

CANADA / JUDGMENT

Yahey v. British Columbia (Attorney General)

2021 BCCA 127

COURT

British Columbia Court of Appeal

DECIDED

18 March 2021

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

2021 BCCA 127 Yahey v. British Columbia (Attorney General) COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Yahey v. British Columbia (Attorney General), 2021 BCCA 127 Date: 20210318 Docket: CA46758 Between: Marvin Yahey on his own behalf and on behalf of all other Blueberry River First Nations beneficiaries of Treaty No. 8 and the Blueberry River First Nations Respondents (Plaintiffs) And Her Majesty the Queen in Right of the Province of British Columbia Respondent (Defendant) And Attorney General of British Columbia Appellant (Pursuant to the Constitutional Questions Act) Before: The Honourable Mr. Justice Grauer (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated February 27, 2020 (Yahey v. British Columbia, 2020 BCSC 278, Vancouver Docket S151727). Oral Reasons for Judgment Counsel for the Appellant (via teleconference): H.E. Cochran M.A. Witten Counsel for the Respondents, Marvin Yahey on his own behalf and on behalf of all other Blueberry River First Nations beneficiaries of Treaty No. 8 and the Blueberry River First Nations (via teleconference): F.M. Kirchner Counsel for the Proposed Intervenor, Cowichan Nation Plaintiffs (via teleconference): D.J. Larkin M.L. Bradley Place and Date of Hearing: Vancouver, British Columbia March 18, 2021 Place and Date of Judgment: Vancouver, British Columbia March 18, 2021 Summary: The applicants applied for leave to intervene in this appeal from an order of the trial judge declaring that the daily hearing fees prescribed by the Supreme Court Civil Rules are inconsistent with the objectives of section 35 of the Constitution Act, 1982, and the honour of the Crown. Held: the applicants are granted leave to intervene, with 15 pages for written argument and 15 minutes for oral submissions. The applicants demonstrated a clear and direct interest in the outcome of the appeal. Their proposed submissions will provide a unique perspective in a manner that will not impermissibly expand the issues on appeal.

[1] GRAUER J.A.: Cowichan Nation Plaintiffs ("Cowichan") apply for leave to intervene in this appeal.

- [2] The appeal is from the order of Madam Justice Burke declaring that the daily hearing fees prescribed by the Supreme Court Civil Rules are inconsistent with the objectives of section 35 of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11, and the honour of the Crown. This order was pronounced in the context of an ongoing trial in which the Blueberry First Nations have claimed against British Columbia, alleging breach of their rights under Treaty 8.
- [3] Cowichan comprises four bands and elected Chiefs acting as authorized representatives of the descendants of the historic Cowichan Nation. They are involved in an ongoing trial seeking recognition of their section 35 Aboriginal rights and title (the "Rights and Title Action"). Their claim is brought against British Columbia, Canada and others.
- [4] The hearing fees in both trials have been and will be substantial if they are required to be paid.
- [5] The Court Services Branch has advised Cowichan that the payment of hearing fees in the Rights and Title Action will be stayed pending the outcome of this appeal from Justice Burke's order.
- [6] In these circumstances, it is not, and could not seriously be, contested that Cowichan is a "person interested in an appeal" within the meaning of Rule 36 of the Court of Appeal Rules, and meets the criteria discussed in *Douglas Lake Cattle Co v Nicola Valley Fish and Game Club*, 2019 BCCA 439 at para 18, and *Halalt First Nation v British Columbia (Environment)*, 2012 BCCA 191 at para 5.
- [7] Given its own exposure to hearing costs, and the fact that its obligation to pay those hearing costs depends upon the outcome of this appeal, Cowichan clearly has a direct interest in that outcome. As such, I do not find it necessary to consider whether Cowichan has a sufficiently broad representative base to qualify under the public interest branch of the test. I note that Madam Justice Fisher concluded that Cowichan did not so qualify as a public interest intervenor in *Snaw-Naw-As First Nation v Canada (Attorney General)*, 2021 BCCA 89.
- [8] The real question in this matter, as noted by the Attorney General, is what conditions should be placed on Cowichan's intervention. The Attorney General raises the concern that the submissions Cowichan proposes to make at the hearing of the appeal would expand the issues on the appeal impermissibly and undesirably.
- [9] In the submission of the Attorney General, Cowichan's proposed submissions are duplicative of those of the appeal respondent Blueberry River First Nations, which do not depend on any difference between the fact that in the underlying case, constitutionally protected treaty rights are in issue, whereas in the Rights and Title Action, Cowichan seeks recognition of Aboriginal rights and title.

