

CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 1507

COURT

Supreme Court of British Columbia

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2020 BCSC 1507 Cowichan Tribes v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cowichan Tribes v. Canada (Attorney General),

2020 BCSC 1507

Date: 20201008

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 Madam Justice Young

Ruling on Plaintiffs' Privilege Objection

during Cross-Examination of Larry George

Counsel for the Plaintiffs:

S. A. Morgan, J. Riddell and

D. M. Rosenberg, Q.C.

Counsel for the Defendant

Her Majesty the Queen in right of the

Province of British Columbia:

M. Volk

Written Submissions Received:

July 3, 2020

July 31, 2020

August 21, 2020

Place and Date of Judgment:

Victoria, B.C.

October 8, 2020

Introduction

[1] In this Aboriginal title and rights case, during the testimony of Mr. Larry George, Lands and Governance Director for Cowichan Tribes, Mr. George was questioned on communications he learned of during Cowichan Tribes Treaty Committee meetings and related to traditional use interviews over which the plaintiffs claim privilege. The plaintiffs were directed to make written submissions specifying the type of privilege asserted and the evidence on which the plaintiffs relied to assert that privilege. The defendant British Columbia has responded with written submissions.

[2] During cross-examination, Mr. George testified about the following two documents:

I. an August 25, 2005 letter from Cowichan Tribes to Musqueam Indian Band ("August 2005 Letter"); and

II. a Cowichan Tribes Traditional Marine Use and Occupancy Study final report draft dated November 28, 2013 ("TMUOS").

[3] The question I must answer is whether Mr. George should be recalled to answer the following questions that the plaintiffs objected to:

- a) what did he learn in Cowichan Tribes Treaty Committee meetings regarding the oral history of Cowichan Tribes elders about fishing on the Fraser River; and
- b) what did he learn through his involvement in the TMUOS prepared for the purposes of consultation about the Trans Mountain Pipeline Expansion Project.

[4] The August 2005 Letter, marked as Exhibit 375 in this trial, was written by Dora Wilson, Cowichan Tribes Acting Chief, to Chief Ernie Campbell of the Musqueam Indian Band ("Musqueam"). Mr. George was involved in preparing the letter. In the letter, Acting Chief Wilson wrote:

The Cowichan Tribes will continue to fish pursuant to our license and what we say is our right according to the oral history of our elders.

[5] Musqueam objected to the admission of the August 2005 Letter into evidence on the basis that it was inadmissible hearsay. The plaintiffs conceded that the letter should only be admitted for non-hearsay purposes to establish that it was sent and not to prove the contents of the letter. I admitted the August 2005 Letter for the limited purpose of proving that it was sent [Day 87 page 7 line 35].

[6] On day 101 of this trial, Mr. George was cross-examined by British Columbia on the August 2005 Letter. Counsel for British Columbia asked which elders he was referencing in the line quoted above. He responded:

There would have been a number of elders that information was brought forward to -- to Cowichan. And there's a lot of recorded and written history that is available, and I believe this may have been available to this court as well. So there is a lot of elders.

[7] He was then asked if he reviewed oral histories before drafting the letter. When asked which oral histories he reviewed to prepare the letter, he responded:

Which ones? I don't think I can specify which ones. We did make reference to -- to information so that what we brought to our leadership was -- was good information for them to determine their decision.

- [8] At this point, the plaintiffs raised an objection because it was quite possible that some of the oral histories reviewed by Mr. George may have been privileged. British Columbia responded that if the plaintiffs intend to rely on the August 2005 Letter, then British Columbia was entitled to ask Mr. George about the references in the letter.
- [9] It was not clear what type of privilege the plaintiffs were claiming. It was also the position of the plaintiffs that they were only relying on the letter for non-hearsay purposes and not to assert oral history evidence.
- [10] On day 102, I ruled:

British Columbia will be permitted to ask Mr. George what he recalls about the purpose of the recording of oral history, and this is with respect to the third chapter, and that's the Kinder Morgan report and who was interviewed and whether he knows what the terms were. And by that I mean whether he knows whether there was an understanding of confidentiality or not. And then he will be stood down, an application will be scheduled to be heard on the issue of privilege, and then depending on the results he may be recalled for further cross-examine [sic] on the three documents.

- [11] On day 102, British Columbia cross-examined Mr. George on his responsibilities regarding the TMUOS for the Trans Mountain Project in 2013. Mr. George testified that it looked like oral histories were relied on for this study. He acknowledged that he was involved in selecting the members to be interviewed. He did not sit in on the interviews. The team gathered the information and the intent was strictly to gather information and record it. He did not recall whether or not there were terms of confidentiality with regard to the interviews.

