

CANADA / JUDGMENT

Cowichan Tribes v. Canada (Attorney General)

2021 BCSC 2520

COURT

Supreme Court of British Columbia

DECIDED

17 December 2021

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2021 BCSC 2520 Cowichan Tribes v. Canada (Attorney General of Canada)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Cowichan Tribes v. Canada (Attorney General of Canada),

2021 BCSC 2520

Date: 20211217

Docket: 14-1027

Registry: Victoria

Between:

Cowichan Tribes,

Squtxulenuhw, 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 Admissibility of BC Assessment Notices

Counsel for the Plaintiffs:

J. A. Proudfoot, A. C. Giannelia,

M. B. Bendle and J. Boutin,

Articling Student

Counsel for the Defendant

City of Richmond:

B. B. Olthuis

and N.P.R. Bond

Counsel for the Defendant

Vancouver Fraser Port Authority:

R. W. Grant, Q.C. and

G. Morfopoulos, Articling Student

Place and Date of Trial/Hearing:

Victoria, B.C.

December 14, 2021

Place and Date of Judgment:

Victoria, B.C.

December 17, 2021

[1] THE COURT: Richmond seeks to admit the affidavit of Ken Barlow, manager of property services at the City of Richmond. In his affidavit, Mr. Barlow states that he has reviewed para. 29(a) of the fourth amended notice of civil claim that lists 10 properties in which the City of Richmond holds fee simple interest. Mr. Barlow appends to his affidavit ten 2020 property assessment notices for those properties. The plaintiffs object to the property assessment notices being entered as exhibits in this trial because they are inadequate

substitutes for qualified opinion evidence of market value. The plaintiffs also question the relevance of current market value.

- [2] I will address the relevance issue first. Richmond submits that the current market value of the properties is relevant to its justification defence and its equitable defence of laches.
- [3] Richmond has not pleaded justification but submits that its reference to s. 35 of the Constitution Act, 1996 is an adequate pleading for justification.
- [4] Counsel for Richmond concedes that market value is not a material fact in this case but that the court should know or have some sense of the general trend of property values in the area.
- [5] In its opening statement, counsel for Richmond said in reference to Mr. Barlow's affidavit:
... exhibit A to his affidavit is a set of BC Assessment notices for those 10 properties that Richmond holds in fee simple. And the point in part is to give the court a sense of what the magnitude of assets these are and which the city owns and holds on behalf of its ratepayers. That essentially is the way in which Richmond's evidence will plug into the defence of justification or the issue of justification.
- [6] Richmond also submits that the property trends are relevant to Richmond's defence of laches. Laches is an equitable doctrine which provides that a claimant must not delay in bringing a claim in a manner that unduly prejudices another party. The delay must prejudice another to be "undue." It is a context-specific inquiry. There are two main considerations:
 - 1) whether the claimant's delay constitutes acquiescence, or
 - 2) if the defendant reasonably relied on the claimant's acceptance of the status quo and has been prejudiced as a result.
- [7] Richmond made reference to its laches claim in its opening statement on day 335. Counsel submitted that the plaintiffs "have admitted that they were undertaking efforts to resolve their claim to the Lands of Tl'uq̓tinus at least since 1995." They did not communicate with Richmond about it until Richmond was served with the amended notice of civil claim that added Richmond as a defendant to this action. In his opening statement, counsel for Richmond said:

So we say evidence that goes to the impact of delay is also ipso facto relevant and admissible to the court's remedial discretion, just as it is to the defence of bona fide purchaser of value. And so evidence as to what Richmond would lose if this delay was excused, in other words, what lies on the other side of the balance, we say is relevant to the exercise of discretion. And, again, subject to the court's ruling on the plaintiffs' objection, we will be tendering Mr. Barlow's evidence for that purpose as well. The value -- some indication of the value of Richmond's fee simple properties that hang in the balance purchased after the plaintiffs were conceiving of this litigation but before they had provided Richmond notice.

