customary law but not opinion as to the legal effect of Anishinaabe customary law or the legal consequences of historic conduct.

[10] Canada submits that Dr. Thoms' opinions, characterized above, are common law legal conclusions as to the legal effect of Anishinaabe custom, and are therefore inadmissible.

[11] Canada concedes that if Dr. Thoms provides evidence about Anishinaabe legal systems, or the history of a statue, that would be evidence about questions of fact, as it assists the Court in understanding the relevant legal system. When Dr. Thoms speaks of customary laws that are "binding," or that such laws are analogous to English real property law in 1833, those are questions of law for the trier of law alone and outside of Dr. Thoms' qualifications.

[12] Ontario acknowledged that Dr. Thoms can speak of Anishinaabe practices, customs, and culture. This includes any opinion regarding Mississauga enforcement of their customary laws against trespass. Ontario stressed that its objection is not in the reference to trespass, or what the Mississauga would do to trespassers.

[13] Ontario submits that Dr. Thoms moved beyond Anishinaabe customs or practices into making a legal conclusion that the Mississaugas are the owners and occupiers of hunting chases and private fisheries. He is said to transgress by comparing Anishinaabe customary law to what was happening in England at the time and opining that Anishinaabe law is binding on non-Anishinaabe settlers. This is a legal conclusion about both the state of law in the colony and in England.

[14] Ontario considers Dr. Thoms' use of the word "binding" as the equivalent of saying a settler would have committed an illegal, criminal, or quasi-criminal act by hunting or trapping in Mississauga hunting territory. Both aspects of Dr. Thoms' evidence, the nature of ownership of Mississauga land, and the binding nature of Anishinaabe customary law, are inadmissible because Dr. Thoms does not have the legal expertise to provide legal opinions on these matters.

[15] The First Nations submit that Dr. Thoms was not offering a legal opinion that Anishinaabe customary laws were adopted by the common law or enforceable through the justice system of Upper Canada. Rather, the First Nations submit Dr. Thoms was only paraphrasing, contextualizing, and offering an ethnographic interpretation of Need's writings. He was contextualizing Thomas Need's analogy by explaining the game laws of England in 1833, and

equating the position of lords of the manor vis-à-vis intruders attempting to hunt on their lands, with the position of the Anishinaabe vis-à-vis intruders seeking to hunt in Anishinaabe hunting territory.

[16] The First Nations submit Dr. Thoms has been qualified to give opinion evidence as an ethnohistorian with specific expertise in Anishinaabe people's land, water and resource use strategies, customary legal systems, and conflicts with non-Aboriginal populations. He has also been qualified to give opinion evidence on the history of Imperial and Canadian fishery and game laws. In result, the First Nations say Dr. Thoms is qualified to provide opinion evidence on his interpretation of the Need text.

Analysis

[17] The prohibition on legal opinion evidence is a basis for rejecting evidence. This general prohibition applies to both lay and expert witnesses. Unlike foreign law, questions of domestic law are not issues that Courts will hear opinion evidence on (Alan Bryant, Sidney Lederman & Michelle Fuerst, *The Law of Evidence in Canada*, 3d ed (Markham: LexisNexis, 2009) at 832).

[18] Justice Blair, in *Teskey v Canadian Newspapers Co* (1989), 68 OR (2d) 737, [1989] OJ No 828, remarked at 752, "It is indisputable that witnesses cannot usurp the prerogatives the trial judge by giving evidence as to the applicable law." Expert opinion evidence on questions of domestic law is essentially argument, and not evidence (Kevin McGuiness & Linda Abrams, *The Practitioner's Evidence Law Sourcebook*, (Markham: LexisNexis, 2011) at 745).

[19] In *Wallace v Allen*, [2007] OJ No 879, Justice Eberhard considered the admissibility of two expert reports written by lawyers. Justice Eberhard found most of the reports' content inadmissible as constituting legal opinions on the very issues requiring judicial determination although he did allow some portions as admissible and helpful to the Court. In finding most of the content inadmissible, Justice Eberhard noted that the opinion of legal experts as to the correct conclusion of law is a matter for argument, not evidence (at para 7).