Affidavit #3 of Mr. Larry George

- [12] In support of this application, Mr. George swore his third affidavit in these proceedings ("Affidavit #3"). With respect to the August 2005 Letter, Mr. George deposed that he had an opportunity to give more thought to precisely what informed the statement contained in the letter that "the Cowichan Tribes will continue to fish pursuant to our license and what we say is our right according to the oral history of our elders."
- [13] At paras. 5-7 of Affidavit #3 Mr. George deposed:

I learned about "the oral history of our elders" as a result of my participation in meetings of the Cowichan Tribes Treaty Committee, which was formed to guide Cowichan Tribes' participation in the British Columbia Treaty Commission process, and which dealt with ongoing matters that could impact Cowichan Aboriginal rights and title. As Lands and Governance Director, I frequently attended Cowichan Tribes Treaty Committee meetings. It was during these meetings that I heard the oral history of our elders that I was thinking of in drafting the August 2005 letter. I did not review any documents or records of interviews in reaching the understanding I expressed in the August 2005 letter. I do not recall which specific elders communicated the oral

history I was referring to in the August 2005 letter.

While I did not attend all Cowichan Tribes Treaty Committee meetings from 1999-2005, at the majority of the meetings I did attend, Cowichan Tribes' external legal counsel at that time, Rob Botterell, was in attendance and provided legal advice.

To perform their work, it is necessary for members of the Cowichan Tribes Treaty Committee to be able to openly disclose and discuss Aboriginal rights and title at meetings. These meetings are confidential for that reason.

- [14] A copy of the TMUOS prepared by Cowichan Tribes and Traditions Consulting Services Inc. is attached to Affidavit #3. Mr. George did not testify as to this report in his examination-in-chief but he was referred to it in cross-examination by British Columbia.
- [15] At para. 9 of Affidavit #3, Mr. George deposed that Cowichan Tribes was involved in preparing the TMUOS to support its involvement in the National Energy Board ("NEB") process considering Kinder Morgan's application for approvals of the Trans Mountain Pipeline Expansion Project.
- [16] At para. 11 of Affidavit #3, Mr. George deposed: "if Cowichan Tribes wanted to consult with the Crown about potential adverse effects on Cowichan Nation Aboriginal rights and title, Cowichan Tribes had to participate in the NEB process."
- [17] Mr. George deposed that Cowichan Tribes retained Kevin Neary, an anthropologist and expert in preparing traditional use and occupancy studies, to work with them to prepare the TMUOS. Mr. Neary interviewed a small subset of known resource users who have engaged in harvesting activities from the 1960s to the present as well as conducting two boat field trips known as "groundtruthing" trips (the "Project Interviews"). Mr. George did not conduct or sit in on the Project Interviews.
- [18] The results of the Project Interviews, along with other information, were used in preparing the draft TMUOS. A final version of the TMUOS was never prepared.
- [19] Mr. George has received information from Hilda Paige, member of Cowichan Tribes, who was a writer and researcher involved in preparing the TMUOS with Kevin Neary that any information Kevin Neary obtained through preparation of the TMUOS in the interview process was kept confidential and not shared outside the study process. It was Hilda Paige's view that Kevin Neary demonstrated a high standard of integrity when it came to his work and was very careful about protecting the confidentiality of the information he was privy to.
- [20] Mr. George was further informed by legal counsel, Ms. Morgan, who represented Cowichan Tribes during the NEB process, that Cowichan Tribes never submitted the TMUOS to the NEB.
- [21] At paras. 14-15 of Affidavit #3, Mr. George deposed:

Cowichan Tribes conducted the Project Interviews because we were required to participate in the NEB process as part of Crown-Aboriginal consultation. Cowichan Tribes retained the interviews for use in future consultation processes for treaty negotiations so as to avoid duplication of work and obtain long-term value from the effort and expense of engaging in consultation on this project.

Cowichan Tribes did not disclose the Project Interview records to anyone. Traditional knowledge is highly confidential, sensitive information, which we rarely disclose outside of the community. In this specific instance we assured interviewees that the information they were providing would be kept confidential

[22] Mr. George attached a copy of the information form titled "Traditional Marine Use and Occupancy Study Project, Cowichan Tribes" that interviewers provided to interviewees prior to conducting the interview. The form states that the information that the interviewees provided would be kept confidential. Mr. George also attached a copy of a document titled "Consent to Participate in Interview Form" and deposed that he was informed that each interviewee signed a consent form and was assured that the information they provided would be kept confidential to the extent indicated on the consent form.

[23] Mr. George was informed by Hilda Paige that the same assurance of confidentiality was provided to interviewees with respect to the "groundtruthing" field trips they participated in.

[24] Mr. George deposed at paras. 17-18:

I know that protecting the confidentiality of traditional knowledge and information provided by elders and knowledge holders is essential to maintaining a relationship of trust between the Cowichan Tribes band administration and members of the community. There is a real risk that if this type of information is disclosed contrary to assurances of confidentiality provided to interviewees, these individuals and other community members will be reluctant or even refuse to participate in these types of studies in the future. Many community members are cautious about sharing traditional use information with outsiders, but generally trust the band administration to follow proper protocol and use that information in confidence.

I believe that if these individuals see that information they provided on a confidential basis is disclosed to government and other parties, these relationships would likely be jeopardized and perhaps harmed beyond repair, which would in turn hamper Cowichan Tribes' ability to meaningfully engage in consultation with the Crown.

