

CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 1968

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1968 Cowichan Tribes v. Canada (Attorney General) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cowichan Tribes v. Canada (Attorney General), 2020 BCSC 1968 Date: 20201211 Docket: 14-1027 Registry: Victoria Between: Cowichan Tribes, Squxulenuhw, 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 Admissibility of Memoranda and Letters from Cowichan Tribes re Protocol to Fish Counsel for Plaintiffs: D. M. Rosenberg, Q.C. D. M. Robbins A. G. Murphy DJ Larkin J. T. Riddell B. R. Martin Counsel for Defendant Attorney General of Canada: S. Vigneau M. L. French G. L. Angrove P. Cassidy M. P. Seebaran M. Eng (Articled Student) Counsel for Defendant Her Majesty the Queen in right of the Province of British Columbia: G. R. Thompson K. J. Phillips D.K.B. Dempster Counsel for Defendant City of Richmond: B. B. Olthuis T. Bant Counsel for Defendant Vancouver Fraser Port Authority: R. W. Grant, Q.C. C. Bant (Articled Student) Counsel for Defendant Musqueam Indian Band: M. L. Macaulay M. Pongracic-Speier, Q.C. A.M.J. Wilson Counsel for Defendant Tsawwassen First Nation: G. Plant, Q.C. S. Gyawali Place and Date of Trial/Hearing: Victoria, B.C. December 3 and 4, 2020 Place and Date of Judgment: Victoria, B.C. December 11, 2020

Introduction

- [1] The defendant Musqueam Indian Band (MIB) seeks admission of the following documents: Exhibit 1171 - Memorandum dated July 28, 1999 from Wayne Paige to Chief X'tli'li ye re Protocol; Exhibit 1172 - Memorandum dated October 26, 2001 from Wayne Paige to John Elliot, Stz'uminus First Nation; Exhibit 1175 - Letter dated July 28, 1999, from Chief X'tli'li ye to Chief Ernie Campbell, Musqueam; and Exhibit 1178 - Letter dated July 4, 2000 from Wayne Paige to Ernie Campbell, Fisheries Commission, Musqueam First Nation.

- [2] The defendant Tsawwassen First Nation (TFN) seeks admission of the following document: Exhibit 1179 - Letter dated July 28, 1999 from Chief X'tli'li ye to Tsawwassen First Nation, attention Mike Baird re protocol to fish in Tsawwassen territory. (Collectively "the Documents")
- [3] The plaintiffs object to admitting the Documents for the truth of their contents, but do not object to their admission for non-hearsay purposes.
- [4] For the reasons set out below, I find that the Documents should be admitted as an exception to the hearsay rule as admissions by representatives of a party who were acting within the scope of their employment by that party. It is still within the power of the plaintiffs who are still leading evidence to call the authors of the Documents if they believe the Documents require further interpretation. The Documents contain statements of fact and not opinion and as such do not need to be adopted by the plaintiffs' witness X'tli'li ye. I do not find it necessary to address the alternative arguments. Parties' Positions
- [5] MIB submits that these documents are out-of-court statements made by a party to the litigation and are admissible at the instance of the opposing party for two reasons. First, Mr. Paige is an employee of Cowichan Tribes and was authorized to coordinate and discuss fishing arrangements with Indigenous groups. Mr. Paige was acting in his capacity as an employee and representative of Cowichan Tribes in relation to the documents at issue and therefore his statements are admissible against Cowichan Tribes. Second, Mr. Paige is also a member of Cowichan Tribes. Cowichan Tribes is a plaintiff in this action and MIB submits that as a member of a represented class, Mr. Paige is a party for the purposes of the rules of evidence. Therefore, Mr. Paige's statements are admissible as admissions of a party.
- [6] TFN submits that the court need not determine whether Mr. Paige is personally a party to this representative action as a result of his membership in Cowichan Tribes. TFN says Mr. Paige was clearly acting in his capacity as an employee of Cowichan Tribes in relation to the documents that he prepared, and that is sufficient to make the documents admissible as statements against interest. In relation to Exhibit 1171, TFN submits that the document does not contain opinion evidence, and that there is no issue with respect to its admissibility on that basis. Any question as to the weight to be attributed to the documents does not affect their admissibility.
- [7] Alternatively, TFN and MIB submit that the documents are admissible as business records under s. 30 of the Canada Evidence Act, R.S.C. 1985, c. C-5 on the grounds that the documents were created in the ordinary course of business in furtherance of the declarant's duties.

