

CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 1660

COURT

Supreme Court of British Columbia

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2020 BCSC 1660 Cowichan Tribes v. Canada (Attorney General)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cowichan Tribes v. Canada (Attorney General),

2020 BCSC 1660

Date: 20201105

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' Application for Responses to Interrogatories from the Vancouver Fraser Port Authority

Counsel for the Plaintiffs:

S. A. Morgan and M. B. Bendle

Counsel for Defendant

Attorney General of Canada:

M. L. French

Counsel for Defendant

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

K. J. Phillips

Counsel for Defendant

City of Richmond:

No appearance

Counsel for Defendant

Vancouver Fraser Port Authority:

R. W. Grant, Q.C.

Counsel for Defendant

Musqueam Indian Band:

M. L. Macaulay and A.M.J. Wilson

Counsel for Defendant

Tsawwassen First Nation:

G. Plant, Q.C.

Place and Date of Trial/Hearing:

Victoria, B.C.

October 7 - 9, 2020

Place and Date of Judgment:

Victoria, B.C.

November 5, 2020

Introduction

- [1] In this Aboriginal rights and title case, the plaintiffs claim fishing rights on the south arm of the Fraser River and land on the southern portion of Lulu Island, defined by the plaintiffs as the Lands of Tl'uqtnus. The larger areas which are occupied by Canada or its agent the Vancouver Fraser Port Authority ("VFPA") and which include the claim area are referred to as the Federal Tl'uqtnus Lands.
- [2] There are two applications before the court. First, the plaintiffs apply for an order that the VFPA answer questions and produce documents which the plaintiffs submit are relevant and material to the Attorney General of Canada's ("Canada's") justification defence and in particular the element of minimal impairment. Second, Musqueam Indian Band ("MIB") applies for an order that the following strategic land acquisition plans not be produced in this action: a report entitled "Industrial Land Acquisition Strategy for Port Metro Vancouver" prepared by Urban Systems and Site Economics, 2014 ("2014 Land Report"), and a report entitled "Land Acquisition Strategy - Final Report" prepared by UMA Engineering Ltd. doing business as AECOM, Cushman Wakefield and LePage, and Novacorpo Consulting, 2008 ("2008 Land Report").
- [3] Canada, the Province of British Columbia ("British Columbia") and the City of Richmond ("Richmond") take no position on either application.
- [4] The procedural history of these applications is as follows. Mr. Tom Corsie, a representative of the VFPA, was examined for discovery about the need for port infrastructure on the Federal Tl'uqtnus Lands. He was asked what made the Federal Tl'uqtnus Lands area uniquely positioned to be a port. Mr. Corsie disclosed that he had written a number of strategic land acquisition plans and targeted areas throughout the region which might be suitable for expansions of existing marine terminal areas or industrial areas. The purpose of the plans was to identify strategic acquisitions for long-term needs and growth of the port. Mr. Corsie was asked to produce the strategic land acquisition plans. The VFPA objected to this disclosure primarily on grounds that it was not relevant and secondarily that the strategic land acquisition plans were highly confidential.
- [5] On June 27, 2019, I ordered disclosure of the strategic land acquisition plans in an oral decision reported at *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 2465 ("June 2019 Order"). In that ruling I agreed with the submission of the plaintiffs that the strategic

land acquisition plans may be relevant to the issue of justification. The VFPA claimed that it was necessary to acquire the Federal Tl'uqtinus Lands because there was no other suitable land in the centre of the region. In coming to that assertion, the VFPA relied on its strategic land acquisition plans which the plaintiffs said they were entitled to review. Whether or not there are or were lands within the VFPA's jurisdiction which would be suitable for the purpose that the claim area is being used is relevant to the issue of justification and minimal impairment. I agreed that alternative lands would not likely be within the claim area thus expanding the scope of relevancy outside of the claim area. I found that an inquiry into necessity was a broader inquiry when asking the defendant if there were no other suitable lands which could have been selected for the purpose for which the claimed land was being used.