Affidavit of Eamon Gaunt

[25] In support of their assertion of privilege, the plaintiffs also rely on the third affidavit of Eamon Gaunt, Treaty Negotiator. He has been employed by Cowichan Tribes as a Treaty Analyst and Negotiator since approximately 2009. He was the Executive Director of the Hul'qumi'num Treaty Group ("HTG") in 1996. From 1999 to 2008 he worked as an independent contractor and worked with Cowichan Tribes and HTG. The HTG is a registered

society that represents its member bands in treaty negotiations. Cowichan Tribes is one of the member bands.

[26] Mr. Gaunt deposed at para. 10:

To the best of my understanding, member bands of the HTG always understood and have approached treaty negotiations as a means of resolving the land question and obtaining redress. In entering into treaty negotiations with the governments of Canada and British Columbia, the HTG member bands did not promise that they would never litigate. Indeed, they viewed the treaty process as an attempt to settle their litigation claims. A successful final agreement would deal with the land question, but they knew and continue to be aware that if an agreement cannot be achieved, the member bands would have to seek another recourse through litigation.

[27] The Cowichan Tribes Treaty Committee ("Treaty Committee") is comprised of only Cowichan Tribes members, employees and legal counsel. Cowichan Tribes' Treaty Manager, Melissa Bellamy, advised Mr. Gaunt that the Treaty Committee has met approximately once a month since its inception. The Treaty Committee addresses all matters that overlap with resolution of the lands question. This includes considering and developing positions to be taken by Cowichan Tribes in the treaty process and in choosing to pursue litigation about Cowichan Aboriginal rights and title.

[28] Mr. Gaunt deposed at paras. 17-20 and para. 22:

To perform their work, it is necessary for members of the Cowichan Tribes Treaty Committee to be able to openly disclose and discuss Aboriginal rights and title at their meetings as they strategize about treaty negotiations, litigation, and particular positions Cowichan Tribes should take within each.

Information shared and disclosed in Cowichan Tribes Treaty Committee meetings is kept confidential. Committee members are asked not to otherwise share any materials provided to them for meetings

Information shared and disclosed in Treaty Committee meetings is not shared with other HTG member bands, the public, the Crown, or any outside entities. It is only the position ultimately adopted through consensus by the Cowichan Tribes Treaty Committee or Chief and Council that is disclosed to the Cowichan Tribes community, in treaty negotiations or other contexts as appropriate.

Should the contents of discussions about Aboriginal rights and title be disclosable in any subsequent litigation, it would severely hamper the ability of the Cowichan Tribes Treaty Committee to operate. If members knew that those discussions would eventually be disclosable to the Crown or to the community, it would be difficult for members of the Treaty Committee to discuss strengths and weaknesses of Cowichan Tribes' own positions and potential for compromise in response to positions taken by the Crown. This would result in an entrenchment of formal positions that would make it very difficult, if not impossible, to find the compromises necessary for successful negotiations.

Cowichan Tribes' then external legal counsel, Rob Botterell, was a member of the Cowichan Tribes Treaty Committee from approximately the late 1990s until approximately 2007. I am informed by Ernie Elliot and Melissa Bellamy that Mr. Botterell was retained by Cowichan Tribes regarding a number of legal matters, including fishing bylaws, specific claims, human resources and treaty negotiations. With respect to the latter, he advised Cowichan Tribes on the pursuit of rights and title through the setting of Cowichan Tribes' position in treaty negotiations. Mr. Botterell sat in on many meetings about oral history, including at Treaty Committee meetings, and advised on strategic use of that information and traditional use studies undertaken during that period.

Plaintiffs' Submissions

Cowichan Tribes Treaty Committee Meetings

- [29] The plaintiffs assert that communications and information disclosed during Treaty Committee meetings are protected by solicitor-client privilege, settlement privilege and, in the alternative, case-by-case privilege.
- [30] The grounds for asserting solicitor-client privilege is that external legal counsel, Rob Botterell, was present at many of the Treaty Committee meetings attended by Mr. George. The Treaty Committee meetings were held to advise Mr. Botterell on Cowichan Tribes' approaches to treaty negotiations and the pursuit of Aboriginal rights and title. Mr. Botterell advised Cowichan Tribes on strategic use of oral history information including oral histories shared at Treaty Committee meetings. There is a clear relationship between Cowichan Tribes and Mr. Botterell for the purpose of seeking and providing legal advice.
- [31] The plaintiffs submit that Mr. Botterell gave legal advice at the meetings. They further submit this is the type of relationship solicitor-client privilege is meant to protect. The public interest in protecting that relationship would be undermined if British Columbia was permitted to question Mr. George about the contents of Treaty Committee discussions where Mr. Botterell was present and provided legal advice.
- [32] Alternatively, the plaintiffs submit settlement privilege applies. The purpose of communications in Treaty Committee meetings was to inform Cowichan Tribes' positions in treaty negotiations with British Columbia and Canada. The aim was to settle a litigious dispute, namely the land question.
- [33] The public interest in settlement provides the rationale for settlement privilege, which applies in full force in the context of attempts to settle historical grievances over land and rights as between the Crown and Indigenous peoples.
- [34] In the further alternative, the plaintiffs submit case-by-case privilege applies because there is a strong public interest in protecting First Nations' internal and confidential communications made for the purpose of engaging in treaty negotiations with the Crown.

