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Cowichan Tribes et al: The Admissibility of Oral History Evidence

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COWICHAN TRIBES ET AL: THE ADMISSIBILITY OF ORAL HISTORY EVIDENCE

I. Introduction

Starting with *Delgamuukw*,[1] the Supreme Court of Canada has recognized that oral history can speak to an Indigenous community's history, genealogy, practices, events, customs and traditions, and can be relevant in Aboriginal rights and title cases. However, courts' consideration of the admissibility of oral history evidence has not always been a straightforward matter. This paper addresses a recent decision, *Cowichan Tribes v Canada (Attorney General)*, 2022 BCSC 933, in which the Musqueam Indian Band ("Musqueam") successfully defended an application seeking a ruling that Musqueam's witnesses' oral history evidence was largely inadmissible.

A. Cowichan Tribes et al Litigation

Cowichan Tribes[2] stands to be a historic Aboriginal rights and title case, both for its length (presently some 445 days into trial) and subject matter. The litigation is being brought by four communities: Cowichan Tribes, Penelakut, Halalt and Stz'uminus, on their behalf as well as on behalf of "all other descendants of the Cowichan Nation", which, for example, includes the members of Lyackson. The plaintiffs seek declarations of Aboriginal title and of an Aboriginal right to fish. The plaintiffs claim Aboriginal title to an area of land and water on the south arm of the Fraser River on Lulu Island, larger in size than Stanley Park. The claim encompasses the alleged site of a village and surrounding lands, as well as a portion of the bed of the Fraser River, at a place variously transcribed as ƛ̓əqtinəs and Tl'uqtinus. The rights claim is to an Aboriginal right to fish for food in the south arm of the Fraser River. The defendants in the case are the Province of

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1 *Delgamuukw v British Columbia*, [1997] 3 SCR 1010 [***Delgamuukw***].

2 *Cowichan Tribes et al v Canada (Attorney General) et al*, SCBC Victoria Registry No 14 1027.

BC, Canada, the Vancouver Fraser Port Authority, the City of Richmond, Tsawwassen First Nation, and Musqueam.[3]

B. The Decision to Order A Voir Dire

At the opening of Musqueam's case, the plaintiffs successfully sought a voir dire to determine the admissibility of the oral history evidence to be given by Musqueam's three oral history witnesses: sʔəyəɬəq (Larry Grant), secəlenəxʷ (Morgan Guerin), and yəχʷyaχʷələq (Chief Wayne Sparrow). A voir dire is a "trial within a trial", and in this case the primary purpose was to determine the threshold reliability of Musqueam's witnesses' oral history evidence.[4] The plaintiffs were also granted leave to raise other objections to the admissibility of Musqueam's witnesses' evidence, including on the basis that it consists of impermissible opinion and/or speculation rather than oral history, that it is not relevant, and that it relates to subject matters over which Musqueam refused document production.

Musqueam's evidence in the voir dire started on January 20, 2022 and finished on March 4, 2022. This amounted to advancing almost 600 transcript pages of evidence from Musqueam's three witnesses over the course of 25 trial days. The witness testimony was followed by detailed and sometimes line-by-line written and oral argument of well over 100 specific objections by the plaintiffs to the admissibility of evidence from Musqueam's witnesses. The oral hearing of the plaintiffs' voir dire objections took 24 days, starting on April 1, 2022 (Day 383) and concluding on May 13, 2022 (Day 407). The resulting reasons on the admissibility of the evidence are almost 150 pages in length.

II. Hearing Oral History in A Voir Dire

A. Options for Addressing Objections to Viva Voce Oral History Evidence

The plaintiffs made a number of global objections in advance of Musqueam's witness testimony, including to the threshold reliability of the oral history evidence, and that Musqueam's witnesses were going to provide opinion evidence which the plaintiffs object to. The Court considered three options for addressing the plaintiffs' objections:

1. Hear Musqueam's witnesses in the trial proper, allowing the plaintiffs to repeatedly interrupt them with objections.[5]

Musqueam and the plaintiffs agreed it would be disrespectful to repeatedly interrupt Musqueam's witnesses, some of whom are elders in their community. The Court rejected this as an option.