- [6] Addressing the issue of confidentiality, the plaintiffs were willing to, and have entered into a confidentiality agreement in order to protect the commercial interests of the VFPA. The impact of that confidentiality agreement on the rights of other parties and the right of the public to open court was a concern of the court.
- [7] The VFPA was the only party who opposed the June 2019 application. I heard no submissions from Richmond, MIB and Tsawwassen First Nation ("TFN") on the issue confidentiality. I directed that, if the confidentiality agreement included terms excluding any party from the courtroom or access to the documents, then that party had to also consent to the confidentiality agreement. The VFPA was granted leave to apply for further direction if consent could not be obtained.
- [8] Rather than entering into a confidentiality consent order, the VFPA provided the 2014 Land Report and the 2008 Land Report (collectively, the "Land Documents") to counsel for the plaintiffs on a temporary counsel-eyes-only basis so counsel could consider whether the Land Documents were relevant. Counsel for the plaintiffs determined that the Land Documents were material to Canada's justification defence and returned the documents to the VFPA requesting a draft confidentiality order.
- [9] The VFPA requested that the examination on the Land Documents occur by way of interrogatories rather than examination for discovery. The plaintiffs and the VFPA agreed to proceed in this manner with counsel for the plaintiffs reserving the right to proceed by examination for discovery should the interrogatory process prove insufficient.
- [10] The delay in providing the interrogatories and providing responses to interrogatories is not material to these reasons.

- [11] On June 26, 2020, the VFPA circulated to all parties a draft consent order setting out terms to govern the use of the Land Documents and addressing other matters including discovery. MIB submits that it had no knowledge that the Land Documents had been already disclosed to plaintiffs' counsel and that they contained information pertaining to MIB. MIB and TFN object to the release of the Land Documents and information about confidential negotiations which will be prejudicial to their relationship with the VFPA.
- [12] MIB applies to vary the June 2019 Order and seeks an order that the Land Documents shall not be produced in this action. TFN also submits that the court should vary the June 2019 Order and order the return of the Land Documents to the VFPA. Neither MIB nor TFN opposed the June 2019 Order when it was made. They submit that the application material did not give any indication that MIB or TFN's interests would be affected by production of the Land Documents.

Plaintiffs' Position on Interrogatories

- [13] The plaintiffs submit that the interrogatories are relevant. The plaintiffs seek a declaration that the descendants of the Cowichan Nation have Aboriginal title to the Lands of Tl'uqtnus and that the Crown grants of fee simple interest in the Lands of Tl'uqtnus infringe the Cowichan Nation's Aboriginal title to these lands. They plead that Canada or its agent the VFPA holds or controls the Crown granted fee simple interest in relation to roughly 700 acres of Cowichan Nation Aboriginal title lands and that Canada has adversely interfered with and continues to interfere with the exercise of Cowichan Nation Aboriginal title to the Land of Tl'uqtnus.
- [14] Canada admits that the VFPA is an agent of Her Majesty in right of Canada and that it carries out port activities on the Federal Tl'uqtnus Lands. Canada says that should the plaintiffs establish Aboriginal title to the Lands of Tl'uqtnus and Canada's infringement then the onus shifts to Canada to justify the infringement. Canada must establish that it consulted with the descendants of the Cowichan Nation and reasonably accommodated their Aboriginal title. Among other things, Canada must show that the Crown's infringement is consistent with the Crown's fiduciary duty toward the Aboriginal group which requires the Crown to satisfy its obligation of proportionality which imports the concept of rational connection, minimal impairment, and proportionality of impact: *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 at paras 85-87.
- [15] In its December 18, 2015 response to demand for particulars, Canada pleads that any incursion on the plaintiffs' claim to Aboriginal title occurred in pursuit of an objective of building port infrastructure to facilitate the general economic development of the Province of British Columbia and Canada and went no further than necessary to achieve those goals.

- [16] The plaintiffs asked the VFPA how it had pursued opportunities to work with First Nations such as TFN and MIB to create industrial lands. The VFPA indicated that it had entered into agreements with eleven First Nations communities, had entered into a memorandum of understanding with TFN and was in negotiations with MIB. However, VFPA declined to answer interrogatories that would provide details of the First Nations partnerships or negotiations, claiming that the information is irrelevant and confidential.
- [17] The plaintiffs submit that they require the details of the VFPA's arrangements with other First Nations in order to be able to counter any potential argument that Canada and the VFPA's continued ownership of the Lands of Tl'uqtnus is necessary. The plaintiffs submit that they need to direct the court to analogous circumstances where the VFPA has been involved in the development of lands for port infrastructure without owning the underlying lands.
- [18] The plaintiffs argue that Rule 7-2(18)(a) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 requires a person being examined for discovery to answer any questions within his or her knowledge or means of knowledge regarding any matter, not privileged, relating to a matter in question in the action. The plaintiffs argue that this is the test that applies in this case because the plaintiffs and the VFPA agreed to proceed with examination for discovery on confidential matters through written interrogatories. Canada pleads that development of port infrastructure on Federal Tl'uqtnus Lands was proportionate in that it was necessary to achieve the government's goals and went no further than necessary. Therefore, the plaintiffs submit that Canada must show something unique about the Federal Tl'uqtnus Lands that requires the VFPA to continue to hold, control and obtain economic benefits from these lands for the building of port infrastructure.
- [19] The plaintiffs say that if the VFPA is willing to work with other First Nations to increase industrial land supplied for port purposes on terms that do not include First Nations' surrender of land or control over that land to the VFPA, or that do include economic benefits flowing to First Nations for the use of the land for port purposes, then this undercuts Canada's argument that its infringement of Aboriginal title goes no further than necessary to achieve its objectives of building port infrastructure.