- [35] Applying the Wigmore criteria to establish case-by-case privilege, the plaintiffs submit that the communications were conducted with an expectation that the information would not be disclosed. The element of confidentiality was essential to the full and satisfactory maintenance of the relationship between the parties. In the opinion of the community, the relationship of the members of the Treaty Committee and the relationship between the Crown and Cowichan Tribes ought to be sedulously fostered to encourage good faith negotiations in preference to litigation. Finally, the balancing exercise required by the fourth Wigmore criteria weighs in favour of protecting the communications referenced in the August 2005 Letter. Injury could inure to the treaty process by disclosing the internal communication and it would be far greater than any resulting benefit to the disposal of this litigation.
- [36] This is not a case where the plaintiffs are trying to rely on a document to prove their right to fish on the Fraser River. The August 2005 Letter was only entered for the purpose of proving that a letter was sent.

TMUOS

- [37] The plaintiffs rely on the evidence in Affidavit #3 that the TMUOS arose because of the Crown's obligation to consult with Cowichan Tribes pursuant to s. 35 of the Constitution Act, 1982. The TMUOS interview process relied on confidential interviews of Cowichan Tribes members. Each interviewee consented to participate with the understanding that their information would only be used in the report if they consented to it and that they could withdraw their consent at any time. To the best of Mr. George's knowledge, the Project Interviews have never been publicly disclosed.
- [38] The plaintiffs submit the Project Interviews are protected by case-by-case privilege and meet Wigmore's four criteria.
- [39] Firstly, the plaintiffs submit that the communication was made during confidential Treaty Committee meetings which were conducted with an expectation that the information would not be disclosed.
- [40] Secondly, the plaintiffs submit that confidentiality is essential to Cowichan Tribes' relationship with its members and its ability to ask knowledge holders and elders to share information about traditional use. This relationship of trust is essential to Cowichan Tribes' ability to engage in good faith consultation with the Crown.
- [41] Thirdly, the Cowichan community view this relationship as one that should be sedulously fostered.
- [42] Fourthly, allowing disclosure of the contents of the Project Interviews in the litigation would undermine the constitutionally protected process while having minimal benefit to the disposal of this litigation.

British Columbia's Submissions

- [43] British Columbia submits that the plaintiffs have chosen to base a substantial part of their case on oral histories. Notwithstanding that, the plaintiffs argue that an inquiry regarding oral history should be limited to those oral histories that they have selected for disclosure. British Columbia submits that it is entitled to cross-examine the witness concerning all relevant oral histories. Oral history regarding resource gathering and the existence, location and occupation of Tl'uqtninus is relevant to this litigation because it informs the use and occupation of the claim area.
- [44] In response, the plaintiffs submit that they are not claiming privilege over all oral history, merely those that were disclosed during the treaty negotiation process.

Solicitor-Client Privilege

- [45] British Columbia submits the plaintiffs have not established solicitor-client privilege because there is insufficient evidence to demonstrate that communications occurred between a solicitor and client for the purpose of seeking and giving legal advice.
- [46] British Columbia submits that the oral histories Mr. George learned about did not come into existence by reason of the desire to obtain a legal opinion. Oral histories are not protected by solicitor-client privilege. They are neutral facts. A restatement of historical fact is independent from the solicitor-client relationship.
- [47] Alternatively, British Columbia submits that the plaintiffs' evidence does not establish a communication between solicitor and client that should be protected. The fact that Mr. Botterell was at some of the Treaty Committee meetings does not protect all communications by the Treaty Committee as privileged. There must be more than a bare assertion of privilege. Protection is not conferred simply because a solicitor was present at the meeting.
- [48] The evidence of Mr. George is unclear as to whether he referred to oral histories before preparing the August 2005 Letter. In trial, he said that he did. In his affidavit, he said he did not. He believes that he was referring to oral history he heard during Treaty Committee meetings.
- [49] British Columbia submits that Mr. George's affidavit does not satisfy the plaintiffs' burden to establish solicitor-client privilege for the following reasons:
- a) Mr. George cannot say with any degree of certainty which oral history he reviewed;
 - b) he has not given evidence as to the specific circumstances in which he learned of the oral histories;
 - c) there is no indication on the face of the August 2005 Letter that it relates specifically to the treaty process;

- d) there is minimal evidence of what, if any, communication occurred between solicitor and client that Mr. George was privy to;
- e) there is no evidence of how the oral histories Mr. George learned of were connected to seeking or giving legal advice;
- f) some of the meetings were conducted without the solicitor being present; and
- g) some oral histories were presented in a public setting.