[20] Canada, in the course of making its submissions on the objection, characterized Dr. Thoms' statement as offering a legal opinion that extended Anishinaabe customary law to the common law:

> MR. YOUNG: I object. We've now gone purely to legal opinion. That is beyond his expertise. That's not what the statement says, and to draw that conclusion is a legal conclusion, to extend customary law.
>
> Justice, you qualified him to give opinions about customary legal systems. We've not pressured the point about customary law where he's talking about hereditary features of the system. I haven't objected to that, even though the qualification goes to legal systems and the questions asked of him went to Anishnaabe law. I haven't objected to that. But once you make the translation to common law that's a legal opinion, and that's beyond his qualifications (Transcript of Trial Proceedings, Phase II, Vol. 51 at 6105-6106).
>
> [emphasis added]

[21] None of the parties have discussed the relationship between the Anishinaabe law and Canadian domestic law.

Anishinaabe Customary Law

[22] It seems to me that it is useful to briefly consider the relationship of Indigenous legal systems to Canadian law in order to set the context in which to address the question poised before me. By Indigenous legal systems I am referring to the rules by which Aboriginal people have organized themselves into distinctive societies with their own social, cultural, legal and political structures that predated contact with the Europeans in North America.

[23] Customary law is defined by Black's as "Law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws" (*Black's Law Dictionary*, 8th ed, *sub verso* "Customary law").

[24] Law Professor John Borrows explains that diverse customs and conventions of Canada's Indigenous peoples evolved to become the foundation of many complex systems of Indigenous law (John Borrows, *Recovering Canada* (Toronto: U of T Press, 2004) at 4). He notes that law is defined as "The body of rules, whether proceeding from formal enactment or from custom, which a particular state or community recognizes as binding on its members or subjects" (*Oxford English Dictionary*, 2d ed, at 712, quoted in *Recovering Canada* at 165, endnote #8). I would draw an implication from this assessment that the foundations of Indigenous legal systems may encompass more than just the customs practiced by a group.

[25] For convenience, I will refer to specific instances of Indigenous law as Aboriginal customary law notwithstanding my earlier observation that custom may not be the only source of

Indigenous laws. Examples of recognition of Aboriginal customary law can be found in common law decisions, statutory enactments, and more recently, Section 35 Aboriginal rights and title jurisprudence.

The Common Law

[26] The common law is capable of giving recognition to and incorporating Aboriginal customary law. The seminal case in which a Canadian court accepted an Aboriginal customary law was *Connolly v Woolrich* (1867), 17 RJRQ 75 (Qc SupCt) [*Connolly*], where the Quebec Superior Court decided that a Cree marriage in the Athabasca region between a trader and his Cree wife married in accordance with Cree custom was valid such that the son of the marriage was entitled to an inheritance from the fur trader's estate. The Court held the English common law prevailing in the Hudson's Bay territories did not apply to Natives who were joint occupants of the territories; nor did it supersede or abrogate the laws, usages, and customs of the Aborigines.

[27] The 1889 case of *R v Nan-e-quis-a Ka* (1889), 1 Terr LR 211 (NWT SC) similarly dealt with an Aboriginal custom marriage. It was uncertain whether the English common law had been received in the territory at the time of the marriage (as it had been *Connolly*) but Justice Wetmore held the marriage was valid either on the basis of *Connolly*, or even if the marriage had predated the reception of English law, the custom marriage was nevertheless valid.

[28] Court recognition of Aboriginal customary law also arose in an Inuit adoption case, *Re Adoption of Katie E7-1807*, [1961] NWTJ No 2, 32 DLR (2d) 686 [*Re Katie*]. Justice Sissions stated at paras 36 and 38:

> 36. I think adoptions "made according to the laws of the Territories" include adoptions in accordance with Indian or Eskimo custom.
>
> …
>
> 38. This adoption "has for all purposes in the Territories the same effect as an adoption with this part" *i.e.* part IV of the *Child Welfare Ordinance.*

[29] In *Re Beaulieu's Petition* (1969), 64 WWR 669 (NWT TerrCt), Mr. Justice Morrow followed *Re Katie* to recognize a Dogrib Indian customary adoption. In an appeal of another Justice Morrow decision, *Re Deborah* (1972), 28 DLR (3d) 483 (NWT CA) [*Re Deborah*], the Northwest Territories Court of Appeal confirmed a custom adoption that the natural parents had been trying to set aside. In *Re Deborah* Justice Johnson refined the legal basis for recognition of custom. He stated:

> Custom has always been recognized by the common law and while at an earlier date proof of the existence of a custom from time immemorial was required, Tindal C.J., in *Bastard v. Smith* (1878) , 2 Mood. & R. 129 at 136, 174 E.R. 238, points out that such evidence is no longer possible or necessary and that the evidence extending "as far back as living memory goes, of a continuous, peaceable, and uninterrupted user of the custom" is all that is now required. Such proof was offered and accepted in this case.

Statute

[30] Aboriginal customary law has been given recognition by operation of federal statute. For example, Indian custom adoptions of children are recognized by the definition of "child" in section 2(1) of the *Indian Act*, RSC, 1985, c I-5.

[31] First Nations customary rules for governance has been also recognized in the definition in section 2(1) of the *Indian Act* which provides:

> "council of the band" means…
>
> (a) . . .
>
> (b) in the case of a band to which section 74 does not apply, the council chosen according to the custom of the band, or, where there is no council, the chief of the band chosen according to the custom of the band.

This provision affords *Indian Act* powers of governance to Indian custom chiefs and councils notwithstanding they are not chosen pursuant to *Indian Act* election provisions or regulations.

Section 35 Aboriginal Rights and Title Jurisprudence

[32] In the Supreme Court of Canada decision *Calder v BC (AG)*, [1973] SCR 313, [1973] SCJ No 56 [*Calder*], Justice Hall, after tracing jurisprudence both back from *Johnson v McIntosh* (1823), 21 US 240, 8 Wheaton 542, to the earlier *Campbell v Hall* (1774), 1 Cowp 204, 98 ER 1045 (which cites an even earlier common law decision, *In Re Calvin's Case* (1608), 77 Eng Rep 377 (KB)) and forward through *St. Catherines Milling and Lumber Co v The Queen* (1888), 14 App Cas 46 and other later Commonwealth and Canadian jurisprudence, asserted

there was a wealth of jurisprudence that affirmed the common law recognition of Aboriginal title.

[33] In that same case, while holding that continuity of Aboriginal title was inconsistent with legislative enactments, Justice Judson did state at 328:

> … the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means…

[34] The continued existence of Aboriginal rights, specifically the Aboriginal right to fish, was confirmed in *R v Sparrow*, [1990] 1 SCR 1075, [1990] SCJ No 49, and the continued existence of Aboriginal title was resolved in *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, [1997] SCJ No 108.

[35] With enactment of section 35 of the *Constitution Act, 1982*, existing Aboriginal and treaty rights were given constitutional recognition in Canadian law. Given the importance of constitutional recognition, jurisprudence on Aboriginal rights has developed significantly.

[36] In *Mitchell v Canada (MNR)*, 2001 SCC 33, [2001] 1 SCR 911 at para. 10 [*Mitchell*], Chief Justice McLachlin stated:

> … aboriginal interests and customary laws were presumed to survive the assertion of sovereignty, and were absorbed into the common law as rights, unless (1) they were incompatible with the Crown's assertion of sovereignty, (2) they were surrendered voluntarily via the treaty process, or (3) the government extinguished them…

> Barring one of these exceptions, the practices, customs and traditions that defined the various aboriginal societies as distinctive cultures continued as part of the law of Canada.

Academic Commentary

[37] Professor John Borrows suggests Indigenous legal systems, based on the customs and practices of Indigenous peoples, exist independently of the common law, since the Canadian Courts' *sui generis* doctrine of First Nations rights "suggests the possibility that Aboriginal rights stem from alternative sources of law that reflect the unique historical presence of Aboriginal peoples in North America" (*Recovering Canada* at 9).

[38] On the other hand, legal academic Sébastien Grammond notes that Chief Justice McLachlin was alluding in *Mitchell* to the doctrine of continuity in British Imperial law, which provides for the continuation of laws applicable to a territory prior to British colonization. He observed that this doctrine has not been employed to recognize any Indigenous legal systems on a large scale in Canada. Rather, there have only been small exceptions such as Indigenous marriages and adoptions (Sébastien Grammond, *Terms of Coexistence: Indigenous Peoples and Canadian Law*, translated by Jodi Lazare (Toronto: Carswell, 2013) at 375-376).