- [8] The plaintiffs disagree that the documents are admissible solely on the basis that the authors are members of Cowichan Tribes. The plaintiffs argue that Mr. Paige is not a named plaintiff or a party in these proceedings. The plaintiffs acknowledge that Mr. Paige is a member of the represented group, but argue that is insufficient to ground a conclusion that his out-of-court statements could amount to admissions binding on Cowichan Tribes.
- [9] The plaintiffs submit that in cross-examination, X'tli'li ye had little or no recollection of the documents. X'tli'li ye was able to provide little evidence regarding their contents. The reliability of the documents has not been established. Further, the plaintiffs submit that the documents lack probative value and they disagree with the defendants' characterization of the statements in the documents as admissions against Cowichan Tribes' interests. The plaintiffs say that the documents do not meet the standard required of business records under s. 30 of the Canada Evidence Act. The documents are distinguishable from other documents that the court has admitted as business records in these proceedings, such as meeting notes, as these documents are comprised of internal memorandum and correspondence. The Law Admissions of a Party
- [10] Out-of-court statements made by a party to the proceedings are generally admissible at the instance of the opposing party. The Supreme Court of Canada in *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 24 held that the rationale for admitting admissions is based on the theory of the adversarial system which does not permit a party to complain about the reliability of his or her own statements: The rationale for admitting admissions has a different basis than other exceptions to the hearsay rule. Indeed, it is open to dispute whether the evidence is hearsay at all. The practical effect of this doctrinal distinction is that in lieu of seeking independent circumstantial guarantees of trustworthiness, it is sufficient that the evidence is tendered against a party. Its admissibility rests on the theory of the adversary system that what a party has previously stated can be admitted against the party in whose mouth it does not lie to complain of the unreliability of his or her own statements. As stated by Morgan, "[a] party can hardly object that he had no opportunity to cross-examine himself or that he is unworthy of credence save when speaking under sanction of oath" (Morgan, "Basic Problems of Evidence" (1963), pp. 265-66, quoted in McCormick on Evidence, supra, at p. 140). The rule is the same for both criminal and civil cases subject to the special rules governing confessions which apply in criminal cases.
- [11] Statements made out of court by a representative of a party in his or her capacity as such may also be admissible against the interests of that party: Sopinka, Lederman & Bryant: *The Law of Evidence in Canada*, 5th ed. (Toronto: LexisNexis Canada, 2018) at 6.474; *Ault v. Canada (Attorney General)*, [2007] O.J. No. 4924 (S.C.) (Q.L.) [Ault] at para. 27. Where the statement is made by an agent or employee of the party, there must be proof of agency and proof that the statement was made within the scope of the authority of the agent or employee: Ault at para. 27. The justification for requiring proof of agency and proof that the admission of the agent or employee was made within the scope of his or her agency or employment (rather than requiring that the principal or employer authorized the

statement), is the proposition that the agent or employee is well informed: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCSC 861 [*Cambie Surgeries*] at para. 81.

- [12] In *Cambie Surgeries*, Steeves J. considered the admissions of a party exception and the decision in *Ault* when considering the admissibility of statements made by one employee in the Ministry of Health to a second employee within the Ministry. He concluded that the statement of one employee to another employee of a party may be admissible against that party (at para. 82): It follows from this that a statement made by one employee to a second employee within the Ministry of Health is admissible as against the Ministry so long as it is made within the scope of the first employee's employment.
- [13] Not every out-of-court statement by a party is admissible under the admission of a party exception. Where a statement is based on hearsay or "unqualified opinion", the party whose admission it is must adopt the hearsay statement or otherwise indicate it is true: *Cambie Surgeries* at para. 81, citing *Ault* at paras. 28-29, citing *Morrison-Knudsen Co. v. B.C. Hydro & Power Authority* (1973), 36 D.L.R. (3d) 95 (B.C.S.C.); *R. v. Streu*, [1989] 1 S.C.R. 1521. The statement must also be relevant in that it tends "as a matter of logic and human experience to make the proposition for which it is advanced more likely than the proposition would appear to be in the absence of that evidence": *Cambie Surgeries* at para. 83, citing *Beazley v. Suzuki Motor Corp.*, 2010 BCSC 681 at para. 15, citing *D.M. Paciocco & L. Stuesser, The Law of Evidence* (Toronto: Irwin Law, 1996) at 19.