- [8] The plaintiffs respond that Richmond has not provided the court with any case that would support the theory that the court needs an estimate of value of the properties at issue to make a determination on laches, justification or the equitable remedies that the plaintiffs seek. An order for compensation is not sought in this litigation. The plaintiffs seek a declaration of Aboriginal title. From the plaintiffs' perspective, the financial value of the land is not relevant. There is no component of the justification analysis which asks if the value of the property has increased and, if so, by how much. Likewise for laches, no component of this claim asks if the property at issue has increased in value.
- [9] I am struggling to see the relevance of the present day value of the property. It is not a material fact that either party has the onus of proving. I surmise that it may be relevant as necessary background to inform the overarching concern of doing justice between the parties. Given the possibility of relevance, I will review the authorities on the admissibility of the property assessments as evidence of value.
- [10] The plaintiffs have provided the court with several authorities for the proposition that assessments are not proper evidence of value.
- [11] In *Dosanjh v. Liang*, 2015 BCCA 18, the Court of Appeal rejected the use of property assessments as evidence to establish market value. In that case the trial judge relied on property assessment to quantify damages. The Court of Appeal found there was no scope for using assessments in place of expert opinion evidence, but qualified its comments by adding "in cases such as the present one".
- [12] At para. 67 Justice Groberman said:
- The basic difficulty with the property assessment as evidence of property value is that the court had no basis on which to evaluate its cogency. The court was not able to determine how the assessor went about making the assessment, and had no basis for determining what weight to give it. This was a particular problem in this case, as the court had no basis for determining the effect of the recent use of the property to grow marijuana on the property value.
- [13] Counsel for Richmond submits that *Dosanjh* is unlike the present case because it involved a collapsed real estate transaction where the assessment of damages depended on a finding of fact of the value of the property. Richmond is not asking this court to make such a finding of fact in this trial.
- [14] In *Dosanjh*, Justice Groberman acknowledged that there are family law cases where the court will rely on property assessments because there is no other evidence of value. The court is required to estimate the value of property for the purpose of dividing a family asset. He does say, however, that "different considerations arise in non-family cases, where one party or the other will generally bear the onus of producing evidence of property value."

- [15] Richmond encourages the court to consider the purpose for which they are seeking to admit the property assessments. They submit that the schism in law related to admitting property assessments is not a distinction between family cases and non-family cases. Rather it relates to the purpose for which the evidence is introduced.
- [16] In this case, Richmond submits that no one bears the onus of proving current value.
- [17] The plaintiffs rely on *Hall v. Mougan*, 2009 BCSC 645, *Davis v. Royal Bank*, 2016 BCSC 1993, *Sarzynick v. Skwarchuk*, 2021 BCSC 443, and *Robillard Estate*, 2015 BCSC 1417, which all follow *Dosanjh* and find that property assessments are not to be relied on to assess the value of property.
- [18] In the recent family law case of *James v. Chase*, 2020 BCSC 1181, Justice Verhoeven declined to rely on the property assessment to assess reduction in property value for the purpose of dividing assets. He said at para. 25:

The B.C. Assessment notice is not a reliable indicator of actual market value. There is no suggestion that any actual inspection or onsite appraisal was made. The assessment is based, as we know, on some kind of formula having to do with the values of other properties.

- [19] Richmond submits that in all these cases the court had to make a finding of value of the asset. It was a key material fact in the dispute. The courts tasked with making a finding of value applied the best evidence rule and found the best evidence for property value was the appraisal.
- [20] Richmond relies on a 2008 case of *Van Wieren v. Van Wieren*, 2008 BCSC 31, where Justice Johnston found it necessary to fix the value of the home. The self-represented plaintiff provided no appraisal. Johnston J. considered the admissibility of the value of the property assessment produced under the Assessment Act, R.S.B.C. 1996, c. 20. He noted that litigants and judges had seemed content to accept assessments as evidence of value. In *Chung v. La*, 2011 BCSC 1547, Justice Savage, as he then was, followed Justice Johnston on the basis that there was a "statutory requirement that assessments be at actual value, and, in the case of most residential assessments that was equivalent to market value."
- [21] Richmond also relies on the principle exception to the hearsay rule. Counsel submits that this evidence is necessary. It could not have been foreseen in advance of 84 days before trial what date would be appropriate for fixing a valuation of the properties, and also the cost of obtaining an appraisal of commercial land is prohibitive.
- [22] Richmond submits that the property assessments are reliable. Mr. Barlow testified that where there is going to be a disposition or acquisition of lands by Richmond or on behalf of Richmond, they will have an assessment on file. The assessment provides a snapshot of what the market has done over the year on any particular property.
- [23] Before seeking council approval, however, Richmond will rely on an appraisal as better evidence that will be tied to a point in time closer to the disposition.

