

CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 164

COURT

Supreme Court of British Columbia

DECIDED

4 February 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 164 Cowichan Tribes v. Canada (Attorney General) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cowichan Tribes v. Canada (Attorney General), 2020 BCSC 164 Date: 20200204 Docket: 14-1027 Registry: Victoria Between: Cowichan Tribes, Squxulenuhw, also known as William C. Seymour Sr., Stz'uminus First Nation, Thólmen, 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 Oral Reasons for Judgment Counsel for Plaintiffs: D. M. Rosenberg, Q.C. D. M. Robbins J. T. Riddell Counsel for Defendant Attorney General of Canada: S. Vigneau J. A. Rosenthal Counsel for Defendant Her Majesty the Queen in right of the Province of British Columbia: G. R. Thompson C.A.M. Jarawka Counsel for Defendant City of Richmond: B. B. Olthuis Counsel for Defendant Musqueam Indian Band: C. Y. Sharvit K. Shupe Counsel for Defendant Tsawwassen First Nation: G. Plant, Q.C. Place and Date of Trial/Hearing: Victoria, B.C. February 4, 2020 Place and Date of Judgment: Victoria, B.C. February 4, 2020 NOTE TO READER: These oral reasons were delivered in court. I have taken the liberty of editing them for grammar and clarity but not content. Some of the page number references to the transcript have been corrected. Where I had paraphrased excerpts from the transcript I have replaced those with a direct quote.

- [1] THE COURT: Yesterday I heard further submissions on the appropriateness of the plaintiffs' re-examination questions. I had ruled on that objection on January 17, 2020. Since then, all the parties have had an opportunity to review transcripts from days 67 and 68 and have provided me with more fulsome objections. Richmond was not present on January 17, 2020 to address the objection and made submissions to me yesterday. British Columbia's objection is really a reiteration of their initial objection with further details. Nonetheless, I have agreed to examine the transcripts in detail, which I did not have the opportunity to do on January 17, 2020. My ruling on January 17, 2020 was based on the impressions that I had

drawn from British Columbia's cross-examination of Dr. Kennedy on the differences between her 2013 working draft and the final report in 2019.

- [2] On January 17, 2020, I expressed surprise at the existence of the 2014 report. Had I paid more close attention to the letter of instruction attached to the 2019 report, I should not have been surprised. However, the paragraph of that letter had not made an impression on me. Clearly it had not made an impression on British Columbia either because we did stand down to confirm that they had actually received the 2014 report.
- [3] I am potentially creating a dangerous precedent by reopening objections that have already been argued. It certainly is not my intention to permit this on a regular basis. I am permitting it on this occasion for a few reasons. Firstly, and frankly, I wanted an opportunity to see if the impressions that I had arrived at from the cross-examination had foundation in the evidence from those two days of transcript. Secondly, Richmond was not present and did not have an opportunity to raise objections on that day, and thirdly, no legal foundation was argued and I wanted to take a look at the law and see if I stood by my ruling.
- [4] On January 17, 2020, at page 4, line 31, in response to the objection of British Columbia and Tsawwassen, the plaintiff counsel Mr. Rosenberg said that he would illustrate through Dr. Kennedy and the transcripts how she had been misled in cross-examination and correct it or make sure the record is correct on what actually occurred, which was the purpose of re-examination. He submitted that in 28 locations, British Columbia and Richmond suggested to Dr. Kennedy she had changed her opinion because the client became Cowichan Nation comprised of five bands, and she changed her opinion accordingly. He submitted that they (the defendant counsel for British Columbia) kept saying to her time and time again, here is what you said in 2013 and look how it changed in 2019. Never did they put to Dr. Kennedy that actually in 2014 when she was still only representing Cowichan Tribes, she had reached that opinion.
- [5] Mr. Rosenberg submits that it was very misleading and improper, attacking the credibility of the witness, suggesting that she had changed her opinion for the wrong reasons and he was entitled to go back and correct the misrepresentation that the misleading line of question had led to. He offered authorities on the point, but unfortunately I did not ask him to follow through, and I will do so in the future.
- [6] In re-examination, Mr. Rosenberg asked Dr. Kennedy if the suggestion made to her by the defendants that she had changed her opinion because of the change in clients was true and she said no. At that point Mr. Rosenberg sought to mark the 2014 report as an exhibit proper. Mr. Thompson objected and said if it was marked, then the 2013 working draft should also be marked because it appears they should be read together. I deferred ruling on that point.