Settlement Privilege

- [50] British Columbia submits that the plaintiffs have not satisfied the necessary elements of settlement privilege.
- [51] Mr. George's recollection that he believes that, in drafting the August 2005 Letter, he was referring to oral histories that he learned during Cowichan Tribes Treaty Committee meetings is insufficient to establish settlement privilege. There is no indication that the oral history was communicated to Mr. George to advance a settlement negotiation.
- [52] British Columbia submits that it is unfair to adduce oral histories as part of the plaintiffs' case while restricting the province from cross-examining about those or other oral histories.
- [53] British Columbia further submits that it is contrary to public policy to permit one litigant to rely on evidence while simultaneously prohibiting another litigant from testing that evidence. In this case the plaintiffs rely on hearsay evidence of historical use and occupation of lands identified as Tl'uqtinus. British Columbia submits there is a suggestion that some other oral histories place Tl'uqtinus in a different location than the claimed area. The defendants are entitled to test the plaintiffs' evidence. British Columbia is entitled to draw out evidence that may assist in rebutting the plaintiffs' case.

Case-by-case Privilege

- [54] To assess case-by-case privilege, British Columbia submits that the court must consider the communicator's expectations over each specific communication.
- [55] British Columbia submits that there is insufficient evidence to conclude that the oral histories relied on for the August 2005 Letter were communicated with an expectation of confidentiality that they would not be disclosed. The circumstances surrounding Mr. George learning the oral histories are not sufficiently clear. It is not known where Mr. George heard the oral histories or what the relevant relationship was. If the Court accepts the evidence that Mr. George learned of the oral histories during Treaty Committee meetings, the analysis must be carried out on that basis. It cannot be carried out on a presumption that Mr. George learned the oral histories from a member of the Treaty Committee. Communications are to be excluded only when they originate in an expectation of confidentiality. Since Mr. George does not recall which elders provided the oral histories that he relied on, the Court has no evidence of the source of the communication and of the context in which the oral history

was given.

- [56] British Columbia submits that the plaintiffs have not identified how the relationship would be injured by Mr. George answering the questions at issue.
- [57] British Columbia submits there is insufficient evidence that oral history gathered directly from each of the elders interviewed for the TMUOS study originated in a confidence that they would not be disclosed to anyone. The evidence establishes that the study participants could permit information from their interviews to be disclosed. Despite Mr. George having reviewed each consent form, there is no evidence that any study participants other than Arvid Charlie chose not to allow disclosure.
- [58] It appears that each interview session explored the source of knowledge about the traditional use areas and traditional ecological use with a focus on how they learned about Cowichan Tribes history, culture and territory: Affidavit #3, exhibit B digital page 71.
- [59] The TMUOS incorporated information from previous projects.
- [60] British Columbia disagrees with the plaintiffs' submission that the decision in *Yahey v. British Columbia*, 2018 BCSC 123 [Yahey] establishes a general rule that interviews about traditional use conducted for the purpose of consultation with the Crown are shielded from disclosure unless the interviewee is a witness to be called at trial and explicitly waives confidentiality for use in court proceedings. Rather, British Columbia submits that the court in *Yahey* simply applied the well-settled Wigmore criteria for case-by-case privilege to the facts of that particular case.
- [61] British Columbia submits that *Yahey* does not stand for the proposition that the absence of reference to court proceedings in a confidentiality waiver establishes that the interest in protecting the communication from disclosure outweighs the interest in getting to the truth and correctly disposing of litigation.
- [62] British Columbia concludes that, even if confidentiality is found, the possible injury to the relationship in this case does not outweigh the public interest in the correct disposal of litigation.
- [63] Finally, British Columbia submits that even if solicitor-client privilege, settlement privilege or case-by-case privilege is established, the Court should find that privilege has been waived, citing *Pacific Concessions, Inc. v. Weir*, 2004 BCSC 1682 at para. 24.

Legal Analysis

[64] There are two types of privileges in our law: class privileges and case-by-case privileges: *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 32. Once the requirements for class privileges are met, there is a prima facie presumption of inadmissibility. The onus is on the party seeking admission to establish why the communications should not be protected by privilege: *R. v. Gruenke*, [1991] 3 S.C.R. 263 at 286 [Gruenke].

Class Privileges and Cowichan Tribes Treaty Committee Meetings

Solicitor-Client Privilege

[65] Solicitor-client privilege is a form of class privilege and applies to confidential communications between a client and their solicitor: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 28. *Canada v. Solosky*, [1980] 1 S.C.R. 821 at 837 [Solosky], states a party asserting solicitor-client privilege must demonstrate:

- (i) a communication between solicitor and client;
- (ii) which entails the seeking or giving of legal advice; and
- (iii) which is intended to be confidential by the parties.

[66] It is only communications that are protected by the privilege. All acts of counsel or mere statements of fact are not protected: *Stevens v. Canada (Prime Minister)*, [1998] 4 F.C. 89 (F.C.A.) at para. 25.

[67] Solicitor-client privilege does not apply to communications in which legal advice is not sought or offered. Legal counsel must be acting in their capacity as lawyers: *Solosky* at 835.

[68] In establishing solicitor-client privilege, the most important question is whether the communications took place within the context of a solicitor-client relationship: *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 [Lee] at para. 32. Once established, solicitor-client privilege applies to all communications made within the framework of the solicitor-client relationship: *Lee* at para. 32, citing *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at p. 893; *Maranda v. Richer*, 2003 SCC 67 [Maranda] at para. 22.

