

CANADA / JUDGMENT

Nuchatlaht v. British Columbia

2020 BCSC 252

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Supreme Court of British Columbia

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2020 BCSC 252 Nuchatlaht v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nuchatlaht v. British Columbia,

2020 BCSC 252

Date: 20200225

Docket: S170606

Registry: Vancouver

Between:

The Nuchatlaht and Chief Walter Michael,

on his own behalf and on behalf of all of the members of the Nuchatlaht

Plaintiffs

And

Her Majesty the Queen in Right of the Province of British Columbia

and The Attorney General of Canada and

Western Forest Products Inc.

Defendants

Before: The Honourable Mr. Justice Myers

Reasons for Judgment - Province's Application to use the Ahousaht litigation document collection

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Place and Dates of Hearing:

Vancouver, B.C.

October 10, 2019

Written Submissions:

January 31, 2020

Place and Date of Judgment:

Vancouver, B.C.

February 25, 2020

- [1] The plaintiffs are claiming aboriginal title to a portion of Nootka Island.
- [2] In this application, the Province seeks to be relieved of its implied undertaking not to make use of documents disclosed to it in prior litigation - the "Ahousaht litigation". The documents were produced by First Nations who are not parties to this litigation. As narrowed at the hearing, these are the documents produced by the Ahousaht, Ehattesaht and Mowachaht/Muchalaht. I will refer to them as the Respondents.

- [3] The plaintiffs in the case at bar - whom I will refer to collectively as the Nuchatlaht - were also parties to the Ahousaht litigation, but as I will explain, their claim was severed and the trial deferred. They do not object to the use of any documents they produced in the Ahousaht litigation.
- [4] In addition to documents produced by the respondents in the Ahousaht litigation, the Province seeks production of further documents it believes to be in possession of the Respondents.
- [5] The Respondents object to the use of the documents disclosed in the Ahousaht litigation. They argue that the Province has already breached its implied undertaking by the steps it took to bring this application. They also object to the production of further documents that have not previously been disclosed.

I. Documents produced by the respondents in the Ahousaht litigation - The implied undertaking issue

Background

- [6] The Ahousaht litigation was started in 2003 and has had a complicated history, described by Madam Justice Humphries in *Ahousaht Indian Band and Nation v. Canada (Attorney General)*, 2018 BCSC 633 at para. 14.
- [7] The action was brought by 12 plaintiff nations or bands which were, in the statement of claim, collectively described as the Nuuchah-nulth nation. The Respondents were plaintiffs and so was the Nuchatlaht (the plaintiff in this action). The action claimed various declarations concerning both the rights to fish and the title over fisheries. In addition to Canada, the Province was also a defendant
- [8] The plaintiffs in the Ahousaht litigation were represented by one law firm. Four years into the litigation, but before the trial, Canada raised the issue of overlapping claims of the plaintiffs, and a consequent conflict in interest of their counsel. Madam Justice Garson dealt with this in *Ahousaht Indian Band v. Canada (Attorney General)*, 2007 BCSC 1162. The result was that only some of the plaintiffs' claims proceeded to trial and some were held in abeyance for "phase two" of the trial. This was meant to avoid overlapping claims and any conflict of interest. The Nuchatlaht's claim was one of the claims deferred to phase two, which has not yet gone to trial.
- [9] Document production in the Ahousaht case took place before Canada brought its application. It will be apparent, then, that BC and Canada have already had access to the document production in the Ahousaht litigation and so have the Nuchatlaht.
- [10] The Province has assembled a collection of documents in Summation (an electronic document and trial management software package) related to the Ahousaht litigation, which it refers to as the Ahousaht collection. As described by the Province, it is a repository of relevant and potentially relevant materials which were gathered by the Province in the

course of its preparations in the Ahousaht litigation. While it contains the documents disclosed by other parties to the Province, it goes beyond that and contains documents gathered by the province from other sources. Consequently, not all documents in the collection are subject to the implied undertaking of confidentiality arising from the Ahousaht litigation. There are approximately 70,000 documents in the collection.

- [11] In preparing for this litigation, the Province searched the Ahousaht collection, attempting to locate any documents relating to the Nuchatlaht. For example, it searched for documents containing "Nuch" in the document coding. The Province says that the search was an attempt to locate documents that had been disclosed by the Nuchatlaht in the Ahousaht litigation. (The Nuchatlaht did not raise any objection in this in the hearing of this motion.)
- [12] In its searches, the Province located documents which it says are relevant to this proceeding and which are subject to the implied undertaking; in other words documents that had not been produced by the Ahousaht, but by the Respondents. It is this which gives rise to the present application.