Position of the VFPA

- [20] The VFPA has stated repeatedly and openly that it is able and willing to enter into agreements with First Nations over the use of lands. The VFPA representative Mr. Duncan Wilson deposes in his affidavit at para. 28:

The VFPA has made clear in its public statements and its conduct that it is ready, able, and willing to enter into agreements with indigenous communities for their mutual benefit, provided that the agreements are economically and commercially feasible for the VFPA. This does not, however mean that it will be possible to reach an agreement with every First Nation on the specific use of specific lands. Whether or not an agreement can be concluded depends entirely

upon the character, concerns, interests, aspirations, and objectives of the particular First Nation with respect to the specific use of the specific lands at issue.

- [21] Mr. Wilson deposes that the VFPA has entered into dozens of agreements with numerous Indigenous communities. Apart from agreements with TFN, the agreements do not involve Aboriginal title or transfer of an interest in land.
- [22] The VFPA challenges this application on the basis of relevance. They submit the plaintiffs have failed to explain how the details of discussions, negotiations and agreements with other First Nations could have anything to do with Canada's defence of justification. They submit that each Indigenous community is unique and discussions, negotiations and agreements with one First Nation does not assist in understanding, assessing or predicting discussions, negotiations and agreements with other First Nations communities.
- [23] Further, the VFPA submits that even if the documents are marginally relevant they should not be disclosed because of privacy and confidentiality concerns. Documents related to negotiations and agreements would contain financial analysis, strategic planning, assessments of alternatives and negotiation strategies. The disclosure of such documents would therefore reveal much of the VFPA's analysis, strategy and approach to negotiation and would place it at an enormous disadvantage in future negotiations with the plaintiffs and other Indigenous communities.

Position of MIB

- [24] MIB applies to the court to re-open and vary the June 2019 Order and opposes the plaintiffs' application for further and better responses to interrogatories.
- [25] Regarding the June 2019 Order, MIB says it did not oppose the order when it was granted because it was unaware that production of the Land Documents would affect its interests. MIB says that the VFPA failed to notify it that MIB reserve lands and MIB's negotiations with the VFPA were referenced in the Land Documents. As MIB took no position on the application, the court did not have the benefit of MIB's submissions on the irrelevance of the documents, the prejudice that MIB would suffer if the documents were disclosed to the plaintiffs, and how MIB's interests should weigh in the balance in the application.
- [26] MIB says it is in the interests of justice for the court to re-open the June 2019 Order and direct the plaintiffs to return the Land Documents to the VFPA, or alternatively, to order that all references to MIB or information pertaining to MIB's interests be redacted and to provide MIB with copies of the documents on the same basis that they are provided to the plaintiffs.
- [27] MIB submits that judges of this court have inherent jurisdiction to revoke, vary and re-open orders. The June 2019 Order has not been entered and MIB says that the court remains seized of the matter and is not functus officio: *Lochhead v. Lochhead*, 2011 BCSC 1662 at para. 15. MIB submits that the fundamental consideration for the court when considering whether to exercise discretion to vary an order is that no miscarriage of justice should occur

as a result of the use of discretion: *Sykes v. Sykes*, [1995] 6 B.C.L.R. (3d) 296 (C.A.). In this case, MIB submits that there was a change in circumstances because a year after the application was heard, MIB became aware that its interests were implicated. New evidence has come to light, including evidence about prejudice to MIB as a result of disclosure of the Land Documents. MIB says that the new information supports varying the June 2019 Order.