- [24] We have evidence of what Richmond paid for the 10 properties. The plaintiffs respond that the prejudice of permitting Richmond to tender property assessments instead of properly qualified opinion evidence outweighs its probative value. It is untested opinion evidence. It is unreliable. Admitting it would effectively deny the plaintiffs the protections contained in Supreme Court Civil Rule 11-7 and would deny the plaintiffs the opportunity to lead expert evidence in response.
- [25] The plaintiffs reject the argument that the assessments should be admitted and given less weight. If the evidence is relevant, then it should be reliable.

ANALYSIS

- [26] The law in British Columbia is clearly set out in *Dosanjh*. Assessment values set out in property assessments should not and cannot be used as indicators of market value. The plaintiffs have provided numerous authorities supporting that proposition.
- [27] The defendants provide two authorities that predate *Dosanjh* and can no longer be relied on since *Dosanjh*. Richmond has not produced any authorities post *Dosanjh* that support their proposition that the property assessments can be relied on if the value of the property is not really important in the case and is not a material fact. In other words, if the evidence would fall in the category of "nice to know", not "need to know", then it does not have to be reliable.
- [28] I reject that proposition.
- [29] Property assessments are not reliable evidence of value for reasons articulated in the case law. Mr. Barlow testified that Richmond itself does not generally rely on notices of assessment as reliable indicators of market value. If Richmond is considering acquiring or disposing of land, they generally obtain appraisals from qualified appraisers for making recommendations to council.
- [30] I agree with the submission of the plaintiffs that the principle approach to hearsay is not intended to create a back door for admission of otherwise inadmissible evidence.
- [31] Under the principled exception, hearsay can exceptionally be admitted into evidence when the party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities (*R. v. Bradshaw*, 2017 SCC 35 at paras. 23 and 24, and *R. v. Khelawon*, 2006 SCC 57).
- [32] Even when the trial judge is satisfied that the hearsay is necessary and sufficiently reliable, she has discretion to exclude this evidence if its prejudicial effect outweighs its probative value (*Khelawon*, para. 49).
- [33] I find that neither prong of the principled exception of the hearsay rule is met. When assessing necessity, I find that the current value of the 10 properties is only of marginal relevance. It is not a material fact that either party has to prove. It was not important enough to justify Richmond expending money to obtain real estate appraisals. The necessity criteria

is not satisfied by an assertion of a litigant that it failed to obtain an appraisal so it is now necessary to rely on inadequate evidence. The necessity test goes to the need to prove this fact at trial, and everyone is in agreement that this fact does not need to be proven at trial.

- [34] There is evidence in the agreed statement of facts of what Richmond paid for the 10 properties.
- [35] The property assessment notices are out of court statements of opinion on property value that cannot be tested. Mr. Barlow, who appends them to his affidavit, does not find them to be reliable evidence of value.
- [36] The probative value of allowing the property assessment notices into evidence is outweighed by the prejudicial effect.
- [37] Accordingly, I order the redaction of para. 5 and exhibit A of the affidavit of Ken Barlow. After the redactions, the affidavit, which has been marked for identification as exhibit A 467, may be marked as a numbered exhibit. That concludes my reasons.

"B. M. Young, J."

The Honourable Madam Justice Young

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