Legal principals

- [13] The law governing the use of documents produced in litigation is simple and stark: they are to be used only for the purposes of the litigation in which they were produced. There is an implied undertaking to the court to this effect. If a party wishes to use the documents for other purposes it must obtain the permission of the party who produced the document or a court order. See: *Juman v. Doucette*, 2008 SCC 8 and *Chonn v. DCFS Canada Corp. (dba. Mercedes-Benz Credit Canada)*, 2009 BCSC 1474. The undertaking applies to litigation involving the identical parties: *Chonn* at para. 21. It applies to all uses of the document: *Chonn* at para. 25. The implied undertaking ceases to apply to documents used in open court: *Chellappa v. Kumar*, 2016 BCCA 2 at para. 35.
- [14] In *Chonn* at para. 41, Mr. Justice Voith noted that it would be appropriate for a party possessing relevant documents disclosed in other litigation to list them in the privileged section of its document list. This was followed in *British Columbia v. Tekavec*, 2012 BCSC 1348.
- [15] In *Doucette*, the court dealt with the considerations to be taken into account in an application to relieve a party from the undertaking:
- [32] An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. In a case like the present, of course, there weighs heavily in the balance the right of a suspect to remain silent in the face of a police investigation, and the right not to be compelled to incriminate herself. The chambers judge took the view (I think correctly) that in this case that factor was decisive. In other cases the mix of competing values may be different. What is important in each case is to recognize

that unless an examinee is satisfied that the undertaking will only be modified or varied by the court in exceptional circumstances, the undertaking will not achieve its intended purpose.

...

- [35] The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted. See *LAC Minerals Ltd. v. New Cinch Uranium Ltd.* (1985), 50 O.R. (2d) 260 (Ont. H.C.), at pp. 265-66; *Crest Homes*, at p. 1083; *Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co.* (1988), 90 A.R. 323 (Alta. C.A.); *Harris v. Sweet*, [2005] B.C.J. No. 1520, 2005 BCSC 998 (B.C. Master); *Scuzzy Creek Hydro & Power Inc. v. Tercon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252 (B.C. S.C.).
- [36] On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. See, e.g., *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49 (Fed. T.D.), at p. 51. In *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (Ont. S.C.J. [Commercial List]), the court held that a non-party to the implied undertaking could in unusual circumstances apply to have the undertaking varied, but that relief in such cases would virtually never be given (p. 130).

Overview of the parties' positions

- [16] The Supreme Court of Canada in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 set out the test for establishing aboriginal title:
- [25] As we have seen, the *Delgamuukw* test for Aboriginal title to land is based on "occupation" prior to assertion of European sovereignty. To ground Aboriginal title this occupation must possess three characteristics. It must be sufficient; it must be continuous (where present occupation is relied on); and it must be exclusive.
- [17] The plaintiffs here do not rely on present occupation; rather they will seek to prove their occupation prior to European sovereignty on the basis of historical records. Therefore, continuity of occupation is not a factor here.
- [18] The Province says that this case largely comes down to the question of whether the ancestors of the plaintiffs exclusively occupied the claimed territory at the time of the establishment of European sovereignty. It argues that the *Nuchatlaht* must establish an intention to exercise exclusive control of the claimed territory and that this depends on how the group is made up.
- [19] In its response to civil claim filed February 16, 2018, the Province makes the following points at Part 1, Division 2:

...

- a. Prior to the Date of Contact, and in the early years following the Date of Contact, the various Indigenous groups referred to as making up the Nuchatlaht affiliation of groups when the British Crown asserted sovereignty over the Claim Area (the "Date of Sovereignty") were primarily resident outside of the Claim Area, though at the Date of Contact and at later dates some of the Nuchatlaht groups may have resided in the Claim Area;
- b. The Nuchatlaht, prior to and at the Date of Sovereignty and at all material times, was comprised of loosely affiliated, small, localized family groups, some of which were territorially displaced from areas outside of the Claim Area by other aboriginal Indigenous peoples, and did not exclusively occupy the Claim Area;

...

- d. the Nuchatlaht groups, prior to and at the Date of Sovereignty and at all material times, were not known to effectively assert and defend territory, including the Claim Area, and other aboriginal Indigenous peoples claimed and used tracts of land and resources in the Claim Area;

...

7. the Court must further be satisfied that the Plaintiffs maintained a substantial connection to, and that they did not abandon, such defined tracts of land as they may have occupied at the Date of Sovereignty, and that such tracts were not the subject of overlapping rights and title claims by members of other First Nations.

