

CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 949

COURT

Supreme Court of British Columbia

DECIDED

25 June 2020

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2020 BCSC 949 Cowichan Tribes v. Canada (Attorney General) THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cowichan Tribes v. Canada (Attorney General), 2020 BCSC 949 Date: 20200625 Docket: 14-1027 Registry: Victoria Between: Cowichan Tribes Squitxlenuhw, 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 Richmond's Application for Production of Interview Documents from Archives of the Cultural and Education Centre of Cowichan Tribes Counsel for Plaintiffs: D. M. Rosenberg Q.C. S. A. Morgan J. Riddell Counsel for Defendant Attorney General of Canada M. L. French J. E. Tross Counsel for Defendant Her Majesty the Queen in right of the Province of British Columbia: G. R. Thompson Counsel for Defendant City of Richmond: B. B. Olthuis T. Bant S. C. Chaster Place and Date of Trial/Hearing: Victoria, B.C. June 3, 2020 Place and Date of Judgment: Victoria, B.C. June 25, 2020

- [1] The defendant City of Richmond ("Richmond") applies for an order that the plaintiffs list all interview documents (including recordings, transcripts and notes) from the archives of the Cultural and Education Centre of Cowichan Tribes that include any discussion of traditional territory, resource exploitation or the seasonal round, whether or not there is any mention of Tl'uqtinus or the Fraser River.
- [2] The defendant Attorney General of Canada ("Canada") takes no position. The Province of British Columbia supports Richmond's application. The plaintiffs oppose the application.

- [3] On Day 80 of this 400-day trial, Cowichan elder Ernie Elliott testified that Cowichan Tribes has a Cultural and Education Centre ("Centre") which houses an archive of interviews. Some of those interviews were referenced in Daniel Marshall's book *Those Who Fell from the Sky*. That book references 212 taped interviews in the Centre's archive. After Mr. Elliott's testimony, Richmond asked the plaintiffs to identify what, if anything, they had listed from the Centre's archive. The plaintiffs have listed approximately 7 interviews from the archive.
- [4] Richmond submits that an interview with the plaintiffs or any of the plaintiffs' ancestors is relevant if it includes any discussion of Cowichan traditional territory, resource exploitation or the seasonal round, whether or not there is any mention of Tl'uqtnus or the Fraser River.
- [5] All parties agree that an interview that does mention Tl'uqtnus or the Fraser River is relevant; however, Richmond defines relevance more broadly than that. Richmond submits that interviews where elders were asked questions of remote resource exploitation or seasonal round in their traditional territory and failed to mention Tl'uqtnus or the Fraser River could help the defendants disprove facts about the claimed village. They rely on *Benoit v. Canada*, 2003 FCA 236 as an illustration of the principle that an absence of evidence can be evidence of absence. If a Cowichan elder is asked where the Cowichan harvested blueberries and they make no reference to the Fraser River or Tl'uqtnus then the defendants might rely on the absence of a reference to disprove facts about resource harvesting in those locations.
- [6] Richmond submits that the most workable standard of relevance for elder interviews is that an interview is *prima facie* relevant if it includes any discussion of traditional territory resource exploitation or the seasonal round regardless of whether it makes mention of Tl'uqtnus or the Fraser River.
- [7] British Columbia submits that a judge must consider the Aboriginal perspective including "the laws, practices, customs and traditions of the group" and the "group's size, manner of life technological abilities, and the character of the lands claimed": *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 ("*Tsilhqot'in*") at para. 35. Notably the intensity and frequency of the use may vary with the characteristics of the Aboriginal group. The result is a context specific inquiry that necessarily considers if and how the Aboriginal community utilized territory: *Tsilhqot'in* at para. 37.
- [8] In *R. v. Bernard*; *R. v. Marshall*, 2005 SCC 43, Chief Justice McLachlin explained that Aboriginal perspective varies from case to case but encompasses communal practices and traditions of the claimant group including its manner of life: paras. 48-51. British Columbia submits that if the court focuses on the claim area, to the exclusion of other areas, this puts the court at an analytical disadvantage. To properly assess the plaintiffs' asserted land use practices the court requires a fulsome view of how such practices and traditions may have operated or been implemented throughout the group's entire asserted traditional territory.