[69] In this case, there is evidence of communications between legal counsel, Rob Botterell, and his client, Cowichan Tribes, at the Treaty Committee meetings. There is evidence that some of those communications entailed seeking and giving legal advice as Cowichan Tribes retained Mr. Botterell to advise on matters such as treaty negotiations, the pursuit of rights and title, and the strategic use of oral history information.

[70] Although a solicitor-client relationship existed at the Treaty Committee meetings, the evidence does not permit a conclusion that the specific communication at issue, that of the oral history referred to in the August 2005 Letter, was made within the framework of that

solicitor-client relationship. It is not clear what the context of disclosure was for this particular communication and whether it entailed the seeking or giving of legal advice. Evidence setting out the context of the communication is imperative because not every communication in the solicitor-client relationship falls within the ambit of privileged communication, such as instances where counsel was not acting in its professional capacity: Maranda at para. 30.

- [71] Solicitor-client privilege does not confer protection simply because a solicitor is involved or present: *Nelson and District Credit Union v. Fiserv Solutions of Canada Inc.*, 2017 BCSC 1139 at para. 52. The evidence in this case does not establish exactly when the communication was made, who made it, and whether legal counsel was even present at that particular meeting. Even if Mr. Botterell was present, as Mr. Botterell was also a Treaty Committee member, it cannot be presumed that he was acting in the capacity of legal counsel at all times during the Treaty Committee meetings, or that the specific communication at issue entailed seeking or giving legal advice.
- [72] The plaintiffs have failed to meet their onus in establishing the communications were made within the context of the solicitor-client relationship or were for the purpose of giving or seeking legal advice. As a result, the communications are not protected by solicitor-client privilege.

Settlement Privilege

- [73] Settlement privilege is another type of class privilege that "extends to documents and communications created for or communicated in the course of settlement negotiations between the parties. The privilege protects such documents and communications whether or not a settlement is actually reached: *Thomas v. Rio Tinto Alcan Inc.*, 2019 BCSC 421 at para. 75 [Thomas].
- [74] The following elements of settlement privilege are set out in *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2008 BCSC 442 at para. 70:
- a) A litigious dispute must be in existence or within contemplation;
 - b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations fail; and
 - c) The purpose of the communication must be to attempt to effect a settlement.
- [75] The mere existence of a dispute or potential dispute does not give rise to settlement privilege. The privilege arises only where litigation is commenced or contemplated. Litigation can be said to be reasonably contemplated when a reasonable person, with the same knowledge of the situation as one or both of the parties, would find it unlikely that the dispute will be resolved without it: *Ross River Dena Council v. Canada (Attorney General)*, 2009 YKSC 4 at paras. 41-42.

- [76] Many of the communications at the Treaty Committee meetings were made for the purposes of treaty negotiations. The affidavit evidence states that treaty negotiations arise in order to avoid future litigation. The litigious dispute in contemplation is the question of Cowichan Tribes' claims to land. If the negotiations are unsuccessful, a reasonable person, with the same knowledge as Cowichan Tribes, would find it unlikely that the dispute regarding land would be resolved without litigation. I find that the first element of the settlement privilege test has been established.
- [77] As to the second element, the Treaty Committee is comprised of Cowichan Tribes members and staff for the purpose of strategizing about treaty negotiations and, if necessary, litigation. According to the evidence of Eamon Gaunt, information shared and disclosed in Treaty Committee meetings is not shared with other HTG member bands, the public, the Crown, or any other outside entities. Should the contents of the discussion about Aboriginal rights and title be disclosable in any subsequent litigation, Mr. Gaunt deposes that it would severely hamper the ability of Cowichan Tribes Treaty Committee to operate. If members knew that those discussions would eventually be disclosable to the Crown or the community, it would be difficult for members of the Treaty Committee to discuss strengths and weaknesses of Cowichan Tribes' own positions.
- [78] Settlement privilege is not limited to communications exchanged by counterparties in settlement negotiations but may extend to undisclosed internal discussions undertaken by one party about the settlement negotiations they are engaged in: Thomas at para. 80; Concord Pacific Acquisitions Inc. v. Oei, 2016 BCSC 2028 at para. 52. Therefore, in this case settlement privilege may apply to the internal communications of the Treaty Committee.
- [79] The Treaty Committee has a mandate to oversee and provide direction on all aspects of Cowichan Tribes' treaty negotiations, which includes strategizing about negotiations and litigation. Generally speaking, communications at the Treaty Committee meetings are made in confidence for the purpose of informing Cowichan Tribes' positions in treaty negotiations and litigation with British Columbia and Canada to resolve the litigious dispute regarding land. Given the Treaty Committee's mandate, it is quite possible that many communications made in the context of the Treaty Committee meetings were for the purpose of attempting to effect a settlement regarding the land question. However, there is insufficient evidence to ascertain whether the purpose of the oral history referred to in the August 2005 Letter was an attempt to effect a settlement. Nor does the evidence show that the communication was respecting "settlement generally" or the "terms of settlement as they developed." For that reason, on the evidence before me, I am unable to conclude that the communication at issue is protected by settlement privilege.