[39] In all of the above, it would appear that Aboriginal customary law which has not been extinguished is given legal effect in Canadian domestic law through Court declarations, including Aboriginal title or rights jurisprudence, or by statutory provisions. I would also suggest Aboriginal customary law may also be given legal effect by incorporation into Indian treaties. It

may be that there are other means by which Aboriginal customary law could be recognized but that is not a question for me to address here.

[40] I should think that Aboriginal customary laws, while they exist on their own independent footing, are not an effectual part of Canadian common law or Canadian domestic law until there is some means or process by which the independent Aboriginal customary law is recognized as being part of Canadian domestic law. Such an acceptance or recognition may at times have the effect of altering or transforming the Aboriginal customary law so that it and Canadian law are aligned. It seems to me this is an aspect of reconciliation as discussed in recent post section 35 Aboriginal jurisprudence.

Legal Opinions & Historical Legal Evidence

[41] Keeping in mind that Courts have generally accepted the need for expert ethnographic evidence in Aboriginal law litigation, it is worth considering the extent to which it is also permissible for experts to give evidence which may approach legal opinion.

[42] In *Samson Indian Nation and Band v Canada*, [2001] FCJ No 50, [2001] 2 CNLR 353 [*Samson Indian Nation*], law professor Douglas Sanders was tendered as a legal historian qualified to give evidence on the legal historical background of the relationship between the Crown and First Nations, and on relevant policy. Professor Sanders' report made extensive use of case law, legislation, Parliamentary reports, and academic articles on legal issues. The Crown objected to the admissibility of Professor Sanders' expert report on the basis, *inter alia*, that it

was unnecessary, as being within the expertise of the Court and more properly the subject of legal argument.

[43] Justice Teitelbaum recognized that the historical background and evolution of the relationship between the parties and "the resulting obligations and duties" was a key issue in that case, and found Professor Sanders' report admissible (at paras 25, 31).

[44] In *Ross River Dene Council v Yukon*, 2011 YKSC 87, [2011] YJ No 121 [*Ross River*] counsel for the First Nation plaintiffs argued that a report by the legal historian Dr. Paul McHugh was "little more than a legal opinion," and "usurped the role of this Court by directing his conclusions to the ultimate issue…" (at para 48). Justice Garson canvassed the case law on the issue of encroaching on the function of a trial judge (at paras 47-61).

[45] Justice Garson found that the passages in question presented and compared the legal, political and historic contexts of relationships between Aboriginal peoples and the Imperial Crown. He noted that in those circumstances Dr. McHugh "could hardly avoid drawing certain factual or legal inferences or conclusions which might appear objectionable at first glance" (at para 53). The evidence was relevant and should not be excluded because it suggested answers to issues which are at the core of the dispute between the parties (at para 54). Lastly, Justice Garson was clear that Dr. McHugh was providing inferences and conclusions within his area of expertise and which were necessary to assist in an area of expertise beyond that of the Court (at para 61).

[46] The common element in the foregoing two cases suggest 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. This is the case when the expert is properly qualified and the expert opinion evidence is necessary to assist the Court.

[47] Finally, I would add evidence such as ventured by Dr. Thoms is best left the subject of cross-examination and argument as to weight rather than challenges for preliminary rulings on admissibility.

Is Dr. Thoms' Statement a Legal Opinion?

[48] Notwithstanding the forgoing discussion, I need not need to delve into further into whether Anishinaabe customary law has entered the realm of Canadian domestic law, as I do not consider Dr. Thoms to have ventured a legal opinion.

[49] I agree with both Canada's submissions and the principle expressed in *Graat* that legal opinions are properly within the realm of the trial judge, as trier of both law and fact in a trial by judge alone.

[50] Although Canada strenuously argued that Dr. Thoms' statement transgressed into common law legal opinion, Canada offers no basis or authority for the proposition that Anishinaabe customary law on trespass of hunting grounds is part of the common law in Canada applicable to non-Aboriginal settlers.

