

CANADA / JUDGMENT

Nuchatlaht v. British Columbia

2021 BCSC 370

COURT

Supreme Court of British Columbia

DECIDED

4 March 2021

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2021 BCSC 370 Nuchatlaht v. British Columbia IN THE SUPREME COURT OF BRITISH COLUMBIA
Citation: Nuchatlaht v. British Columbia, 2021 BCSC 370 Date: 20210304 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 Corrected Judgment: The text of the judgment was corrected at paragraph 18 on March 9, 2021. Before: The Honourable Mr. Justice Myers Reasons for Judgment - Application to Exclude Expert Report of Jacob Earnshaw Counsel for the Plaintiff: Jack Woodward, Q.C Morgan Blakley Counsel for British Columbia: Jeffrey B. Echols Counsel for Attorney General (Canada): Ainslie M.L. Harvey Counsel for Western Forest Products Inc. Geoffrey Plant, Q.C. Place and Dates of Hearing: Vancouver, B.C. February 17-18, 2021 Place and Date of Judgment: Vancouver, B.C. March 4, 2021 I. Introduction

- [1] This is an aboriginal title case in which the plaintiffs seek title to a portion of Nootka Island. The Province applies to exclude the expert report of Jacob Earnshaw. All parties have consented to the hearing of this application before the trial which will likely be heard in March 2022.
- [2] Mr. Earnshaw was asked to address the following by plaintiff's counsel:
1. To perform reconnaissance surveys within the Nuchatlaht claim area to understand the condition of recorded Culturally Modified Trees (hereafter CMT) sites as well as search out and record other previously unrecorded archaeological sites.
 2. Prepare written reports outlining findings.
 3. Prepare a written expert report, with my opinion on the following issues:
 - a) The extent of archaeological research into the claim area.
 - b) What the archaeological record tells us concerning the use and occupation of the Claim Area.

- [3] In his report, Mr. Earnshaw defined Culturally Modified Trees (CMTs): . . . culturally modified trees are archaeological features that refer to any tree with modifications related to the cultural use of the forest by Indigenous people.
- [4] The Province raises issues of bias or impartiality, novel approach, qualifications and necessity of the opinion. II. Analysis
- [5] The leading authority for admissibility of expert evidence is *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. The court summarised the criteria:
- [23] At the first step, the proponent of the evidence must establish the threshold requirements of admissibility. These are the four Mohan factors (relevance, necessity, absence of an exclusionary rule and a properly qualified expert) and in addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science for that purpose: J. (J.-L.), at paras. 33, 35-36 and 47; Trochym, at para. 27; Lederman, Bryant and Fuerst, at pp. 788-89 and 800-801. Relevance at this threshold stage refers to logical relevance: *Abbey (ONCA)*, at para. 82; J. (J.-L.), at para. 47. Evidence that does not meet these threshold requirements should be excluded. Note that I would retain necessity as a threshold requirement: D. (D.), at para. 57; see D. M. Paciocco and L. Stuesser, *The Law of Evidence* (7th ed. 2015), at pp. 209-10; *R. v. Boswell*, 2011 ONCA 283, 85 C.R. (6th) 290 (Ont. C.A.), at para. 13; *R. v. C. (M.)*, 2014 ONCA 611, 13 C.R. (7th) 396 (Ont. C.A.), at para. 72.
- [24] At the second discretionary gatekeeping step, the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks. The required balancing exercise has been described in various ways. In *Mohan*, Sopinka J. spoke of the "reliability versus effect factor" (p. 21), while in J. (J.-L.), Binnie J. spoke about "relevance, reliability and necessity" being "measured against the counterweights of consumption of time, prejudice and confusion": para 47. Doherty J.A. summed it up well in *Abbey*, stating that the "trial judge must decide whether expert evidence that meets the preconditions to admissibility is sufficiently beneficial to the trial process to warrant its admission despite the potential harm to the trial process that may flow from the admission of the expert evidence": para. 76. Bias or Impartiality
- [6] The first challenge to Mr. Earnshaw's evidence is that he is biased or lacks impartiality.
- [7] Justice Cromwell for the court in *White Burgess* stated, at para. 40, that independence and impartiality go to not just weight but to threshold admissibility.
- [8] At para. 48 he dealt with a shifting onus: Once the expert attests or testifies on oath to this effect [that his is impartial] , the burden is on the party opposing the admission of the evidence to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty. If the opponent does so, the burden to establish on a balance of probabilities this aspect of the admissibility threshold remains on the party proposing to call the evidence. If this is not

done, the evidence, or those parts of it that are tainted by a lack of independence or by impartiality, should be excluded. This approach conforms to the general rule under the Mohan framework, and elsewhere in the law of evidence, that the proponent of the evidence has the burden of establishing its admissibility.

- [9] I note here that Mr. Earnshaw testified at the voir dire and said he was impartial with respect to his opinion.
- [10] The Court continued with respect to the threshold for admissibility:
- [49] This threshold requirement is not particularly onerous and it will likely be quite rare that a proposed expert's evidence would be ruled inadmissible for failing to meet it. The trial judge must determine, having regard to both the particular circumstances of the proposed expert and the substance of the proposed evidence, whether the expert is able and willing to carry out his or her primary duty to the court. For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court. Similarly, an expert who, in his or her proposed evidence or otherwise, assumes the role of an advocate for a party is clearly unwilling and/or unable to carry out the primary duty to the court. I emphasize that exclusion at the threshold stage of the analysis should occur only in very clear cases in which the proposed expert is unable or unwilling to provide the court with fair, objective and non-partisan evidence. Anything less than clear unwillingness or inability to do so should not lead to exclusion, but be taken into account in the overall weighing of costs and benefits of receiving the evidence.
- [50] As discussed in the English case law, the decision as to whether an expert should be permitted to give evidence despite having an interest or connection with the litigation is a matter of fact and degree. The concept of apparent bias is not relevant to the question of whether or not an expert witness will be unable or unwilling to fulfill its primary duty to the court. When looking at an expert's interest or relationship with a party, the question is not whether a reasonable observer would think that the expert is not independent. The question is whether the relationship or interest results in the expert being unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.
- [11] Turning to the arguments here, one of the reasons the Province says Mr. Earnshaw is biased or impartial is because he has posted on Twitter his disapproval of cutting old growth forest. I do not see that as impartiality or bias, and certainly not one that would rise to the level of