Analysis

- [14] Three of the documents in question, Exhibits 1171, 1172 and 1178, were prepared by Mr. Paige who was employed as the Fisheries Manager for the plaintiff Cowichan Tribes. Exhibit 1171
- [15] Exhibit 1171 is a memorandum that Mr. Paige drafted to X'tli'li ye on July 28, 1999. X'tli'li ye did not recall seeing it. She testified that Mr. Paige was the Fisheries Manager for Cowichan Tribes. She testified that Mr. Paige would have drafted the document, and that he was authorized to coordinate and discuss fisheries arrangements with other Indigenous groups.
- [16] The memorandum is written in relation to Fraser River sockeye salmon. The memorandum provides that some Fraser River sockeye "will be coming through our area 18 at Pender island, also other first nations will be requesting to harvest sockeye in our Territory". It further provides that "at this time we have 2 requests from Lyackson First Nation and Halalt First Nations to come into our territory" to harvest approximately 7,100 pieces. The memorandum states that "We have to give these Tribes requesting to come into our areas something in writing from yourself of a Protocol agreement." It also provides that Mr. Paige prepared a draft protocol for each of MIB and TFN "for us to go into" their "Territory to Harvest 20,000 Pieces". The memorandum attaches two draft protocols, one addressed to MIB and the other addressed to TFN.

- [17] On cross-examination, X'tli'li ye could not recall whether an area discussed in the document was within the Cowichan Tribes' territory. She testified that, in reviewing the document, she believed Mr. Paige was communicating that he was trying to follow the rules of the Department of Oceans and Fisheries (DFO). X'tli'li ye agreed that there was no reference to DFO on the face of the document.
- [18] MIB argues that this memorandum contains statements which relate to MIB's pleadings which maintain that access to the fisheries was shared on the basis of kinship and reciprocity, pursuant to the Coast Salish system of access resources in the territory of another group. MIB argues that Mr. Paige's description of the requests for access is relevant to that pleading.
- [19] The plaintiffs say the reliability of the memorandum is not established and X'tli'li ye was unable to recall seeing it. The plaintiffs say the court may rely on the direct evidence of X'tli'li ye about what she believes the memorandum was intended to communicate. The plaintiffs say that the memorandum is not properly characterized as an admission because it does not clearly amount to statement against the interests of Cowichan Tribes.
- [20] In my view, Exhibit 1171 is admissible under the admission of a party exception. The document was prepared by the Fisheries Manager of Cowichan Tribes for the Chief of Cowichan Tribes in relation to fisheries arrangements with other Indigenous groups. It is tendered by MIB against Cowichan Tribes, a party in this action. In my view, the fact that the document was prepared by an employee of Cowichan Tribes, acting squarely within the scope of his duties, for the Chief of Cowichan Tribes, runs counter to the plaintiffs' arguments as to the lack of reliability of the document. I agree with the submissions of counsel for TFN that the document does not contain the sort of "unqualified opinion" that could render the statement inadmissible. The plaintiffs' argument as to the meaning of the document and whether it supports the inference put forward by MIB goes to the issue of the weight of the evidence, not its admissibility. Exhibits 1172 and 1178
- [21] Exhibit 1172 is a memorandum dated October 26, 2001 from Mr. Paige to the Stz'uminus First Nation, attention John Elliot, and was copied to X'tli'li ye. On its face, the memorandum relates to a protocol to access chum food fish, and a request from the Stz'uminus First Nation to access fish food in Cowichan Tribes' territories.
- [22] X'tli'li ye testified that she was the Chief of Cowichan Tribes on October 26, 2001 when the memorandum was written. She said she had not seen it before. She testified that she could not be sure whether the memorandum relates to the Stz'uminus First Nation asking Cowichan Tribes for permission to fish chum in the Cowichan River. She did not agree that in making this request, Stz'uminus First Nation was following the traditional protocol. She did not recall whether Cowichan Tribes agreed to Stz'uminus First Nation's request to access chum food fish.