- [28] MIB also relies on Rule 13-1(17) of the Supreme Court Civil Rules which describes the court's authority to correct a clerical mistake in an order arising from an accidental slip or omission, or to amend an order to provide for any matter that should have been but was not adjudicated on.
- [29] MIB submits that the documents contain highly sensitive commercial and economic information about MIB lands. MIB acknowledges that parties may be compelled to produce that kind of information in litigation but the information must be relevant to justify a production order. In this case, MIB says that the documents are irrelevant, or at best, of marginal relevance and little probative value. Any probative value the documents may have is outweighed by the harm MIB will suffer if the information is provided to a third party. Further, MIB says it is significantly prejudiced by the VFPA's disclosure of the information to plaintiffs' counsel while denying MIB access to the information on the same confidentiality terms.
- [30] MIB says that the public interest weighs in favour of protecting the relationship between MIB and the Crown, and that MIB's relationship with the VFPA as agent of the Crown is essential to encourage MIB's economic development in the name of reconciliation. To promote this aim, there must be trust between the VFPA and MIB. Disclosure of the information to third parties negatively impacts the relationship between MIB and the VFPA by decreasing the trust between them, risking negatively impacting future negotiations.
- [31] Regarding the plaintiffs' application for further and better responses to interrogatories, MIB opposes the granting of the application, except in relation to interrogatories 18, 19 and 57. The interrogatories are examination on the Land Documents, and seek confidential information, such as information about negotiations between MIB and the VFPA to situate industrial or logistical sites on MIB reserve lands. The interrogatories were not served on MIB.
- [32] MIB submits that the information sought is irrelevant to the issues in this trial, including the issue of justification and minimal impairment. The question of whether any Crown conduct that infringes the plaintiffs' rights is justified must be decided with reference to the plaintiffs' Aboriginal title and rights, and factual details regarding the VFPA's negotiations with MIB will not make minimal impairment of the plaintiffs' rights more or less probable. The negotiations between MIB and the VFPA will not advance the plaintiffs' case, as the negotiations are based on different land, a different interest in land (reserve lands as opposed to claimed aboriginal title land) and between different parties.

- [33] MIB says that to the extent the negotiations have any relevance, it is marginal at best and the prejudice to MIB outweighs any probative value that information may have. The questions seek details about negotiations between MIB and the VFPA that are conducted in the context of the Crown's duty to consult and accommodate MIB. Requiring disclosure of information about confidential negotiations would undermine MIB's ability to have candid discussions with the VFPA, damage MIB's relationship with the Crown, and damage MIB's economic development prospects. Given that the information sought is of no relevance or of marginal relevance, MIB submits that the court should decline to order the disclosure sought.

Position of TFN

- [34] TFN opposes the plaintiffs' application for further and better responses to interrogatories from the VFPA on the basis that the information is irrelevant and its disclosure would be prejudicial to TFN. The interrogatories demand sensitive and confidential information and documents regarding VFPA's discussions, ongoing negotiations and agreements relating to use of TFN's lands for port facilities. Although the interrogatories affect TFN and its interests, the interrogatories were not served on TFN.
- [35] TFN argues that there is no legal authority for the plaintiffs' assertion that information about the Crown's negotiations with other First Nations is relevant to whether the Crown's actions in respect of the plaintiffs' claim were minimally impairing. To the contrary, the case law is clear that the justification analysis is highly contextual and specific to the claiming nation and the land at issue. TFN relies on *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 at para. 201 where the court held that the approach under s. 35(1) is highly contextual and cited *R. v. Sparrow*, [1990] 1 S.C.R. 1075 for the proposition that the "justificatory standard must be defined in the specific factual context of each case".
- [36] Further, TFN says that the interrogatories are crafted such that they are unlimited in scope, and as a result they are impermissibly vague and overbroad. Rule 7-2 of the Supreme Court Civil Rules requires that the information demanded must be relevant and the questions must be clear. TFN says that the interrogatories do not meet these requirements and that the principle of proportionality does not allow for "catch-all" requests.
- [37] TFN submits that it would be prejudiced by broad disclosure of confidential information about its ongoing relationship with the VFPA. The relationship between the Crown (and its agent the VFPA) is complex and evolving, and requires that the work done between the parties remain confidential. TFN emphasizes that the plaintiffs are not seeking information from purely commercial actors, but instead from parties who have a constitutionally enshrined relationship that is worthy of protection by the court.
- [38] TFN also takes the position that the Land Documents should not have been disclosed and submits that the court should vary the June 2019 Order. Like MIB, while TFN had notice of the plaintiffs' application for production of the documents, TFN took no position at the time because it says it was unaware that the documents referred to confidential matters involving

TFN. TFN says the court ordered production of the documents without the benefit of submissions from TFN. TFN relies on the decision in *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287 for the proposition that a trial judge may revisit evidentiary rulings made during a trial. TFN has never seen the unredacted documents. To the extent the Land Documents relate to matters between TFN and the VFPA, TFN says they are irrelevant to the issues in this trial.