- [9] The plaintiffs are not completely opposed to the application because they say that they have produced recordings, interviews or transcripts that bear on seasonal patterns of use and occupation even if the interviews do not relate to mainland use and occupation.
- [10] They oppose an order that they produce interviews about site-specific use of areas outside the South Arm of the lower Fraser River - namely the Gulf Islands and Vancouver Island - where they are unrelated to the seasonal round. It appears to me that the defendants are not seeking this disclosure and that there is very little disagreement between the parties on this application. It appears to me that the defendants are seeking disclosure of interviews where elders were asked open-ended questions as to where the Cowichan harvested in order to see if the elders mention the mainland, Fraser River or Tl'uqtnus. They do not appear to be asking for site-specific use of areas outside the South Arm of the lower Fraser River which are unrelated to the seasonal round.
- [11] In their reply submissions the plaintiffs rely on three rulings I made prior to trial where I limited the scope of discovery to the claim area. In my view those three decisions do not settle this dispute.
- [12] In *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 1107 I denied the plaintiffs' request for the names of the main village sites of the Musqueam before, at and after 1846 according to recognized Musqueam knowledge holders on the basis that Musqueam has not asserted exclusive use and therefore this evidence outside the claim area was not relevant.
- [13] The Cowichan do assert a land claim to the Lands of Tl'uqtnus and therefore, the sufficiency of their occupation of those lands is relevant. If Cowichan elders are asked where their ancestors harvested resources and they make no mention of the Fraser River or the Lands of Tl'uqtnus, then the absence of evidence may support the defence and in that regard it is relevant.
- [14] In *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 2199 I denied an application by the defendant Canada for production of information related to monitoring of food fisheries for each plaintiff nation including food fisheries outside of the claim area. Canada asserted that the ability of the Cowichan to fish for food elsewhere such as on Vancouver Island and the Gulf Islands was relevant to their justification defence. I dismissed the application for various reasons. I did accept that fish catch elsewhere was of marginal relevance but questions about monitoring fish catch outside the South Arm over 13 years was overly broad in terms of location and time. I also found that it was likely this question had already been answered in the affidavit of Mr. Larry George and the documents to which he referred.
- [15] In *Cowichan Tribes v. Canada (Attorney General)*, 2019 BCSC 1608 I denied the defendant Canada's request for information of any Halalt oral history respecting Halalt ancestors' fishing practices on Vancouver Island and the Gulf Islands. I did find that the inquiries Canada made were relevant in the general sense to ascertain how the South Arm of the Fraser fishery fit into the overall fishing practices of the Cowichan but I accepted the plaintiffs' statement that they had already answered that question. I found that a further in-

depth analysis of oral history should only be ordered if the issue was directly relevant to the case. I recognized the difficulty in obtaining oral history which would require new interviews of Halalt elders. I did not find the inquiry to be sufficiently relevant to expend extensive resources to comply in the middle of the trial.

- [16] Each production of documents application has to be determined on its own facts and merits. In the case before me the interviews have already been conducted and are archived in a searchable library. All parties appear to agree that interviews which include discussion of Cowichan traditional territory resource exploitation or the seasonal round are relevant even if they do not mention Tl'uqtnus or the Fraser River.
- [17] In proving the claim to the Lands of Tl'uqtnus the plaintiffs must focus on proving the occupation of the lands themselves and not how the lands were occupied relative to other lands used or occupied by the same Aboriginal group. The plaintiffs are concerned that the defendants are expanding disclosure to a free-ranging general inquiry into the Cowichan Nation's use of all of its territory. The plaintiffs say that unlike in other kinds of Aboriginal rights claims, the requirement of integrality does not arise in relation to proving Aboriginal title.
- [18] The plaintiffs submit and I agree that absence of evidence is evidence of absence only in cases where one would expect the evidence to be there ordinarily.
- [19] If an interview is focused on site specific resource harvesting in the Cowichan Valley then it is not relevant to the Tl'uqtnus land claim.
- [20] If the interview relates to a discussion of all Cowichan traditional territory, resource exploitation or seasonal round then one would expect a reference to Tl'uqtnus or the Fraser River. In that scenario the absence of evidence might be evidence of absence.
- [21] Although it will be time-consuming to review the interviews and determine which ones are relevant, the evidence in the two affidavits before the court on this application indicates that the plaintiffs have already done much if not all of this work.
- [22] I agree with the submissions of British Columbia that there is a danger in the court taking too narrow a focus regarding Cowichan's asserted land use practices at the Lands of Tl'uqtnus or the Fraser River.
- [23] I am not persuaded that Richmond's delay in bringing this application is grounds for dismissing it. As this trial evolves, new issues arise which have not previously been anticipated and need to be addressed in the middle of trial. Disclosure is an ongoing process which likely will continue until the end of trial.

- [24] The order sought requires parameters. Although it is likely implied, the reference to traditional territory resource exploitation or the seasonal round should reference that it is only the Cowichan traditional territory resource exploitation or the seasonal round that is relevant. Further, the applicant is not interested in modern day resource harvesting and some time parameters should be set.
- [25] Accordingly, I order that within 42 days of the pronouncement of this order the plaintiffs shall list all interview documents (including recordings, transcripts and notes) from the archives of the Cultural and Education Centre of Cowichan Tribes that includes any discussion of Cowichan traditional territory, resource exploitation or the seasonal round, whether or not there is any mention of Tl'uqtinus or the Fraser River.
- [26] I have not heard submissions on limiting the time period that the interviews relate to. I believe resource exploitation and seasonal round after 1880 would be of little relevance. If the parties require further direction on time parameters they have liberty to bring this matter back before me by teleconference. "B. M. Young, J." The Honourable Madam Justice Young

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Prepared on 26 October 2026 · Esheria