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[3] This paper is written by Cheryl Sharvit and Aaron Wilson of Mandell Pinder LLP, which represents Musqueam.

[4] *Cowichan Tribes v Canada (Attorney General)*, 2022 BCSC 1365 [**Voir Dire Ruling**] at para 14.

[5] *Ibid* at para 5.

2. Have the plaintiffs state their global objection, allow the witnesses to testify in the trial proper and then hear submissions on the plaintiffs' objections to the various portions of the evidence.[6]

This was the procedure followed for the plaintiffs' oral history witnesses earlier in the trial.[7] The parties agreed to state a global objection at the beginning of the plaintiffs' witnesses' testimony and to not interrupt them. The plaintiffs then prepared written submissions about the admissibility of their oral history evidence, including a "Cowichan Oral History Framework," and identified what portions of the testimony of their witnesses they considered to be oral history. In the end the defendants, including Musqueam, did not pursue any objections to admissibility of the plaintiffs' oral history.[8] Instead, weight will be argued at the end of the day.

Although this procedure was proposed by the plaintiffs for their witnesses, they nonetheless argued that Musqueam's witnesses should give evidence in a voir dire because the plaintiffs would be seeking to exclude much of Musqueam's witnesses' testimony.

While the parties accepted the plaintiffs' approach to their own oral history, the Court noted during the plaintiffs' application to hear Musqueam's evidence in a voir dire that *had* any of the parties asked for a voir dire in the plaintiffs' case to determine admissibility of their oral history, the Court likely would have agreed to a voir dire.[9]

3. Enter into a voir dire for the entirety of Musqueam's witnesses in examination in chief and in cross-examination and then hear submissions on the admissibility of the evidence.

This is the option sought by the plaintiffs and adopted by the Court. One voir dire was declared for the evidence of all of Musqueam's oral history witnesses, with objections to be held until the end of the voir dire. The plaintiffs would then indicate with specificity the testimony to which they objected and the grounds for the objections.

Justice Young articulated a number of reasons for her decision. The Court considered it an advantage that any inadmissible evidence would not form part of the official record because the voir dire acts as a "holding vessel" until the court declares whether the evidence is admissible or not.[10] A voir dire was considered by the Court to be the most efficient way to proceed because it would not interrupt the flow of the evidence with objections, and because the parties were directed to conduct full examinations, as if evidence were heard in the trial proper.[11] This included the Musqueam witnesses giving all of their trial evidence in one voir dire, and directing the plaintiffs to conduct a full cross-examination of Musqueam's witnesses on all of their testimony. The Court noted that had Musqueam's witnesses testified within the trial proper, they

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6 *Ibid* at para 6.

7 *Ibid* at para 9.

8 *Ibid* at para 10.

9 *Ibid* at para 12.

10 *Ibid* at para 11.

11 *Ibid* at paras 14.

would have had to testify for many more days,[12] presumably because the plaintiffs would have made objections during the testimony.

B. Considerations

Much of the law concerning voir dires is from a criminal law context. Both the federal and provincial Crowns have moved away from seeking voir dires to determine the admissibility or oral history evidence. Guideline #17 of the Attorney General of Canada's 2018 Directive on Civil Litigation Involving Indigenous Peoples and Directive #17 of the 2022 BC Directives on Civil Litigation involving Indigenous Peoples are that "Oral history evidence should be a matter of weight, not admissibility" and state counsel should consider developing an oral history protocol with opposing counsel to ensure appropriate treatment of oral history evidence.[13]

While a stated purpose of the voir dire in this case was to respect Musqueam witnesses by avoiding the need for unnecessary recall, whether this would be achieved was unclear at the outset. Because there was no prior agreement among the parties about rolling unobjected to evidence (or evidence ruled admissible) into the trial proper, the ruling put Musqueam in the position of not knowing whether any of its witnesses' evidence would become trial evidence, including non-oral history evidence and evidence not objected to by the plaintiffs.