Plaintiffs' Position on Varying the June 2019 Order

- [39] The plaintiffs oppose the application to vary the June 2019 Order. MIB and TFN had notice of the application that resulted in the order and they did not oppose it. The plaintiffs say that the application materials expressly indicated that the plaintiffs were seeking documents about other lands, outside the Lands of Tl'uqtinus, that the VFPA had considered for the situation of port infrastructure. Further, the plaintiffs submit that it appears that at the time both MIB and TFN were in negotiations with the VFPA about situating port infrastructure on their lands.
- [40] The plaintiffs say that the Land Documents contain information that is confidential to the VFPA, not MIB or TFN, as they contain the VFPA's assessment of strategic options, internal views and analysis. Nor do they contain information about ongoing negotiations with MIB and TFN, but are rather forward-looking strategy documents about potential acquisitions.
- [41] The plaintiffs submit that applications for reconsideration are extraordinary. There must be a prospect of a miscarriage of justice before the court will reconsider an order and reconsideration is not an opportunity to re-litigate the issue: *Speckling v. Local 76 of Communications, Energy and Paperworkers' Union of Canada*, 2019 BCSC 960. The plaintiffs say that MIB and TFN's argument that new information has come to light that the Land Documents contain confidential information about their lands and interests is not new evidence that would or could have affected the outcome of the June 2019 application. This information came to light as a result of the June 2019 Order and the fact that it resulted in the disclosure of relevant evidence shows that it was properly made. Further, the plaintiffs submit that MIB and TFN had sufficient information at the time of the June 2019 application to raise the concerns they are raising now.
- [42] The plaintiffs take no position regarding whether the Land Documents should be produced to MIB. However, the plaintiffs submit that the Land Documents should not be redacted to remove references to MIB and MIB's interests. The plaintiffs say that if part of a document is relevant, the whole of the document must be produced, with limited exceptions: *0878357 B.C. Ltd. v. Tse*, 2012 BCSC 516 at para. 28. The plaintiffs submit that the information in the Land Documents about MIB is relevant because it demonstrates that the VFPA is willing to consider situating port infrastructure on land it does not own.

Ruling on Application to Vary the June 2019 Order

- [43] Judges of this court have the discretion to re-open, vary or revoke orders that have not been entered, although this discretion should be exercised sparingly. In *Klebe v. Klebe*, 2020 BCSC 577 [Klebe] at para. 33 Justice Shergill described the law as follows: "It is well established that a trial judge has unfettered discretion to re-open an issue before formal judgment has been entered, though this discretion should be exercised sparingly and with the greatest of care to avoid an abuse of the court's processes." The overriding objective in permitting a re-opening is to prevent a miscarriage of justice: *Klebe* at para. 34, citing *Grewal v. Grewal*, 2016 BCCA 237. Further, the court must also consider whether a rehearing is likely to change the result.
- [44] A potential miscarriage of justice can occur for a wide variety reasons, including where there has been a change in circumstances between the date of the order and the time of the application to re-open, and before the order has been entered: *Cheema v. Cheema*, 2001 BCSC 298 at para. 17. The court may also exercise its discretion to re-open in circumstances where new evidence has come to light: *Klebe* at para. 37; *Sykes*.
- [45] The June 2019 Order is a pre-trial order that I made following the plaintiffs' application for disclosure of the Land Documents. The VFPA relied on an assertion by Mr. Corsie that there are no other lands within the VFPA's jurisdiction which would be suitable for the purpose for which the claimed land is being used. Based on that reliance, I concluded that the Land Documents are material to this defence and declined to restrict the scope of relevancy to the claim area given the assertion of necessity. My initial determination as to the relevance of the Land Documents is unchanged.
- [46] Regarding MIB and TFN's submissions that they were denied the opportunity to make submissions at the June 2019 application, I note that both MIB and TFN have indicated that they have been engaged in discussions with the VFPA in relation to port infrastructure. The notice of application seeking production of the Land Documents was served on all parties and showed that the plaintiffs were seeking documents and information relating to land, outside of the claim area, that the VFPA was considering for the possible development of port infrastructure. This evidence should have been sufficient to alert MIB and TFN to the prospect that the June 2019 application might engage their interests. Although MIB and TFN did not make submissions at the time, I ordered that the VFPA was required to provide the Land Documents to the plaintiffs once a confidentiality agreement was reached. To the extent the agreement included terms which excluded any party from access to the documents, I ordered that that party must consent to the confidentiality agreement. This was to protect the interests of the parties who did not appear.
- [47] On this application, TFN and MIB made lengthy submissions as to the prejudice they would suffer should the Land Documents be disclosed. At the June 2019 hearing, I did not have the benefit of TFN and MIB's submissions as to the impact the disclosure of the confidential information in the Land Documents would have on the relationship between the VFPA and