- [7] Mr. Thompson objected to the imputation that the cross-examination questions were in some way misleading. The point in his cross-examination was whether or not there was a change, and there was nothing suggesting that there was some deliberate misleading of the witness.
- [8] In response, Mr. Rosenberg submitted that it was not necessary to accuse Mr. Thompson of deliberately misleading the witness. The point is that the witness had been put in a position where it has been suggested to her that as a result of the change in the lawyers' clients who retained the law firm, she changed her opinion, and that was put to her time and time again. He submitted it was misleading because the court was of the impression that the 2013 draft was a draft of the 2019 main report when, in fact, it was a rough draft and that there was a 2014 report.
- [9] In my oral ruling I said I was quite surprised that morning to find out that there was a 2014 report. I had the impression from the cross-examination that Dr. Kennedy wrote a rough draft and then changed it recently in the final report in 2019. I concluded that it was fair to give the plaintiff an opportunity to bring to my attention each entry where the change was made shortly after the 2013 draft so that I had the full picture.
- [10] Before I set out what I had found in the transcripts from day 67 and 68, I will touch on the law which was not argued on January 17, 2020. Although I did make a reference to Dr. Kennedy's prior consistent statement, I did not make any reference to rebutting allegations of recent fabrication or recent concoction. The law as it relates to self-serving evidence is set out in *Sopinka and Lederman and Bryant*, and I am relying on the 2014 edition at page 407 which cites *R. v. Stirling*, [2008] 1 S.C.R. 272, and in it, it says: There is a general exclusionary rule against the admission of self-serving evidence to support the credibility of a witness unless her credibility has first been made an issue. A witness may not repeat her own previous statement concerning a matter before the court. Contradictory statements may be used against a witness, but you are not entitled to give evidence of statements on other occasions by witnesses in confirmation of her testimony.
- [11] And there are, of course, exceptions: When credibility is impeached, a prior consistent statement may be permitted for the purpose of bolstering the witness's credibility by showing consistency with her testimony and not evidence of the truth of the contents of the earlier assertion. That can only be done to rebut allegations of recent fabrication. If in cross-examination a witness account of some incident is challenged as being a recent invention, he or she may support himself or herself in evidence of earlier statements made to the same effect. The evidence is only used to bolster credibility and not for truth of contents. The imputation of recent fabrication need not be expressed but may be implied or arise implicitly from the whole of the circumstances of the case.
- [12] And for that last assertion, I am citing *R. v. Campbell* (1977), 38 C.C.C. (2d) 6 at para. 17 where Mr. Justice Martin from the Ontario Court of Appeal said the following: I accept the proposition that an express allegation of recent fabrication in cross-examination is not

necessary before the exception with respect to rebutting an allegation of recent fabrication becomes operative, and that a suggestion that the accused's story has been recently been contrived may also arise implicitly from the whole circumstances of the case, the evidence of the witnesses who have been called and the conduct of the trial. Where the circumstances are such as to raise the suggestion that the accused's evidence is a recent fabrication, counsel may properly anticipate the allegation of recent fabrication in cross-examination, and examine the accused in chief with respect to previous statements to other persons, prior to being cross-examined. And I am not going to include the citations.