...

4. Overlapping modern day territorial claims, as between the Nuchatlaht and the Ehattesaht, and as between the Nuchatlaht and the Mowachat-Muchalaht are identified in the action in this Court (the "2003 Action") styled Ahousaht Indian Band v. AG of Canada (S033335, Vancouver Registry, June 17, 2003) filed by the Nuchatlaht Indian Band and the Nuchatlaht Nation and their members, together with other First Nations and their members cooperating through the Nuuchahnulth Tribal Council. Schedule "A" to the Statement of Claim in the 2003 Action is a map which delineates the territories over which each of the plaintiffs claim aboriginal title. The map identifies that Nuchatlaht's claim of aboriginal title in the 2003 Action overlaps with the aboriginal title claims of both the Ehattesaht and the Mowachat-Muchalaht. Aspects of the 2003 Action in relation to foreshore and offshore areas and fishing rights have proceeded to adjudication in relation to some of the parties to the 2003 Action, but not the Nuchatlaht, and overlapping claims of territory and land-based claims of aboriginal title raised in the 2003 Action remain outstanding.

[underlining in original.]

- [20] The Province argues that documents disclosed in the Ahousaht litigation may bear on these issues.
- [21] The Respondents argue that the documents which were disclosed in the Ahousaht litigation contain sensitive and confidential information about their members, band affairs, family histories, practices and use of their territory. They were not produced so that they could be used in other litigation.
- [22] The Respondents also argue that the Ahousaht litigation was limited to fishing rights, whereas the current claim is native title to land. Mr. Woodward, the Nuchaltaht's counsel, says he was careful in drafting this claim to avoid any overlap with other Nations' claims and that it does not include a claim for the foreshore or fishing rights.

Analysis

- [23] It is clear from the authorities that determination of whether the implied undertaking should be waived is a balancing of interests. The passages from Juman I quoted above (para. 15) are not meant to be a code. Paragraphs 35-36 of the judgment were meant to represent opposite sides of a spectrum. Many cases will fall somewhere in the middle of the continuum. Similarly, the concept of "related proceedings" is not an on-off switch. Cases can be related to varying degrees.
- [24] There is a similarity of the issues in this case and those in the Ahousaht case. It is true that the case at bar is one for a declaration of title to land and the Ahousaht case involved fisheries. Nevertheless, the issue of fishing rights involved connection to and use of defined geographic areas that are adjacent to the one claimed here. While the rights or titles claimed in the Ahousaht case (which, at least in its original inception included the right to fish in inland waters, lakes, rivers and streams) may stop at the foreshore, this is not necessarily the case for the evidence.
- [25] In Garson J.'s trial decision in the Ahousaht litigation, she noted the "co-mingling" of the Ehattesaht with the Nuchatlaht: *Ahousaht Indian Band and Nation v. Canada* (Attorney General), 2009 BCSC 1494 at para. 323.
- [26] Clearly the parties are not identical. The Respondents have no direct interest in this litigation. However, the Nuchatlaht was and remains a party to the Ahousaht litigation.
- [27] All the parties except Western Forest Products have had access to the documents in the Ahousaht litigation. Western Forest Products' role in this case is limited: it takes no position on whether the Nuchaltaht can establish title. Its only interest is the consequences to it if title is established. That can be dealt with at a separate hearing. It agrees, therefore, that it need not see the documents. If the documents are used as exhibits at trial, there are mechanisms that can be employed to protect any particularly sensitive information.

[28] I appreciate that some of the documents produced by the Respondents may be sensitive. However, because the same parties that will see the documents have already had access to them, it is difficult to see any meaningful incremental invasion of privacy. Apart from the potential costs of searching for documents, to which I will return, I see little, if any, prejudice to the respondents in alleviating the province of its undertaking.

[29] In her judgment ordering the test case procedure (2007 BCSC 1162), Garson J. noted the uniqueness of native title cases:

[57] At the outset of this discussion, the unique nature of aboriginal rights and title litigation and the distinctive approach required in order to bring the parties closer to the objective of reconciliation, must be considered. In *Kwakiutl Nation v. Canada (Attorney General)*, 2006 BCSC 1368 (B.C. S.C.) at para. 26 (Hereditary Chiefs), Madam Justice Satanove noted that:

I think it must be recognized that just as aboriginal rights are *sui generis*, aboriginal rights litigation is also unique. It involves hundreds of years of history and sometimes unconventional techniques of fact finding. It involves lofty, often elusive concepts of law such as the fiduciary duty and honour of the Crown. We cannot simply view aboriginal claims in the same light as other civil litigation. I believe effective case management of aboriginal litigation requires an effort on behalf of all parties and the court to find a creative way to try the issues without invoking oppressive conduct that deters the plaintiffs or prejudices the defendants.