Case-by-case Privilege

- [80] Case-by-case privilege refers to communications for which there is a prima facie presumption that they are not privileged. A determination about whether a context-specific communication should be privileged is decided in each case: Gruenke, at 290-291.
- [81] Wigmore's four criteria for establishing confidentiality at common law was first adopted by the Supreme Court of Canada in Slavutych v Baker, [1976] 1 S.C. R. 254 at 260. They are as follows:
- (1) The communications must originate in confidence that they will not be disclosed.
 - (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
 - (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
 - (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
- [82] The party seeking to protect the communication from disclosure must demonstrate that the authors of the communications possessed expectations of confidentiality: Northwest Organics, Limited Partnership v. Roest, 2017 BCSC 673 [Roest] at paras. 52-53; Yahey at para. 16.
- [83] The court in Roest held that the Wigmore criteria are not "carved in stone" but are a "general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case": Roest at para. 50; R. v. National Post, 2010 SCC 16 at para. 53.
- [84] Case-by-case privilege may restrict disclosure where Wigmore's four criteria for establishing confidentiality at common law exists. Those criteria seek to balance the protection of confidential communication with the public interest in the correct disposal of litigation: P. (V.) v. Linde, [1996] 2 W.W.R. 48 at para. 25.
- [85] In Yahey, Justice Burke applied the Wigmore criteria to preserve the confidentiality of interviews with elders and community members undertaken in the course of traditional use studies. The court concluded that it must apply these criteria to such interviews in a manner sensitive to the unique legal and constitutional context of the duty to consult, which is underpinned by the honour of the Crown and reconciliation, and involves reciprocal duties on the Crown and First Nations to participate in good faith in the consultation process.
- [86] The context of this case is analogous to Yahey. This application must also be "viewed in the context of the Crown's constitutional duty to consult and deal honourably with First Nations". This context includes Cowichan Tribes' reciprocal duty to "express its interests and concerns regarding potential impacts to its rights, and to consult in good faith" and

recognition of the fundamental importance of reconciliation between the Crown and First Nations in this process: *Yahey* at para. 18; *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 1.

Case-by-case Privilege and Cowichan Tribes Treaty Committee Meetings

- [87] Regarding the first Wigmore criterion, the general communications within the Treaty Committee meetings originate in a confidence that they will not be disclosed. Mr. George deposed that he learned the oral history of his elders during confidential meetings of the Cowichan Tribes Treaty Committee which were conducted with an expectation that the information would not be disclosed. However, the case-by-case privilege analysis must be applied specifically to the oral history referenced in the August 2005 Letter that was communicated at the Treaty Committee meetings. For case-by-case privilege, the case has to be made for specific communications and the circumstances, not its membership in a class: *Vancouver Airport Authority v. Commissioner of Competition*, 2018 FCA 24 at para. 47.
- [88] Evidence regarding the expectation of confidentiality on the part of the communicator in relation to the specific communication is required. Otherwise, there is a risk that case-by-case privilege will be transformed into a class privilege: *Roest* at paras. 51 and 55.
- [89] The evidence supports a finding that the members of the Cowichan Tribes Treaty Committee believed that their communications were made in confidence and that they would not be disclosed, thereby fulfilling the first Wigmore criterion.
- [90] The second Wigmore criterion is fulfilled. Maintaining the confidentiality of Indigenous oral history disclosed to Treaty Committee members is essential for Cowichan Tribes' ability to adequately participate in the treaty process, speak freely about settlement options, and develop its position.
- [91] I find that the third Wigmore criterion is also fulfilled. The relationship between members of the Cowichan Tribes and its leadership that allows for good faith negotiation between Cowichan Tribes and the Crown should be sedulously fostered. Good faith negotiation is preferable to litigation as a means of achieving reconciliation between the Crown and Indigenous claimants: *Haida Nation v. British Columbia*, 2004 SCC 73 at para. 14; *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 186. As Mr. Gaunt deposed, "for First Nations, the decision to ratify a treaty will come from the people. It is essential that the same people who will ratify the treaty support the organization which is negotiating on their behalf."
- [92] Regarding the fourth Wigmore criterion, I find that there is a public interest in upholding reconciliation embedded in s. 35 of the Constitution Act: *Yahey* at para 24. Therefore, there is also a public interest in protecting First Nation's internal and confidential communications made for the purpose of engaging in treaty negotiations. The probative value of the evidence that would be obtained from the cross-examination of Mr. George regarding this oral history would be very low. Mr. George does not recall many significant

details regarding the oral history. The minimal benefit gained for the correct disposal of this litigation is outweighed by the injury to the relation between community members, Cowichan Tribes and the Crown as well as the public interest.

[93] The test for case-by-case privilege has been met in this case.