If a voir dire is ordered for oral history witnesses, efforts should be made to address uncertainty in advance, including consideration, with sufficient notice, of the following matters:

Procedure within the voir dire

Where a voir dire is ordered for the hearing of oral history evidence, it is beneficial to clearly state the procedure in advance, ideally by consent, so there is no uncertainty during the voir dire or after a ruling on admissibility. For example, in this case, the voir dire order had to be amended twice during the course of the voir dire. First, in order to clarify that the plaintiffs could object to the form of Musqueam's direct examination questions (e.g. leading questions) in order to allow counsel for Musqueam to re-state the question and avoid unnecessary recall of witnesses after the fact. A second amendment was made in order to permit Musqueam to object to the plaintiffs' questions in cross-examination during the voir dire, as the original order stated without distinction that all objections would be held until the end of the voir dire.

Is the voir dire a blended voir dire?

A blended voir dire is distinguished from a "regular" voir dire as its purpose is intended to resolve multiple or more complex issues. In the present case, the plaintiffs argued for a blended voir dire on the basis that their objections were interrelated and could not be separated out. This meant that Musqueam had to lead all of the witnesses' evidence in the voir dire.[14]

In order to avoid witnesses giving evidence on the same matters twice (once within the voir dire, and again in the trial proper), it is essential for the parties and the court to have agreement in

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12 *Cowichan Tribes v Canada (Attorney General)*, 2022 BCSC 933 [**Oral History Ruling**], at para 641.

13 https://www.justice.gc.ca/eng/csj-sjc/ijr-dja/dclip-dlcpa/litigation-litiges.pdf; https://news.gov.bc.ca/files/CivilLitigationDirectives.pdf.

14 Voir Dire Ruling at para 12.

advance on how voir dire evidence will be received at trial, including the evidence not objected to and not ruled on.

Procedure for admissibility of evidence at trial

In contrast to the approach taken by Garson J on consent of the parties in a mid trial ruling from the *Ahousaht* case, the voir dire ruling in this case did not provide that evidence heard on the voir dire which was ruled admissible would become evidence at trial.[15] Instead, it was left to the parties to determine after the Court's ruling on admissibility whether the parties would consent to the evidence becoming evidence in the trial proper.[16] It was not until months after the admissibility ruling that a consent order to this effect was made on September 22, 2022 deeming the evidence of Musqueam's witnesses in the voir dire evidence at trial, with the exception of inadmissible evidence.

While the parties in this case reached agreement,[17] a lack of agreement could have led to Musqueam's witnesses needing to be recalled to again give and be cross examined on their evidence that was ruled admissible. Musqueam's witnesses were left wondering whether any of their testimony would become part of the trial record without having to take the stand again. This is why it is in our view preferable to confirm all parties' agreement in advance that evidence found admissible (or not challenged) automatically becomes evidence at trial.

Attention should also be given to how documents tendered in a voir dire will be addressed. Will objections to exhibits, tendered in direct and in cross, be argued at the same time as objections to the admissibility of viva voce evidence? In this case, documents were marked as exhibits for identification within the voir dire, and arguments about admissibility were carved off and dealt with in an application separate from the application on objections to admissibility of the viva voce testimony.[18] The documents thus ruled admissible were to be entered into evidence only once the admissible evidence from the voir dire became part of the trial record.[19]

Separate voir dires for each witness?

This is also an important consideration. In *Ahousaht*, separate voir dires were held for each of the Ahousaht's witnesses whose testimony was ordered to be given in a voir dire.[20] A potential benefit of separate voir dires is that the ruling on objections to one witness' evidence may limit similar objections in subsequent witnesses' voir dires, through both the party leading the witness seeking to avoid leading evidence they now know is inadmissible, and the party objecting from making objections they now know will not be upheld. In *Cowichan Tribes*, the plaintiffs argued that there should be one voir dire for all of Musqueam's witnesses because their evidence was

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15 *The Ahousaht v Canada (Attorney General)*, 2008 BCSC 769 [***Ahousaht***] at para 2(d).