- [13] The language of this evidentiary ruling needs some tweaking to apply to the situation before me. Clearly no one is accusing Dr. Kennedy of lying or fabricating evidence, but there has been a suggestion that she formed an opinion in 2013 and changed that opinion in 2019. My review of the transcripts lead me to conclude that there was a suggestion implied, perhaps not expressly articulated, that the change in opinion had something to do with the change in the identity of the clients. This suggestion is set up by an introduction of the two retainer letters. It is picked up by Dr. Kennedy, who said that she expanded her view when the number of plaintiffs expanded.
- [14] Although not being called a liar, Dr. Kennedy has been accused of changing her opinion. A change of opinion by an expert affects the credibility of that expert, which of course is the whole purpose of the cross-examination. The first hurdle of the test has been met. Through cross-examination Dr. Kennedy's credibility was potentially impeached with references to prior inconsistent statements. Although there is no direct accusation of recent fabrication, there is an inference that the changes occurred after the 2018 retainer letter was sent to her. Whether it was an intentional reference or not, it was certainly the one that I picked up on and which the plaintiff is permitted to address in re-examination. Therefore, I think the evidentiary exception to permit references to prior consistent statements in order to bolster the witness's credibility by showing consistency with her testimony is applicable to this scenario.
- [15] Before I review some examples in the transcript, I want to address Mr. Rosenberg's allegations that the plaintiff and Dr. Kennedy was misled and that there was a form of impropriety by the defendants. On January 17, Mr. Rosenberg said he did not accuse Mr. Thompson of deliberately misleading the witness, but it was suggested to the witness that her change of opinion was as a result of the change of client. On February 3rd, Mr. Rosenberg did accuse the defendants of improper and misleading cross-examination. Counsel for the Province and Richmond objected to his characterization.
- [16] I reviewed the cross-examination of Mr. Thompson and of Mr. Olthuis and I see no intentional misleading of the witness or impropriety. The witness was repeatedly shown prior inconsistent statements she made in 2013 which is appropriate cross-examination. Mr. Thompson was under no obligation to put a prior consistent statement to the plaintiff's witness. This is the job of plaintiff's counsel. Given that plaintiff's counsel did not object, Mr. Thompson continued with the line of questioning uninterrupted. The credibility of the

expert was potentially impeached and whether or not it was intentional, there was a suggestion that the change was made after the 2018 retainer letter.

- [17] I do caution Mr. Rosenberg to be careful with his use of language. His allegation of impropriety has not been borne out by the evidence. That language should only be used in rare occasions where it is clearly applicable and not used as a common figure of speech. Re-examination does not require proof of impropriety or intentionally misleading the witness. It should be permitted to enable a witness to explain and clarify relevant testimony which may have been weakened or obscured in cross-examination. And that is from Sopinka and Lederman again at page 118. It is also permitted to rehabilitate the credibility of a witness which may have been impaired in cross-examination, which includes the right of a witness to explain or clarify discrepancies between her in evidence in chief and cross-examination. It may entail introduction of a previous consistent statement to rebut the suggestion that the witness's evidence has been recently contrived.
- [18] The case law does not define "recent," but I conclude a suggestion or an inference picked up by the witness that her opinion changed after the 2018 retainer letter constitutes a recent change.
- [19] Now I will briefly review those entries in the transcripts which I think are particularly relevant to this ruling.
- [20] On Day 67, in the first five pages of the transcript, Mr. Thompson cross-examined Dr. Kennedy on the two retainer letters she received. In 2013 she was retained to provide an opinion on behalf of Cowichan Tribes. In 2018 she was retained to provide an opinion on behalf of Cowichan Tribes, Chemainus First Nation, Penelakut Tribe and Halalt First Nation. In 2013, she prepared a working draft and it was not brought to our attention that she was being asked to revise a 2014 report. For the purpose of this ruling, it is not necessary for me to go through each and every difference between the 2013 working draft and the 2019 report.
- [21] At Day 67, page 20, when questioned about the language of Kwantlen being referred to as a dominant river-based survivor in 2013 but not in 2019, Mr. Thompson said at line 42: You did use the same sources. ... you simply took the time to think about it more and just revised your opinion? The use of the words "and just" suggests a recent change, whether that was intended or not. At Day 67, page 23, lines 36-40, he also asked: So then in 2019 obviously you changed it to "particularly the Cowichan" and you didn't explain why that changed your opinion. You put an emphasis on the Cowichan in 2019 that was not there in 2013. Again, whether intended or not, this line of questioning does suggest a recent change.
- [22] At Day 67, page 32, lines 13-16, Mr. Thompson said: So what I'm curious about is you've also expanded the group because you're talking about in 2013 Cowichan Tribes, smaller entity, and in 2019 you're talking about a much larger entity.