disqualification. His main interest in archaeology is CMT's. There is nothing inappropriate with him wanting those trees to be preserved. Indeed, it would be surprising for an archeologist to not have an opinion on the destruction (I use the term neutrally) of what he or she studies. To use an analogy, I do not think that a court would have prevented Howard Carter, who discovered the tomb of Tutankhamun, from giving expert testimony on Egyptian history if he had decried the destruction or looting of the pyramids.

- [12] The Province also says that Mr. Earnshaw is biased because he has written about CMT's previously, including his master's thesis. Once again, I do not see that this results in him not being able to provide an independent report. Experts are experts because they focus on a particular area. They may even express an opinion or theory in their writings, for example, that the less tread there is in a tire the tire more susceptible it is to hydroplaning. That does not mean that their evidence within that area should not be admitted. Novel Science
- [13] Next, the Province argues that Mr. Earnshaw's report propounds a novel theory or methodology and that the courts have advised caution in admitting such evidence: *R. v. Bingley*, 2017 SCC 12, paras. 15, 41-43 and *R. v. J.-L.-J.*, 2000 SCC 51, paras. 25, 33 & 35. The Province argues: Mr. Earnshaw's novel approach is first described in Chapter 8 of his 2016 thesis. Based on his thesis, He advocates that CMTs are largely overlooked in the current method of CMT assessment, which he says focuses on standing forests rather than logged forests (his terminology is clearcuts)." He describes his method as post-impact assessment and explains it as looking for embedded scars in stump cross-sections of logged old growth trees. He postulates, theorizes and concludes, based on limited data, that CMTs exist within Cultural Forests across vast portions of the British Columbia coast and in far greater numbers than current CMT assessments predict. He argues that Cultural Forests are evidence of land ownership and management by First Nations.
- [14] It is true that novel theory must be scrutinised at the admissibility stage. However, the closer the opinion gets to the ultimate issue, the greater the scrutiny: *R. v. Mohan*, [1994] 2 S.C.R. 9 at para. 28. Here the opinion does not approach the ultimate issue. The basis for Mr. Earnshaw's opinion is not completely untested: it was contained in his thesis and one peer-reviewed article.
- [15] Mr. Earnshaw has acknowledged the limits of the report. For example, he said he could not determine which groups were responsible for creating the archaeological sites. Further, this is not a scientific report with formulas and calculations that makes it impossible for the court to assess. Nor has the Province adduced any evidence to show that the theory is novel.
- [16] I therefore do not exclude the report on this basis. Qualified Expert
- [17] The Province argues that Mr. Earnshaw is not a qualified expert. In *R. v. Marquard*, [1993] 2 SCR 223 at para. 35, Justice McLachlin (as she then was) stated: . . .The only requirement for the admission of expert opinion is that the "expert witness possesses special knowledge and experience going beyond that of the trier of fact": *R. v. B  land*, [1987] 2 S.C.R. 398, at p. 415. Deficiencies in the expertise go to weight, not admissibility. As stated by Sopinka, Lederman

and Bryant, *The Law of Evidence in Canada* (1992), at pp. 536-37: The admissibility of such [expert] evidence does not depend upon the means by which that skill was acquired. As long as the court is satisfied that the witness is sufficiently experienced in the subject matter at issue, the court will not be concerned with whether his or her skill was derived from specific studies or by practical training, although that may affect the weight to be given to the evidence.

- [18] Mr. Earnshaw has a bachelor's degree and a master's degree in anthropology from the University of Victoria. His archeology experience began in 2008 as a student and an archeology assistant at a field school in Barkley Sound. Mr. Earnshaw completed his master's thesis on CMT studies on the Northwest Coast and is working on multiple archeology sites in BC, including several along the coast. He might not be a senior person in his field, but he meets the threshold requirement for admissibility. Necessity
- [19] Finally, the Province says that the report is of limited necessity. Given Mr. Earnshaw cannot be specific as to which group modified the trees, the Province argues that the report "provides no ready made inferences for the court to use in deciding, factually, whether the Plaintiffs' are descended and continued from an Indigenous collective that exclusively occupied the Claim Area, at any relevant time."
- [20] The report may not give the near-conclusive evidence needed for the plaintiffs but nevertheless it is not irrelevant. It would, if accepted, advance the basis of the claim. It is up to the plaintiffs to determine what other evidence they call to fill in the required evidentiary gaps. Overall Balancing
- [21] In terms of the overall question of the whether the pitfalls of admitting the report outweigh its usefulness, I conclude the report ought to be admitted. In addition to what I have said above, admitting the report will not result in an inordinate use of court time. This is not a jury trial and as the trial judge I will be capable of dealing with the matters raised here in assessing the weight of the report. III. Conclusion
- [22] The Province's motion is therefore dismissed. "E.M. Myers J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/21/03/2021BCSC0370cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/nuchatlaht-v-british-columbia-2021-bcsc-370>

Prepared on 28 October 2026 · Esheria