

CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 66

COURT

Supreme Court of British Columbia

DECIDED

13 January 2020

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2020 BCSC 66 Cowichan Tribes v. Canada (Attorney General) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cowichan Tribes v. Canada (Attorney General), 2020 BCSC 66 Date: 20200113 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 Oral Ruling re Clarification of July 29, 2019 Ruling Counsel for Plaintiffs: D. M. Rosenberg, Q.C. J. T. Riddell Counsel for Defendant Attorney General of Canada: J. A. Rosenthal Counsel for Defendant City of Richmond: B. B. Olthuis T. Bant Counsel for Defendant Musqueam Indian Band: K. Shupe Counsel for Defendant Tsawwassen First Nation: S. Gyawali Place and Date of Trial/Hearing: Victoria, B.C. January 13, 2020 Place and Date of Judgment: Victoria, B.C. January 13, 2020

- [1] THE COURT: On July 29, 2019, I released a ruling on the plaintiffs' motion to rely on sworn statements. That was reported at 2019 BCSC 1243. In that ruling I accepted that there were two parts to the necessity test. The first is whether the witness is unable to attend trial. Obviously Wesley Modeste is not. I found that the evidence to support the cognitive decline of Mabel Mitchell was lacking and that the plaintiffs did not establish the first part of the necessity test with respect to her. I granted leave to the plaintiffs to adduce better medical evidence to establish her inability to attend trial.
- [2] After the first part of the necessity test has been met, the court is to assess threshold reliability of the evidence. I heard submissions on the threshold reliability at the application in July 2019, and I accepted that Wes Modeste's affidavit had met the threshold reliability test for the following reasons, which were set out in my reasons, but perhaps not clearly enough. Firstly, it is a sworn statement. Secondly, it sets out his personal memory. Thirdly, it sets out oral history which will be subject to the global oral history objection along with all the other

oral history evidence. Fourthly, Mr. Modeste's father was a Chief and was a family orator who presided over ceremonies, so was a man of influence in his community. Fifthly, Mr. Modeste himself was an elected councillor and Chief and therefore, also a respected member of the community.

- [3] For these reasons, I find that the threshold test for reliability and the first part of the necessity test has been met for the Modeste statement.
- [4] I have not made an assessment on the threshold reliability of Mabel Mitchell's statutory declaration, although I did make some comments about it. Those comments should be considered obiter and not a ruling on the threshold reliability.
- [5] The second part of the necessity test is whether the admission of the written statement is necessary to prove a relevant fact in this case.
- [6] I found that I cannot rule on that until I know what the other plaintiffs' witnesses say, and this will require submissions from counsel after the plaintiffs' evidence is in. I do not see the need to file a further notice of application, but it would be helpful to have counsel circulate outlines of their arguments in advance so everyone is prepared to argue about the necessity of the statement at the end of the plaintiffs' case.
- [7] If the second part of the necessity test is met, I will then need to assess the ultimate reliability at the end of trial.
- [8] The next question is about the timing of when the written statement of Wesley Modeste should be read in. It was my intention to have Mr. Modeste's affidavit read in prior to the oral history objection so that it could be dealt with in that ruling. The exercise of reading the statement does not mean that the ultimate necessity and reliability has been accepted because the objections are still pending, much like they were with the other oral history evidence.
- [9] The word "admissibility", I think, has created some confusion. For example, in para. 92 of the ruling when I said acceptance of "... admissibility is not particularly high. A finding of admissibility does not imply acceptance of the evidence by the trier of fact", it would have been more clear if reworded to say "acceptance of threshold reliability does not imply acceptance of the evidence by the trier of fact."
- [10] On December 16, 2019, at the case management conference, there was some discussion about reading in the affidavit while we are sitting in Duncan so that Mr. Modeste's family could be in attendance. On that day after hearing the proposed schedule, I thought there would be insufficient time to conclude all the viva voce testimony and that the Modeste statement would have to be read in in Victoria but that we could accommodate the family with a video connection. I will not make a firm direction on scheduling until our next judicial management conference, which is on Wednesday. It appears with the new time estimates I received on Friday that we may have enough time to complete the three viva voce witnesses within the two weeks, in which case there would not be time to read in the

Modeste statement in any event, but I will hear more about that on Wednesday.

- [11] So just in conclusion, there are five steps to admitting the written statement. Firstly, the threshold necessity, which has been met for Mr. Modeste, but not for Mrs. Mitchell. Secondly, threshold reliability, which has been met for Mr. Modeste, but not for Mrs. Mitchell. Thirdly, once steps 1 and 2 are met, the statement should be read into the record subject to further objections to oral history evidence contained therein and ultimate necessity of the statement and the timing of that to be determined.
- [12] Fourthly, at the end of the plaintiffs' case all parties will make submissions on whether the statement was necessary to prove a material fact in the plaintiffs' case.
- [13] And then finally, fifthly, at the end of the trial, in closing, all parties will make submissions about the ultimate reliability of the sworn statement.
- [14] Mabel Mitchell's statement has not met any of the above tests, so a continuation of the application must be scheduled by requisition to assess the new affidavit and medical evidence to see if the threshold necessity and threshold reliability tests are met. Counsel should exchange brief outlines of their argument in advance of the hearing of that continuation of the application. "B. M. Young, J." The Honourable Madam Justice Young
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