16 Voir Dire Ruling at para 15; Oral History Ruling at para 642.

17 With one exception, which required the parties to go before the Court and seek clarification on the Court's ruling.

18 See *Cowichan Tribes v Canada (Attorney General)*, 2022 BCSC 1586 [**Contested Documents Ruling**].

19 *Ibid* at para 4.

20 *Ahousaht* at paras 1-3, 27.

interrelated, and in particular because one witness's testimony about the transmission of oral history may be relevant to the admissibility of the oral history of another witness.[21]

III. What Constitutes Oral History Evidence?

The Court defined Indigenous oral history as "the practice of transmitting information orally as a means of recording history and preserving Indigenous knowledge"[22] and at paras 4-9 of the ruling the Court provided a brief description of oral history relying primarily on *Delgamuukw* and trial judgment from *Tsilhqot'in*.

The plaintiffs argued that oral history could not include inference, explanation, analogy or interpretation, and they sought to exclude all such testimony from the trial record. They made objections on the basis that Musqueam's definition of oral history was "overly broad,"[23] and suggested that Musqueam's definition of oral history amounted to abandoning the rules of evidence. Musqueam's view was that oral history cannot properly be understood if stripped of its context and the ways that the witnesses explained the oral history for the Court.

The plaintiffs also sought to limit oral history to the recounting of events, rather than the transmission of knowledge about matters such as relationships and norms governing the Indigenous world at the relevant times.

The Court agreed with Musqueam's submissions that interpretation and context are very much a part of the living oral history, and that in some cases opinion, inference and context are useful and necessary to explain oral history. The Court also accepted that modern expressions of oral history form part of that history and are admissible.

For example, Morgan Guerin testified about Musqueam practices that relate to governance and stewardship over the territory. He gave evidence about abundance, the ability to share and the importance of kinship ties, and spoke to teachings about the expectations of conduct and responsibilities of a host. Mr. Guerin also provided modern analogies of how the teaching is expressed today in order to illustrate the teachings. The plaintiffs objected to the modern analogy as opinion, but the Court found the illustrations were admissible as a modern-day explanation of a core teaching in Musqueam culture.[24]

In another example from Mr. Guerin's evidence, plaintiffs' counsel suggested to Mr. Guerin in cross examination that given the numbers of other First Nations accessing the Fraser River in pre-colonial times compared to the number of Musqueam people who were there, Musqueam did not have the practical ability to exclude others or the power to require them to ask permission or identify themselves. Mr. Guerin disagreed and explained that there was a kinship protocol that kept the peace in the territory rather than the use of military might; he disagreed that numbers are required to exclude people or grant permission, otherwise "it would be much like saying Canada cannot be considered a country because the military might of the United States could

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21 Voir Dire Ruling at paras 12-13.

22 Oral History Ruling at para 4.

23 *Ibid* at para 56-60.

24 *Ibid* at paras 247-248.

beat us up at any time. That's not the point. We have a lot of societal constructs that make -- no, we have peace in the area." The plaintiffs objected to this response on the basis that it was impermissible opinion evidence which provided a modern analogy, but the Court found that it was an expression of Mr. Guerin's oral history teachings and admissible as oral history evidence.[25]

The Court accepted a broader understanding of oral history, concluding that:

- Oral histories may express values and mores and may be "woven with history, legend, politics and moral obligations" (referring to *Delgamuukw* at para 86; *Tsilhqot'in* at paras 136-137);[26]
- Oral traditions accumulate interpretations as they are transmitted, and modern interpretations demonstrate the relevance of oral history to the present;[27]
- "Oral history is evidence not just of events, but of the context in which events took place, including the relevant laws, cultures and traditions";[28] and
- "Oral histories may speak of laws and legal regimes that govern relationships; they 'are something to be evaluated and something to evaluate by'."[29]