MIB, and the VFPA and TFN. I agree that disclosure of confidential negotiations between the VFPA and MIB or TFN may prejudice that relationship. This prejudice can be addressed through redaction of information related to confidential negotiations in the Land Documents.

- [48] Although I find that any prejudice to MIB or TFN is not sufficient to set aside the June 2019 Order in its entirety, I do find that there are grounds to reopen the June 2019 Order to add additional conditions to protect the confidentiality interests of MIB and TFN.
- [49] The VFPA shall deliver to counsel for MIB and TFN the unredacted Land Documents on a counsel-eyes-only basis on the same conditions as they were produced to counsel for the plaintiffs.
- [50] Counsel for MIB and TFN will advise counsel for the VFPA of any reactions they say are necessary to protect the interests of their clients. I offer some guidelines for redactions below.
- [51] The redactions need not exclude all references to MIB and TFN but should exclude any details of confidential negotiations between the parties.
- [52] The fact that the VFPA is willing to negotiate with First Nations groups and the details of completed agreements are not confidential and have some relevance in illustrating potential options which may or may not be available to the plaintiffs.
- [53] The details of the VFPA's negotiations, financial analysis, and negotiation strategy are confidential. This kind of information will not prove or disprove a material fact in this action, and the potential harm to the relationship between the VFPA and MIB, and between the VFPA and TFN, is a good reason to allow the redactions: 0878357 BC Ltd. v. Tse, at para. 28. Although marginally relevant, I find the prejudice of disclosing this information outweighs any probative value.
- [54] Once the redactions have been agreed to between the parties then the parties must determine whether a confidentiality agreement would still be necessary prior to the disclosure of the redacted Land Documents. If so, all parties must consent to the terms of that confidentiality agreement before the document can be relied on.

Ruling on the Plaintiffs' Application for Answers to Interrogatories from the VFPA

- [55] I turn now to the plaintiffs' application for further and better responses to interrogatories. The interrogatories are primarily an examination of the VFPA's representative on the Land Documents. Excerpted and redacted copies of the 2014 Land Report and the 2008 Land Report are attached as Exhibits D and E, respectively, to Affidavit #17 of Sarah McMillan.
- [56] Although heavily redacted, the 2014 Land Report sets out the industrial land acquisition strategy for Port Metro Vancouver (the "Port"). It provides that the purpose of the report is to define the land requirements that would enable the Port to optimize its mandate as the west

coast gateway for Canadian imports and exports. The 2014 Land Report discloses the characteristics of the kinds of sites that the VFPA is considering acquiring and also provides that opportunities to work with First Nations are being considered. The 2014 Land Report includes a specific reference to MIB lands, although the details are redacted.