[51] Ontario similarly advances an unsupported proposition that, if its interpretation of what Dr. Thoms said holds, then Anishinaabe customary trespass law were to have the legal effect of making trespassing by non-native settlers a criminal or quasi-criminal offence.

[52] Dr. Thoms pointed out that Thomas Need alluded to Mississauga enforcement of their Aboriginal customary laws against non-native settler trespassers in the quotation from Need's book:

> On one point alone, that of hunting furs, they … are said to be as tenacious as English landholders of their game, and as some white man who have gone out for that purpose have never returned. There are grounds for suspecting that they do not always confine their remonstrance to angry words or sulky looks.

[53] In my view, Dr. Thoms was offering an explanation of what Thomas Need had stated in his 1838 book. If we look to the impugned statement by Dr. Thoms, inserting to whom or to what the statement is attributable, we see from the transcript:

> One, we're going to talk later -- I [*Dr. Thoms*] wish to speak later -- about English game law. And this [*Need's text*] is an analogy in which he [*Need*] is saying the Mississaugas are just like English lords. They are the owners and occupiers of hunting chases, of private fisheries, which is the case in England at this period. And also he [*Need*] says the laws [*Anishinaabe customary laws against trespass on their hunting grounds*] aren't just binding on the Mississauga or the Chippewa or the Algonquin. They appear to be binding on non-native settlers.

[54] It is clear Dr. Thoms is expounding on Need's analogy that in matters of hunting furs in Mississauga hunting grounds, the Mississaugas were as tenacious as English landholders. Need had further implied the Mississauga do more than merely object against trespass by non-settlers

hunting in the Mississauga hunting grounds. Dr. Thoms' last sentence necessarily relates to the interpretation he was taking from Need's implication.

Opinion Evidence in Historical Laws

[55] A criteria of opinion evidence is that the evidence be necessary to assist the Court (*R v Mohan*, [1994] 2 SCR 9, [1994] SCJ No 36). The present trial is a clear example of Aboriginal litigation, dealing with a great span of history, and a vast amount of historical documents, where the Court requires the expertise of a qualified historian, ethnohistorian, or anthropologist.

[56] In *Samson Indian Nation* and in *Ross River*, the experts witnesses were legally trained law professors whose evidence threaded on legal matters. It seems to me that a properly qualified witness, even if not a law professor, may be permitted to provide similar opinion evidence which both relates to the Aboriginal customary laws and European laws of the time which touches on legal issues when properly qualified and the expert opinion evidence is necessary to assist the Court.

[57] Dr. Thoms is qualified to give expert opinion evidence, including on Anishinaabe legal systems and history of Imperial fishing and game laws. I stated in my Order of April 28, 2014 that:

> 1. Dr. J. Michael Thoms is qualified to give opinion evidence as an ethnohistorian on the Anishinaabe – Crown relationship during the early colonial and post-Confederation periods up to World War II with particular expertise in:
>
> i) the Anishinaabe people's land, water and resource use strategies, their customary legal systems, and their conflicts with non-Aboriginal populations;

> …
>
> iii) the history of fishery and game laws of the Imperial, Canadian, and Ontario Crowns; and
>
> …
>
> [emphasis added]

[58] I consider Dr. Thoms to be in a position to offer his opinion as an ethnohistorian on the context of Thomas Need's statement touching as it does on Anishinaabe customary law and the history of English fishery and game legislation. The subject matter is within his expert qualifications.

[59] Because of Canada's objection, Dr. Thoms did not give a more fulsome explanation. If Dr. Thoms' last sentence were to be taken by itself, it is unclear and without context or support. I do not take the last sentence as an isolated statement but if I were to do so, any uncertainty about what Dr. Thoms meant now goes to a question of weight.

Conclusion

[60] I conclude Canada's objection to Dr. Thoms offering a legal opinion based on common law is overruled. I similarly overrule Ontario's objection.

ORDER

THIS COURT ORDERS that:

1. The objections by Canada and by Ontario to the challenged evidence of Dr. Thoms are dismissed.

2. No assessment is made at this time as to the weight of the evidence of Dr. Thoms and Canada or Ontario may make submissions as to the weight to be given to the challenged evidence after cross-examination.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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