In short, the Court adopted a broad definition of what oral history is and employed a principled approach to determining the admissibility of oral history evidence. Notably, Justice Young quoted with approval the words of Justice Vickers from the *Tsilhqot'in* trial decision, that "to truly hear the oral history and oral tradition evidence presented in these cases, courts must undergo their own process of decolonization."[30] The Court identified a number of non-exhaustive factors that contribute to the admissibility of oral history evidence and noted that admissibility must be determined on a case-by-case basis. The Court rejected any requirement for "independent corroboration" of oral tradition (such as through written explorer or trader records), because it offends the direction from the Supreme Court of Canada.[31]

IV. What Oral History Is Relevant?

Relevance of oral history from time immemorial, or indeterminate time periods

The plaintiffs raised a number of objections to Musqueam's oral history that related to the pre-contact period. They maintained that this case is about whether the Cowichan exclusively occupied the claim area at the legally relevant date of 1846, and about whether they had a culturally integral practice of fishing the south arm of the Fraser River for food in the early 1790s,

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25 *Ibid* at paras 282-283.

26 *Ibid* at para 6.

27 *Ibid*.

28 *Ibid* at para 8.

29 *Ibid* at para 9, citing John Borrows, "Listening for a Change: The Courts and Oral Tradition" (2001) 39:1 Osgoode Hall Law Journal 1 at p 28.

30 *Ibid* at para 12.

31 *Ibid* at para 21.

being the time of contact in the lower Fraser River.[32] While the plaintiffs did not take issue with "mythology" or creation stories being included in oral history,[33] they argued that this case is not about Musqueam's territory or historical practices, and so Musqueam's oral history evidence about events prior to 1790 is not relevant.

The Court ruled that Musqueam's oral history evidence which relates to indeterminate periods of time is relevant to who Musqueam are as a people, its relationship with the lands, waters and resources of the territory, and that its history extends back for many generations.[34]

For example, Mr. Guerin was asked what his knowledge is about the time of year people from Vancouver Island would come over to the south arm of the Fraser River. In answering, Mr. Guerin shared ancient oral history about the time when the south arm started to exist and when kinship arrangements were set up. The plaintiffs objected and argued that oral history, dating to the depths of time before Lulu Island and the South Arm as geographic features are said to have even existed, was legally irrelevant. In finding the evidence admissible, the Court accepted Musqueam's submission that the reference to ancient times when the kinship arrangements were first set up extends back for generations before contact and is relevant to stewardship and Musqueam's relationship with its lands, waters and resources in the territory.[35]

The Court therefore rebuffed the plaintiffs' argument that Musqueam's oral history evidence should be restricted to events which took place in specific time periods such as the period *after contact* in 1790, and acknowledged that due weight must be given to the ancestral laws and customs of Indigenous peoples who occupied the land *prior to contact*.[36]

Importantly, the Court accepted Musqueam's submission that if section 35 is to do more than pay lip service to Aboriginal perspectives, section 35 rights, and the practices engaged in at the relevant time periods, need to be understood in accordance with Indigenous legal traditions.[37] At paragraph 86 the Court adopted Musqueam's position that this oral history evidence is an important part of a the "true picture" to be considered by the Court at the end of the day:

> [86] I agree with Musqueam's submission that a true picture of the practices relied on by the plaintiffs in support of their claims to Aboriginal rights requires consideration of the broader pre-existing Coast Salish society that both Musqueam and the plaintiff communities were and continue to be a part of. Musqueam submits that this society has included, as part of its core structure, customs, practices and rules governing access to resources through affinal relationships. Evidence of pre-existing rules, traditions and customs about fishing relied on by the plaintiffs is relevant to their claim and Musqueam's pleadings regarding permission.

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32 *Ibid* at para 78.

33 *Ibid* at para 56.

34 *Ibid* at paras 83, 200.

35 *Ibid* at paras 199-200.

36 *Ibid* at paras 85, 87, citing Justice McLachlin (as she then was), dissenting in *R v Van der Peet*, [1996] 2 SCR 507.

37 *Ibid* at para 85.