- [57] The 2008 Land Report describes the Port's land acquisition strategy and sets out guiding principles and an acquisition framework to encourage targeted land acquisitions for the long term sustainability of the Port. It provides that a source of new industrial lands could be through partnerships with First Nations. It includes specific reference to TFN, as well as specific reference to other First Nations communities. The 2008 Land Report states that partnerships with First Nations will become more critical over time to ensure that the land base necessary to support port operations and throughput is secured.
- [58] Duncan Wilson is the Vice President, Environment, Community and Government Affairs for the VFPA and has sworn an affidavit in support of the VFPA's opposition to this application. He acknowledges that the VFPA has entered into dozens of agreements with numerous Indigenous communities. He emphasizes that each Indigenous community is separate and distinct with unique cultures, interests, aspirations and needs. The fact that the VFPA has entered into an agreement with one First Nations community does not mean that it will successfully conclude an agreement with another. He provides evidence that disclosure of documents related to negotiations and agreements which contain financial analysis, strategic planning, assessment of alternatives and negotiation strategies would place the VFPA at an enormous disadvantage in future negotiations with the plaintiffs and other Indigenous communities.
- [59] Mr. Wilson expresses a concern about damage to the relationship between the VFPA and other Indigenous communities. Many Indigenous communities would not negotiate with the VFPA if they believe confidential information will be disclosed.
- [60] The VFPA has made it clear in public statements that it is willing to enter into an agreement with Indigenous communities for their mutual benefit provided the agreements are economically and commercially feasible for the VFPA.
- [61] In Mr. Wilson's view, the outcome of any negotiation with Cowichan over the use of lands subject to the claim would depend entirely on the position taken by Cowichan and not any previous agreement negotiated between the VFPA and other Indigenous communities.
- [62] My conclusion is that the relevant and material evidence is that the VFPA is willing to negotiate with Indigenous communities. The plaintiffs should be able to explore this evidence as it relates to whether there were and may continue to be alternative suitable sites available to the port for the purposes for which the claimed lands are currently being used. That evidence is relevant to the minimal impairment test in the justification defence. In that regard, requests about the VFPA's mandate to negotiate with First Nations are relevant.

- [63] I accept Mr. Wilson's statement that the fact that the VFPA has entered into an agreement on specific terms with one First Nation community does not mean that it will do so with the next. I agree that the details of negotiations with other First Nations are contextual, may not be probative of any particular issue and merely illustrate a range of possible outcomes. For that reason, I find that the details of the negotiations between the VFPA and First Nations groups generally are not particularly relevant or probative to this case. I accept Mr. Wilson's concern that disclosure of confidential information exchanged in the course of negotiations between the VFPA and Indigenous communities has the potential to negatively impact the relationships between the VFPA and Indigenous communities.
- [64] The VFPA should not be required to disclose details of its financial analysis, strategic planning or its negotiation strategies. However, documents which demonstrate that the VFPA has assessed the suitability of other land for the purposes for which it uses the claimed land are relevant and must be produced.
- [65] While I agree that the defence of justification must be looked at in the broader sense beyond the geographic parameter of the claim area, I do not agree that requires an examination of confidential negotiations with other First Nations. These details are of only marginal relevance. The disclosure of those details would be harmful to VFPA's ability to negotiate in a competitive market and may discourage First Nations from entering into negotiations.

The Interrogatories

- [66] I will now address each interrogatory. In the plaintiffs' reply and response submissions dated September 18, 2020, the plaintiffs modified their interrogatories and proposed alternatives. The difficulty I have with this procedure is that the VFPA did not have an opportunity to respond to the modified interrogatories. Therefore I will refer to the original interrogatories and responses to those original interrogatories. To the extent that the interrogatories are examination on portions of the Land Documents which are redacted pursuant to the above order, the VFPA is not required to provide a response.

Confidentiality Provisions in Agreements

- [67] Where the VFPA is required to produce agreements with First Nations communities in response to any of the interrogatories below, to the extent any of those agreements contain confidentiality provisions, the VFPA may apply to the court for an order that the agreements be redacted before they are produced.

Interrogatory 14

- [68] Interrogatory 14 provides:

The 2014 Industrial Land Acquisition Strategy identifies as Target Site D1, "Musqueam near Delta Port", [] (p. 6 of the 2014 Industrial Land Acquisition Strategy; see also pp. 106-107). Is the VFPA pursuing acquisition or lease of this target site? What is the status of any such negotiation? Produce any relevant documents relating to Target Site D1.

The VFPA responded that the VFPA is in discussions with Musqueam on IR no. 4 in Delta. The VFPA stated that the status of those discussions is not relevant and is confidential and that there is not really any documentation to produce.

[69] I find that the VFPA is not required to answer any questions or produce any documents that relate to the confidential details of ongoing negotiations.

Interrogatory 15

[70] Interrogatory 15 provides:

Has the VFPA been in negotiations, or is the VFPA currently in negotiations, with Musqueam Indian Band or a Musqueam Indian Band-controlled entity about the situation of industrial or logistical sites on Musqueam Indian Band reserve land? If yes, please produce relevant documents, including any finalized agreements.

The VFPA responded that discussions over MIB reserve land are not relevant and are confidential.

[71] I find that the VFPA has answered the first part of this question in its answer to Interrogatory 14. The VFPA is directed to produce any finalized agreements but the VFPA is not required to produce confidential details of negotiations.

