

CANADA / JUDGMENT

# Cowichan Tribes v. Canada (Attorney General)

2020 BCSC 165

## COURT

Supreme Court of British Columbia

## DECIDED

11 February 2020

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2020 BCSC 165 Cowichan Tribes v. Canada (Attorney General) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cowichan Tribes v. Canada (Attorney General), 2020 BCSC 165 Date: 20200211 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 re Marking Prior Report of Expert as an Exhibit Counsel for Plaintiffs: D. M. Rosenberg, Q.C. D. M. Robbins J. 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 11, 2020

- [1] This is a Ruling on whether Dr. Kennedy's 2014 report (SC14413) which has already been marked for identification as exhibit A203, should be marked as an exhibit proper as requested by plaintiffs' counsel. I requested that the plaintiffs' counsel address the reason for marking the exhibit and the use to be made of the exhibit. Mr. Rosenberg submitted that, in keeping with the case law, the 2014 report is a prior consistent statement in that it is consistent with Dr. Kennedy's tendered 2019 expert report. The plaintiffs are not tendering the 2014 report as opinion evidence or for the truth of its contents. They are tendering the report for admission as an exhibit to establish the credibility of Dr. Kennedy to show that her prior consistent statement rebuts any suggestion of recent fabrication which I addressed in my February 4, 2020 ruling.

- [2] In addition to *R. v. Stirling*, [2008] 1 S.C.R. 272 which I relied on in the February 4, 2020 ruling, Mr. Rosenberg has referred me to three other authorities which consider expert reports to be prior consistent statements. The first case is *Cheeseman v. Credit Valley Hospital*, 2019 ONSC 4996. *Cheeseman* is a medical malpractice case being tried before a jury. There were several evidentiary rulings made in this decision which are not relevant for this ruling. Para. 101 of that decision addresses whether or not an expert report should be given to a jury. Justice Koehnen says that the oral testimony of the expert is the evidence and not the report. He notes that courts have been reluctant to give jurors copies of expert reports on account of rules concerning prior consistent statements. An expert report is a form of prior consistent statement that an examiner in chief can usually not put to the witness. Relying on *R. v. Johnson*, 2017 ONSC 2084 (Ont. C.J.), at paras. 15-17, Justice Koehnen rules that giving the expert opinion to the jurors would put undue weight on the report and diminish the testimony given in chief for cross-examination.
- [3] In *R. v. Johnson*, Justice Boswell of the Superior Court of Justice of Ontario was asked in a jury trial to mark a defence pathologist's expert report as a numbered exhibit. The defence pathologist had given evidence over two days and spent considerable time reiterating his conclusions to the jury. Justice Boswell discusses the reasons why expert reports are not by convention filed as evidence. He says expert reports are in essence, prior consistent statements, with all the attendant baggage that goes along with them. It is not a practice to provide a jury with transcripts or summaries of the evidence of certain witnesses and not others. Filing an expert report as an exhibit would have the effect of emphasizing the evidence of the expert even though the juries are repeatedly told they are just like any other witness.
- [4] In denying the request Justice Boswell emphasizes the prejudice to the defendants if the expert report would be filed because it may not capture the evidence that came out in cross-examination and he was not prepared to order the transcript of the cross-examination. He was concerned about the over-emphasizing of the science behind the aging of injuries. There is a risk that the report may be misused.
- [5] The third authority referred to by Mr. Rosenberg is *R. v. Lehne*, 2019 S.K.Q.B. 314 at para. 77. This is an appeal from a summary conviction. There were ten grounds for appeal. One ground was that the trial judge had erred in admitting an expert report as an exhibit when the expert testified viva voce. Justice Chow cites *R. v. Browne*, 2017 ONSC 5059 (Ont. S.C.J.) where Justice Coroza makes it clear that in the context of a jury trial there is potential prejudice associated with leaving a report with jurors and that prejudice outweighs the identifiable benefit. Justice Chow notes that the same concerns were expressed by Boswell J. in *Johnson*. He distinguishes the two cases because they both deal with jury trials and not judge alone trials. Notice had been given to the Crown in *Lehne* of the defendant's intention to introduce the impugned report. Justice Chow did not find this decision to admit the report to warrant appellant intervention.

- [6] Counsel for British Columbia, Mr. Thompson, objects to having the 2014 report marked as an exhibit proper. He submits that the evidence in re-examination is the evidence the plaintiffs should rely on to rebut any allegations of recent fabrication and that it is not necessary to enter the previous report itself. There is a danger in setting a precedent of entering previous drafts of reports in trials. It is in the form of oath helping. Mr. Thompson emphasizes that admission of this previous draft does not meet the necessity test. The sole purpose of referring to the earlier report was to rehabilitate the witness' credibility. The court should rely on the re-examination testimony and not the prior report.
- [7] Alternatively Mr. Thompson submits that if the 2014 report does go in then the 2013 working draft should also go in. The 2014 report was introduced to contrast it against the 2013 report.
- [8] Mr. Olthuis for the City of Richmond objects to the admission of the 2014 report as an exhibit reiterating the argument that the court should rely on the viva voce evidence from the re-examination of the witness and not the report itself. The report is in excess of 400 pages I am advised. The witness was only re-examined on certain passages. There may be a host of other passages which may not be important or necessary and could be prejudicial if admitted as an exhibit. Analysis and Ruling
- [9] I agree with the submissions of counsel for British Columbia and the City of Richmond that admitting a prior report of the expert who has tendered opinion evidence in this trial could be prejudicial to the defendants. The prejudice arises from admitting 400 pages of the 2014 report which has not been cross-examined on. Even if the report is only being tendered to rehabilitate credibility I do not know whether it is consistent with the 2019 report or whether only the portions re-examined on are consistent. There may be a suggestion in closing argument that two consistent reports are better than one. This prejudicial oath helping gives me some concern. It also circumvents the very strict civil rules of admission of expert reports.
- [10] I find the probative value of the 2014 report to be weak. The only purpose for entering such a report would be to rehabilitate the credibility of Dr. Kennedy after cross-examination about a recent change of opinion between 2013 and 2019. In my view this is been well addressed during her cross-examination and her re-examination and I see no merit in bolstering the rehabilitation by entering the report.
- [11] None of the cases cited by the plaintiffs suggests that a previous consistent statement used to rehabilitate a witness accused of recent fabrication must be admitted into evidence. Rather they suggest a principled approach to admissibility weighing the probative value of the expert report against the potential prejudices.
- [12] Exercising my discretion I find that the report should not be admitted as a proper exhibit. It has already been marked for identification.

[13] Accordingly I have allowed Mr. Rosenberg to continue his re-examination on the differences between the 2013 working draft and the 2019 report. "B. M. Young, J." The Honourable Madam Justice Young

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Prepared on 29 October 2026 · Esheria