In other words, oral history is not just a source of information about events that took place, but why and how they took place in the Indigenous society. If it were otherwise, oral history evidence would be stripped of the Indigenous perspective.

Does oral history need to be site specific?

The plaintiffs argued that Musqueam oral history that was not about the specific site claimed by the plaintiffs was inadmissible. Musqueam's position was that evidence did not have to be specific to the claim area to be admissible. Instead, oral history about identity, kinship ties, permission and stewardship that include broad references to Musqueam territory is relevant to demonstrate a legal system based on kinship that allows the plaintiffs to access fish in the Fraser.[38]

As with the argument about Musqueam oral history from indeterminate time periods, Musqueam relied on para 101 of *Delgamuukw* where Lamer CJC warned of imposing a near-impossible burden on Indigenous parties:

> [101] In my opinion, the trial judge expected too much of the oral history of the appellants, as expressed in the recollections of aboriginal life of members of the appellant nations. He expected that evidence to provide definitive and precise evidence of pre-contact aboriginal activities on the territory in question. However, as I held in *Van der Peet*, this will be almost an impossible burden to meet. Rather, if oral history cannot conclusively establish pre-sovereignty (after this decision) occupation of land, it may still be relevant to demonstrate that current occupation has its origins prior to sovereignty. This is exactly what the appellants sought to do.

The plaintiffs maintained that the law about establishing continuity of occupation from *Delgamuukw* could not assist Musqueam, because Musqueam is a defendant in this proceeding and is not seeking to prove its own Aboriginal title.[39]

Justice Young rejected the Plaintiffs' interpretation of *Delgamuukw*, and accepted that *Delgamuukw* recognizes the importance of according due weight to Indigenous perspectives, and not just to the perspectives of Aboriginal rights *claimants*.[40] The Court went on to refute a "site specific" approach to the relevance of oral history:

> [113] Given the nature of Musqueam's oral history it is not possible to tease out only those aspects that relate solely to the geographic areas at issue in these proceedings. The stories and legends of Musqueam knowledge holders are not site specific and it would be artificial and prejudicial to Musqueam to exclude them because they do not relate exclusively to the claim area. Excluding the evidence entirely would deny Musqueam a voice and its perspective in this litigation because its oral history is not confined to Lulu Island and the south arm of the Fraser River.

The Court concluded that Musqueam's oral history evidence about identity, laws and customs, kinship ties and permissions and stewardship of resources is relevant and cannot be restricted to

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38 *Ibid* at para 103.

39 *Ibid* at para 82.

40 *Ibid* at para 115.

the claim area.[41] For example, Mr. Guerin testified about the responsibilities and rights of Musqueam in relation to the Fraser River generally, and at times referred to areas outside of the Fraser River when giving evidence about Musqueam people's reputation as warriors, including reference to a fortified Musqueam village located in present-day University of British Columbia. The Court found that this was oral history evidence about the identity of the Musqueam people and should not be restricted in time or geography.[42]

V. Threshold Reliability of Oral History Evidence

Oral history is a form of hearsay evidence. As noted by Justice Young:

> [15] Hearsay evidence is admissible where the twin criteria of necessity and reliability are met: *R. v. Khelawon*, 2006 SCC 57. In cases like this one, which involve inquiries into historical events, necessity is usually established as a result of the deaths of those who observed the event. Therefore, the admissibility of oral history evidence often rests on an assessment of its threshold reliability.

However, as Justice Vickers recognized in *Tsilhqot'in*, Courts have struggled with the admissibility of hearsay evidence of oral history and traditions, and no court has set a formal procedure to determine the admissibility of oral history evidence.[43] Like Justice Vickers, Justice Young relied on an informal but principled approach to assess the admissibility of Musqueam's witnesses' oral history evidence.

Transmission of Musqueam oral history

The court in *Tsilhqot'in* heard expert evidence about oral history transmission, and in *Cowichan Tribes* one of the plaintiffs' experts devoted just over four pages (of a 644-page expert report) to "The Transfer of Knowledge." In contrast, Musqueam chose not to lead expert evidence, including on the transmission of oral history at Musqueam. Instead, Musqueam established how its oral history is transmitted and why it is reliable through the evidence of its witnesses Larry Grant, Morgan Guerin and Chief Wayne Sparrow.