[Emphasis added by Garson J.]

[30] The Nuchatlaht's claim originally advanced in the Ahousaht litigation may go to trial after this case has been concluded. If so, given the overlapping claims, it might be that already-disclosed documents come forward that would have had a bearing on this case. That would cast doubt on the decision and in turn bring the process into disrepute. Allowing access to the documents now will avoid that risk. In short, it is preferable that this case - one of importance to the parties and the public - be decided on the fullest possible record.

[31] The Respondents argue that the Province has already breached its implied undertaking by reviewing the Ahousaht collection database, as I set out above. They say this is a further ground for not relieving the Province from its undertaking. The Province argues that it reviewed the database for two purposes:

- a) The first was to locate documents disclosed by the Nuchatlaht; and
- b) The second purpose was to enable it to list as privileged relevant documents disclosed by any of the parties in the Ahousaht litigation, as per the judgment in *Chonn*.

[32] It appears to me that the setting up of a collection which contains documents from multiple sources, including those disclosed by other parties and those located by the Province as part of its own research, created a potential problem from the outset that is now apparent. Nevertheless, I do not think the Province breached its undertaking, given the requirement to list the documents on its privileged list. I do not think the Province acted in bad faith.

[33] To be clear, disclosing a document as privileged does not give the listing party carte blanche to make use of the document. (I am not sure the logistical challenges of accessing documents for the purposes of listing them as privileged and at the same time not making use of them has been worked out in the prior cases.)

[34] Balancing the factors, I conclude that the province should be relieved of its implied undertaking regarding the sought for category of documents contained in the Ahousaht database. These are - and I quote from the Province's last iteration of this request:

All Mowachaht/Muchalaht or Ehattesaht First Nation documents disclosed in Ahousaht Indian Band and Nation et al. v. Canada (Attorney General) et al. (BC Supreme Court Action No. SO33335) which contain information pertaining to use of the Claim Area in this proceeding, or to relationships between the Ehattesaht Collective and the Nuchatlaht Collective, including the exhibits listed at paragraph 6 of unfiled Affidavit #12 of Diane Hill, made on September 27, 2019 and handed-up at the hearing on November 28, 2019

[35] Regarding the pragmatics of locating the documents, I think the most efficient way to handle this is for the Province to review the database and produce a list of the relevant documents it seeks to rely on or to use. It should then provide that list to counsel for the Respondents. They will then be given the opportunity to raise any issue concerning specific documents, such as heightened confidentiality concerns. Given the existing disclosure in the Ahousaht litigation, I would expect that to apply to few documents. For that reason, I would not - at the moment - make any order for the payment of the costs of the process. That issue can be brought back before me should the magnitude of the project end up being significant. Needless to say, the parties can agree to an alternate mechanism.

II. Disclosure of Land Use Studies

[36] The Province asks for an order that the Ehattesaht produce traditional use studies (TUS) prepared for them if they deal with any of the land claimed in this litigation. Specifically, to quote, once again, from the Province's latest iteration of its request:

the Ehattesaht First Nation shall produce to all parties their traditional use study documents and related documents to the extent those documents pertain to past and present use of the Claim Area or parts of it by the Ehattesaht Collective or its members (Ehattesaht First Nation, Ehattesaht Nation, or Ehattesaht Indian Band)

To be clear, this is separate from the undertaking issue; it is an application for documents in the hands of a third party under Rule 7(1)(18).

[37] The Province's argument as to relevance of the documents is in essence the same as it was for the Ahousaht litigation documents.

- [38] This is not a case where a party seeks documents concerning an opposing party from, for example, a doctor. There, the documents are created for the purposes of the doctor providing medical services to the patient who is a party in the litigation. Similar situations involve banks or the Canada Revenue Agency. Here, the documents were created for the sole purpose of the Ehattesaht who are not a party. While they may have disclosed the documents to third parties, such as forestry companies, that does not detract from this point.
- [39] The Ehattesaht have deposed that the documents may contain confidential and personal information concerning family histories and other matters.
- [40] They have also deposed to their limited resources and the efforts in locating and determining the relevancy of the TUS documents.
- [41] In balancing the interests of justice, the Province and the Ehattesaht, I think this request is a bridge too far, and I decline to grant the order.

III. Costs

- [42] In view of the fact that the Province was successful on one application and the respondents on another, each party ought to bear its own costs.

"E.M. MYERS J."

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