- [10] In the Attorney General's submission, the only part of Cowichan's proposed submissions that is not duplicative is with respect to the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), an issue that the Attorney General says would impermissibly expand the scope of the appeal. Accordingly, the Attorney General asserts that Cowichan's proposed submissions can be adequately represented by the respondents.
- [11] Cowichan's position is based principally on the proposition that they bring a different perspective because they are seeking recognition of Aboriginal rights and title, as opposed to the enforcement of treaty rights. The former, it contends, has distinct considerations, particularly given their position that Indigenous peoples who have not negotiated treaties are uniquely reliant on the courts to define their rights. In addition, Cowichan asserts that the charging of court hearing fees to Indigenous peoples seeking to uphold and protect their section 35(1) rights should be scrutinized in light of government of British Columbia's affirmation of UNDRIP via the Declaration on the Rights of Indigenous Peoples Act, SBC 2019, c 44. This legislation was not in force at the time of the judgment below.
- [12] That there may be a degree of duplication in submissions is acceptable in the case of an intervenor with a direct interest, and may even be inevitable. But I accept that Cowichan is indeed in a position to bring a different perspective given the different context of their claim, and I also accept Cowichan's representation that it will consult with the respondents to ensure that any duplication is minimal. In my view, any concern about duplication is best addressed in circumstances such as we have here by limits on the length of the factum the intervenor may file, and on oral argument.
- [13] With respect to issues, in particular Cowichan's proposition that the imposition of hearing fees should be scrutinized in light of UNDRIP, the Attorney General relies on the words of Justice Seaton in *Canada (Attorney General) v Aluminum Co of Canada* (1987), 10 BCLR (2d) 371 (CA) at para 44: Intervenor should not be permitted to take the litigation away from those directly affected by it. Parties to litigation should be allowed to define the issues and seek resolution of matters they determine appropriate to place in issue. They should not be compelled to deal with issues raised by others.
- [14] Cowichan points out that the Attorney General raised the matter of UNDRIP in its factum, in the context of its submission that the preferable process to address constitutional infirmity would be a suspended declaration of invalidity, to allow the legislature, through the rules committee, to consult appropriately. In para 84 of its factum, the Attorney General says this:
84. A suspended declaration of invalidity would also afford the government an opportunity to consult and cooperate with the Indigenous peoples in British Columbia to ensure the legislative amendment is consistent with the United Nations Declaration on the Rights of Indigenous Peoples, pursuant to s. 3 of the Declaration on the Rights of Indigenous Peoples Act.

- [15] As I understand Cowichan's UNDRIP argument, it is that, given its adoption into BC law, the Declaration is an important contextual factor for this Court to consider in analysing whether the reading down of the provisions was constitutionally appropriate, and in assessing the question of the inconsistency of court hearing fees with fair and effective mechanisms for redress given the constitutional parameters and the honour of the Crown. In my view, the provision of such context is consistent with the role an intervenor is meant to play. It gives the Court something extra to think about in relation to the issues raised in the appeal, but not, I think, to an undue or distracting extent.
- [16] Given that the issue of legislative compliance with UNDRIP has already been referred to, and given the enactment of the legislation since the application was argued, it is my conclusion that raising it in the way Cowichan proposes is well within the appropriate parameters of intervention.
- [17] In seeking to leave the question of oral argument to the division hearing the appeal, the Attorney General relies on two cases, *Equustek Solutions Inc v Google Inc*, 2014 BCCA 448, and *Halalt First Nation v British Columbia (Minister of Environment)*, 2012 BCCA 191. In my view, both of those cases are distinguishable, principally on the basis that the intervenors did not enjoy the obvious direct interest that Cowichan has in this case.
- [18] Leave to intervene is accordingly granted. Cowichan may file a factum not to exceed 15 pages in length to be filed by April 16, 2021. The Attorney General may file a response factum of no more than 10 pages in length to be filed by April 30, 2021. Cowichan may make oral submissions not to exceed 15 minutes.
- [19] Cowichan may not claim costs against any party in the appeal, and is not liable to any party for costs. "The Honourable Mr. Justice Grauer"

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/ca/21/01/2021BCCA0127.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/yahey-v-british-columbia-attorney-general-2021>

Prepared on 26 October 2026 · Esheria