Interrogatory 17

[72] Interrogatory 17 provides:

Is an impact benefits agreement, or other form of agreement (including lease and partnership agreements), being negotiated between Musqueam Indian Band or a Musqueam Indian Band-controlled entity and the VFPA, any of its subsidiaries, or the federal Crown in relation to the VFPA port or industrial activities? If yes, please produce relevant documents.

The VFPA responded that any such agreements would not be relevant and are confidential.

[73] The VFPA is directed to answer yes or no to the first part of the question but is not required to produce the confidential details of ongoing negotiations.

Interrogatory 18

[74] Interrogatory 18 provides:

Does the VFPA, any of its subsidiaries, or the federal Crown have any agreement(s) in place with Tsawwassen First Nation or a Tsawwassen First Nation-controlled entity in respect of port or industrial activities on Tsawwassen-controlled or owned land? This includes, but is not limited to, any lease, impact benefits agreement, or form of partnership agreement. If yes, please produce a copy of any such agreement.

The VFPA answered "2004 MOA (a copy is on TFNs web site)" and that any other agreements would not be relevant and are confidential.

[75] The VFPA has answered the interrogatory in part but is directed to answer whether there are any other completed agreements. If the answer is in the affirmative and the agreements are finalized, then the VFPA is ordered to produce copies of any agreements subject to the terms set out in this ruling.

Interrogatory 19

[76] Interrogatory 19 provides:

Is an impact benefits agreement, or other form of agreement (including lease and partnership agreements), being negotiated between Tsawwassen First Nations or a Tsawwassen First Nations-controlled entity and the VFPA, any of its subsidiaries, or the federal Crown in relation to the VFPA's port or industrial activities? If yes, please produce relevant documents.

The VFPA responded that any agreements would not be relevant and are confidential.

[77] The VFPA is directed to answer the first part of the question but is not required to produce any confidential negotiation information.

Interrogatory 41

[78] Interrogatory 41 provides:

Is the VFPA working with First Nations such as Musqueam Indian Band and Tsawwassen First Nation to create industrial land? (See page 69 of the 2014 Industrial Land Acquisition Strategy.) If so, how?

The VFPA responded that the information is not relevant and is highly confidential.

[79] The VFPA is ordered to answer the first part of the question. If any agreements have been finalized, then the VFPA is required to produce those agreements subject to the terms set out in this ruling. If the VFPA is in negotiations with First Nations, then the VFPA does not have to reveal the confidential details of those negotiations.

Interrogatory 42

[80] Interrogatory 42 provides:

Has the VFPA ever entered into a joint venture or partnership with a First Nation for the development of port facilities or infrastructure (including development of industrial lands suitable for logistics facilities)?

The VFPA responded that the information is not relevant and is highly confidential.

[81] The VFPA is ordered to answer this question.

Interrogatory 57

[82] Interrogatory 57 provides:

What does the VFPA know about the status of the 330 acre area and Tsawwassen First Nation's land use plan that is designated for industrial use, as identified at p. iii of the 2008 Land Acquisition Strategy - Final Report?

The VFPA responded that this information is not relevant and is confidential.

[83] The VFPA is ordered to answer this question. If any final agreements are reached with respect to this 330 acre area they are to be disclosed subject to the terms set out in this ruling. The VFPA is not obliged to disclose confidential negotiations.

Interrogatory 58

[84] Interrogatory 58 provides:

Does VFPA agree with the statement at p. iv of the 2008 Land Acquisition Strategy - Final Report, that "Partnerships with First Nations [] will become more critical over time to ensure that the land base required to support port operations and throughput is secured"? What, if anything, has the VFPA been doing on these fronts?

The VFPA responded in the affirmative to the first question, and that the details of the VFPA's actions are irrelevant and highly confidential.

[85] I order that the details of the VFPA's actions should only be produced if agreements have been concluded. There is no obligation for the VFPA to disclose the details of confidential negotiations.

Interrogatory 61

[86] Interrogatory 61 provides:

To what extent has the VFPA pursued the option to "work in partnership with First Nations to create industrial land for port related uses," as identified at p. 27 of the 2008 Land Acquisition Strategy - Final Report?

The VFPA responded that the information is not relevant and is highly confidential.

[87] I order that the VFPA answer this question provided they can do so without disclosing any confidential negotiations.

"B. M. Young, J."

The Honourable Madam Justice Young

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