Case-by-case Privilege and TMUOS

[94] The communications made over the course of the Project Interviews, for the purpose of developing the TMUOS, fulfills the first condition of the Wigmore criteria. The following factors support a finding that the interviewees communicated the knowledge in confidence that it will not be further disclosed:

- a) Assurances of confidentiality were given to the interviewees prior to the information being collected, except to the extent indicated on the consent forms. The consent forms provided an option for the interviewees to consent to the use of their name, title, and a quote in any publications that may result from the research. The interviewees consented to sharing a very narrow aspect of the interviews that does not go to the substance of the information they provided. Signing the consent forms did not negate the interviewees' expectation of confidentiality.
- b) The individuals involved in preparing the TMUOS agreed to the "same strict terms of confidentiality as is required of Cowichan Tribes' staff."
- c) Traditional knowledge is "highly confidential, sensitive information" that is rarely disclosed outside of the community.
- d) TERA Environmental Consultants used information from the Project Interviews to prepare a Traditional Marine Resource Use Report. The report states that travelways, plant gathering locations, hunting site locations, fishing site locations, and all information pertaining to sacred areas were reported by community members of Cowichan Tribes to be confidential. In other words, the community members asserted an intent of confidentiality over the contents of the Project Interviews.

[95] The second Wigmore criterion has been fulfilled. Protecting the confidentiality of traditional knowledge and information provided by elders and knowledge holders is essential to maintaining a relationship of trust between the Cowichan Tribes' band administration and members of the community. Community members were reluctant to participate in the TMUOS as the project's tight timeline did not allow for appropriate protocol and caused a level of suspicion. Without the assurance of confidentiality, community members may refuse to participate in similar future studies.

[96] I find the third Wigmore criterion has been fulfilled. The "constitutional principles of the duty to consult establish that the relationship ought to be sedulously fostered in order to protect reconciliation and the reciprocal process of consultation between the Crown and First Nations":Yahey at para. 24. Cowichan Tribes requires evidence of traditional use and

potential adverse effects that a project might have on asserted Cowichan Nation Aboriginal rights or title in order to engage in consultation with the Crown. Resource users and knowledge holders must be willing to share their knowledge in order for Cowichan Tribes to meaningfully carry out their constitutional duty to consult in good faith with the Crown.

- [97] The fourth Wigmore criterion has also been fulfilled. I find that the disclosure of confidential communications made for the purpose of Cowichan Tribes' engagement in constitutionally-mandated consultations with the Crown would result in harm to the collection of traditional knowledge for future studies, the s. 35 consultation process, and to reconciliation as a whole.
- [98] British Columbia submits that the public interest in the correct disposal of litigation regarding Aboriginal rights and title outweighs the risk of injury due to the finality of the claim and impacts on third parties. However, this ignores the public interest that also rests in both the Crown's fulfilment of the constitutionally-mandated duty to consult and avoiding "harm to the functioning of reconciliation": Yahey at para. 24.
- [99] Cross-examining Mr. George on the Project Interviews would have little benefit to the truth-seeking function of the Court. Mr. George does not have direct, specific knowledge regarding the Project Interviews. The evidence adduced from cross-examination would be hearsay. The harm to the relationships necessary for consultation processes outweighs the minimal probative value that would be adduced from the cross-examination of Mr. George.
- [100] In this case, the four Wigmore criteria for case-by-case privilege are met. While the constitutional context regarding the duty to consult in this case is analogous to Yahey, I agree that Yahey does not stand for the general proposition that evidence from the Project Interviews and TMUOS can never be disclosed. Rather, the evidence of the particular case must be relied on to determine if the Wigmore criteria are met.

Waiver of Privilege

- [101] British Columbia submits that, even if privilege is established, the plaintiffs' reliance on oral histories to establish use and occupation of the land constitutes an intention to waive privilege over all oral histories regarding the area in and around the South Arm of the Fraser River.
- [102] The evidentiary burden to demonstrate waiver of privilege rests with the party asserting waiver. Waiver is established where the possessor of the privilege "(1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege": *Sauvé v. Insurance Corporation of British Columbia*, 2010 BCSC 763 at para. 21. Waiver may also be implied where it would be unfair or inconsistent for a party to benefit from reliance on privileged communications while also seeking to shield them from disclosure: *Ross River Dena Council v. Canada (Attorney General)*, 2016 YKSC 51 at para. 21.

[103] British Columbia has not met its onus to establish waiver. The plaintiffs are not evincing an intention to rely on, or benefit from, the evidence they claim to be privileged. They are not seeking to adduce evidence about the substantive content of the Treaty Committee discussions. Nor do they seek to rely on the substantive content of TMUOS or some interviews conducted for the TMUOS while shielding other interviews from disclosure. Rather, they adduced evidence of oral history from other sources. This does not constitute a waiver of privilege on all oral history regardless of the source of the communications.

Conclusion

[104] I find that the question of what Mr. George learned in Cowichan Tribes Treaty Committee meetings regarding oral history of Cowichan Tribes elders about fishing on the Fraser River is disallowed as the answers it would elicit are privileged.

[105] I also find that the information Mr. George learned through his involvement in the TMUOS process is privileged.

[106] Mr. George will not be recalled to testify on these points.

"B. M. Young, J."

The Honourable Madam Justice Young

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