- [23] Further down, Day 67, page 32, lines 46-47, and page 33, lines 1-5, he said: Q I'm interested in the change in the entity because in 2013 you were stating that the Cowichan Tribes held those rights you're describing. A M'mm-hmm. Q. And then in 2019 you say all those plaintiff groups hold those rights.
- [24] Dr. Kennedy responded that she only had to focus on Cowichan Tribes at the time, and I assume she meant 2013. That was all she was asked to address. The same right could be held by a larger group, but that was not the question that was asked. The question and answer tie the change in opinion to the change in the retainer.
- [25] Again Day 67, page 36, lines 45 - 47, and also going onto page 37, lines 1-4, Mr. Thompson asked, again referring to the Cowichan as a single group in 2013: In 2013 again you're referring to the Cowichan -- you're referring to the Cowichan as the single group. And in 2013 you seem to refer to the Cowichan as referring to groups, plural. And we've been through this. So the fact is that your expansion of that is to do with what? That you were asked a different question? Again, this reference infers that the change of opinion was due to the change in the retainer.
- [26] At Day 67, page 41, lines 15-18, Mr. Thompson said: But I'm just curious. You make a distinction here between residents -- the nonresidents, rather, in 2013 and now you're saying most people in 2019. So what is the basis for that change? I interpret this again as an inference of recent change.
- [27] At Day 67, page 43, lines 34-38, Mr. Thompson says: I'm curious about this in that you've clearly indicated that they lived mostly on Vancouver Island in 2013. Now you've just changed to 2019 to have basically permanent residence in both locations. I interpret this again to be an inference of recent change.
- [28] At Day 67, page 48, lines 4-11, Dr. Kennedy was asked: ... in 2013 you're talking about Cowichan assumption of fishing rights on the main river, and in 2019 you mentioned continuing control on the south arm. So you appear to have moved from Cowichan assuming those rights to the Cowichan continuing those rights over a longer period. This is an inference in my view to a recent change of opinion.
- [29] At Day 67, page 55, lines 44-47, Mr. Thompson said: So what you've done here between the two reports is in 2013 you're making a distinction between the Cowichan and Penelakut, and in 2019 you seem to be grouping members together. First of all when he refers to 2013 report, he is referring to the working draft, and secondly, I interpret this to be an inference of recent change.
- [30] On Day 68, at page 5, lines 30-33, Mr. Thompson says: In the 2019 report you removed the dates in reference to Jason Allard's Hul'q'umi'num mother and HBC father. That suggests again a recent change.

- [31] On Day 68, at page 20, lines 10-13, Mr. Thompson says: In the 2019 report you added that the Penelakut are residing on the south arm of the Fraser. That wasn't something you put in the 2013 report ... The question suggests a recent change, although the answer does not because Dr. Kennedy said she changed her opinion over the course of the six years.
- [32] On Day 68, page 20, at lines 32-38, Mr. Thompson suggested that: Q So this is a bit of an expansion between 2013 and 2019; correct? A Well, yes. The plaintiffs have expanded. I now have to consider the interests of all these contemporary First Nations and tribes, and so I'm paying more attention to the Penelakut and the others. This answer appears to connect the recent change to the 2018 retainer letter. Dr. Kennedy was re-examined on the 2014 report and it appears that that change occurred in 2014.
- [33] On Day 68, page 24, lines 39-42, again Mr. Thompson is suggesting Dr. Kennedy changed her thinking between 2013 and 2019, which suggests a recent change.
- [34] On Day 68, at page 27, lines 26-31, in reference to a footnote related to Professor Suttles' Penelakut polity work, Mr. Thompson said: And you had at that point quoted Professor Suttles on that issue, and it appears now that in 2019 you're adopting Professor Suttles from '98. In 2013 it seemed you were adopting Professor Suttles from 1995. Does that seem fair? I have placed emphasis on the word "now" in this ruling because it does suggest a recent change of opinion.
- [35] So those are all of the excerpts that I thought particularly relevant to this ruling. I did review briefly Day 70 as well and did not come up with any examples. I do not think any further examples are necessary. I do conclude the re-examination was appropriate. "B. M. Young, J." The Honourable Madam Justice Young

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/01/2020BCSC0164.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/cowichan-tribes-v-canada-attorney-general-2020-bcsc-164>

Prepared on 27 October 2026 · Esheria