- [23] Exhibit 1178 is a letter dated July 4, 2000 from Mr. Paige addressed to Musqueam First Nation, attention Chief Ernie Campbell. On its face, the letter discusses the approaching sockeye fishery, and states in part, "Please accept this letter as a protocol to access SOCKEYE FOOD FISH in your territory." X'tli'li ye did not recognize the letter and agreed that it appeared to be written by Mr. Paige further to his authority to coordinate fishing arrangements with other Indigenous groups. X'tli'li ye did not agree that in sending this letter, Cowichan Tribes was following traditional protocol to access resources in MIB territory.
- [24] The evidence supports a conclusion that both documents were prepared by Mr. Paige and that Mr. Paige made the statements to Indigenous groups while acting within the scope of his authority as Fisheries Manager during his employment with Cowichan Tribes: Ault at para 27. Therefore, in my view Exhibits 1172 and 1178 are admissible against Cowichan Tribes under the admission of a party exception. Exhibits 1175 and 1179
- [25] Exhibit 1175 is a letter dated July 28, 1999, from X'tli'li ye addressed to Musqueam First Nation, to the attention of Chief Ernie Campbell. The letter states "Please accept this letter from Cowichan Tribes as a protocol to access Sockeye Food Fish in your territory in area 29".
- [26] Counsel for MIB cross-examined X'tli'li ye on the document. On cross-examination, X'tli'li ye testified that she could not recall the letter, although it looked familiar. She testified that she did not draft the letter and was not familiar with the location of fish management areas. She agreed that on the face of the letter, it appeared that she was suggesting at least one of the sub-areas in area 29 was in MIB's territory. She did not agree that in sending the letter Cowichan Tribes was following traditional protocol to access resources in MIB's traditional territory.
- [27] MIB seeks to rely on Exhibit 1175 as an admission that protocol was required to be followed, and was followed, by Cowichan Tribes in 1999.
- [28] Exhibit 1179 is a letter dated July 28, 1999 from X'tli'li ye to TFN, sent to the attention of Mike Baird. The letter states "Please accept this letter from Cowichan Tribes as a protocol to access Sockeye Food Fish in your territory in area 29".
- [29] Counsel for TFN cross-examined X'tli'li ye on the document. X'tli'li ye agreed that getting enough food fish for the Cowichan was a top priority during her time as Chief of Cowichan Tribes, and that she understood when she signed these letters, that meant the people would get food fish. X'tli'li ye agreed that Exhibit 1179 has the same text as the third page of Exhibit 1171.
- [30] TFN seeks to rely on the document for the truth of its contents.
- [31] In my view, Exhibits 1175 and 1179 are admissible under the admission of a party exception. The documents were prepared by employees of Cowichan Tribes, signed by the elected Chief of Cowichan Tribes while acting within the scope of her authority, and communicated to MIB and TFN, respectively. The plaintiffs should not be permitted to maintain a position

that suggests that statements the Chief of Cowichan Tribes made to other Indigenous groups regarding fishing arrangements are not sufficiently reliable to be admitted for the truth of their contents.

- [32] In summary, in my view Exhibits 1171, 1172, 1175, 1178 and 1179 are admissible under the admissions of a party exception to the hearsay rule.
- [33] As the documents are admissible under the admissions of a party exception on the basis that they were prepared by an employee of Cowichan Tribes as part of his functions as Fisheries Manager, or by the Chief of Cowichan Tribes acting within her authority, it is not necessary to consider MIB's submission that the documents also constitute admissions because they were prepared by members of Cowichan Tribes. Nor is it necessary to consider whether the documents are admissible as business records under the Canada Evidence Act. "B. M. Young, J." The Honourable Madam Justice Young

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