

CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2021 BCSC 2497

COURT

Supreme Court of British Columbia

DECIDED

30 November 2021

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2021 BCSC 2497 Cowichan Tribes v. Canada (Attorney General) IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Cowichan Tribes v. Canada (Attorney General), 2021 BCSC 2497 Date: 20211130 Docket: 14-1027 Registry: Victoria Between: Cowichan Tribes, Squxulenuhw, also known as William C. Seymour Sr., Stz'uminus First Nation, Thólmen, also known as John Elliott, Penelakut Tribe, Kwaliimtunaat, also known as Joan Brown, 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 on Leave to Apply to Further Redact Report of Dr. Lovisek Counsel for Plaintiffs: D. M. Robbins T. Kolawole, Articled Student Counsel for Defendant Attorney General of Canada: S. Vigneau G. L. Angrove Counsel for Defendant Musqueam Indian Band: K. Shupe C. M. Clemente Counsel for Defendant Tsawwassen First Nation: S. Gyawali Place and Date of Trial/Hearing: Victoria, B.C. November 16, 2021 Place and Date of Judgment: Victoria, B.C. November 30, 2021

- [1] THE COURT: The plaintiffs brought an application for leave to apply to make further redactions to Dr. Lovisek's fish and land reports on the basis that she is not a properly qualified expert in kinship and has exceeded her qualifications by giving opinions on this point.
- [2] The plaintiffs take the position that the direction made by me on February 9, 2021, at a judicial case management conference gave them latitude to continue to raise objections to the admissibility of the report long after the cross-examination of Dr. Lovisek had concluded. The following history will show those comments were superceded by further direction given on April 16, 2021.
- [3] Having said that, all parties have the right to request leave to apply to reopen an issue such as objections to an expert report if they have been taken by surprise by new evidence. The court will grant leave in exceptional circumstances. No exceptional circumstance arose

here.

- [4] On February 9, 2021, I was addressing the scheduling of a hearing on objections to Dr. Lovisek's qualifications and the admissibility of her reports. The plaintiffs took the position that they should be permitted to fully cross-examine Dr. Lovisek on her report before I heard objections on the admissibility of her reports. I disagreed. I said: I'm not satisfied on what I've heard so far that the plaintiffs require a full cross-examination before they raise objections to the admissibility of Dr. Lovisek's reports. I'll rule on the admissibility of Dr. Lovisek's reports before she's tendered for cross-examination. And then I will say this: if the plaintiffs wish to raise a further objection on admissibility after fulsome cross-examination, they're at liberty to apply to do so. But that's the format that I want the parties to proceed on.
- [5] The plaintiffs now submit that they approached their cross examination with that understanding. I do not agree. At the insistence of the plaintiffs, the issue of the extent of their cross-examination before arguing objections was revisited on April 12, 2021, and I did revise my direction on April 16, 2021.
- [6] I noted that the point of contention before me on February 9, 2021, was the extent to which the plaintiffs may cross-examine Dr. Lovisek during the qualification stage. Initially the plaintiffs took the position that they should be permitted to fully cross-examine Dr. Lovisek before they argued admissibility objections, but I rejected that submission.
- [7] The plaintiffs modified their request. They submitted to me on April 12, 2021, that in the qualification stage they should be permitted to cross-examine Dr. Lovisek fully on her qualifications and on issues related to bias and impartiality and on her instructions and use of nomenclature. I granted the plaintiffs leave to cross-examine Dr. Lovisek on qualifications, on issues of bias, lack of independence and reliance on Crown contracts. I extended the time for cross-examination voir dire in order to allow the plaintiffs to cross-examine Dr. Lovisek on her choice of nomenclature and the origin of her assumptions.
- [8] I directed that after Canada's re-examination I would hear submissions and stand down to rule on Dr. Lovisek's qualifications as an expert witness at the trial. After that ruling was delivered, assuming Dr. Lovisek was qualified by the court, then I directed that I would hear full submissions on the objections to the five reports, starting with the two reply reports to the Layland report. I directed that Dr. Lovisek would not be recalled until a ruling on the qualifications and objections was delivered. I did not extend latitude for additional objections after cross-examination of Dr. Lovisek on the merits of her report.
- [9] When I said that on April 16th, that once Dr. Lovisek had been qualified I will hear full submissions on the objections to the five reports, I asked if that required further explanation, and Mr. Rosenberg responded that it was very clear. This direction superceded the direction of February 9, 2021, at the plaintiffs' request.

- [10] During the qualification cross-examination, Dr. Lovisek said that she was not a social anthropologist and said social anthropology tended to be more kinship analysis. Although she took courses in kinship analysis, she would not describe herself as an expert in that area. She described herself as a cultural anthropologist with a specialty in ethnohistory.
- [11] The plaintiffs filed an 89-page submission, which included a 54-page table setting out redactions which were still contested. The application took three days to hear.
- [12] Prior to their cross-examination of Dr. Lovisek on the merits of her report, the plaintiffs received my ruling on the objection to the land and fish report, and at para. 42 of the May 28, 2021 decision indexed at 2021 BCSC 1030, I said: Dr. Lovisek does not profess to be an expert in linguistics or in genealogy or kinship. Any opinions given in these areas would exceed her area of expertise. That does not mean that she cannot reference linguistic, genealogy or kinship references in historical literature as she has done in the Land Report and Fish Report.
- [13] Accordingly, the plaintiffs cannot possibly be surprised by Dr. Lovisek's lack of expertise in social anthropology. The comment I made on February 9, 2021, prior to the April 16, 2021 modification did not grant latitude for the plaintiffs to leave their request for redactions open indefinitely.
- [14] I will not grant leave to the plaintiffs to apply to reopen their request for redactions at this late date to illustrate objections that were well within their knowledge before they commenced their objection submissions.
- [15] I agree that my gatekeeper function continues to the end of the trial. In closing argument the plaintiffs will have the opportunity to draw to the court's attention those areas of the land and fish report where they say that Dr. Lovisek has given opinions that exceed her qualifications. "B. M. Young, J." The Honourable Madam Justice Young

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Prepared on 27 October 2026 · Esheria