The plaintiffs argued that Musqueam provided no evidence of a clear "framework" for transmission of oral history at Musqueam and maintained such evidence was required with respect to: how oral history is preserved within Musqueam; who is entitled to relate oral history and whether there is a hierarchy in this regard; and the community practices with respect to safeguarding the integrity of its knowledge.[44] They submitted that the testimony of Musqueam's three witnesses was inconsistent on how oral history was transmitted.

According to the plaintiffs, it was problematic that Musqueam did not call an expert to give an opinion about these matters including providing a standard against which to test whether the witnesses' evidence was oral history or reliable. They argued that evidence about transmission of oral history from the oral history witnesses themselves was prone to bias. In oral submissions, the plaintiffs submitted that as an alternative to an expert witness such as an anthropologist,

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41 *Ibid* at para 116.

42 *Ibid* at paras 243-244.

43 *William et al v British Columbia et al*, 2004 BCSC 148 [***William***] at para 16.

44 Oral History Ruling at para 24.

Musqueam could have called a community member specially trained on the transmission of oral history who would provide evidence about transmission only and would not provide any oral history evidence themselves.[45]

While the plaintiffs used the language of "Oral history framework" to describe a process for transmitting oral history, Musqueam rejected this terminology. Relying on the evidence of its witnesses, Musqueam set out how transmission and preservation of Musqueam oral history is achieved, including in relation to the participants in the transmission of Musqueam oral history, settings in which oral history is transmitted, and how Musqueam oral history is reliable and maintains its integrity as a result of how it is transmitted. Musqueam asserted that the best evidence about the transmission of oral history is from those who participate in the process and not from outsiders such as academics or consultants. Musqueam argued it would be wrong to presume that evidence from the knowledge holders themselves about how knowledge is preserved is biased and unreliable, and that it would be discriminatory to conclude that oral history is presumptively self-serving and unreliable.

The Court had no hesitation in holding that expert evidence is *not* required to assess the threshold reliability of oral history.[46] The Court concluded that the plaintiffs' demand for a rigid framework is inconsistent with the law, and inconsistent with the plaintiffs' approach to their own oral history evidence, in which they urged flexibility in admitting the oral histories of Indigenous communities.[47] Indeed, Justice Young found that there is no rigid set of requirements at Musqueam:

> [33] As set out below, I conclude that Musqueam has provided sufficient evidence of the framework for transmission of oral history to allow me to assess the threshold reliability of the oral history evidence. I am satisfied that there is no rigid set of requirements that must be met when oral history is transmitted within the Musqueam community in order for oral history to qualify as such. It would be a disservice to the Musqueam perspective for the court to require one. Within the Musqueam community there is a sliding scale when it comes to the level of formality of transmission. Informally transmitted oral history, like all oral history, is admissible provided it is useful, necessary and reliable. Oral history that is transmitted in the absence of a process to check for accuracy may be accorded less weight.

The Court observed that Musqueam's witnesses were sincere and proceeded to set out its own understanding of how Musqueam's oral history is transmitted based on Musqueam's evidence. The Court found that there may be more than one recognized process for the transmission of oral history within a community, and that inconsistencies in how different individuals receive their oral history is not fatal to its admissibility. The Court recognized that Musqueam people start learning oral history from infancy, and that it is a lifelong process. It accepted that oral history may be transmitted during ceremonies in the bighouse, or less formally while engaging in traditional practices, as well as through "kitchen table talk," where oral history can be shared,

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45 *Ibid* at para 22.

46 *Ibid* at para 30.

47 *Ibid* at para 46.

confirmed, corroborated, discussed and corrected. The Court also recognized that in modern times, some families have made recordings to preserve oral history, but these recordings remain the property of the family who holds the knowledge.

Sources of Musqueam witnesses' oral history

In assessing threshold reliability of specific passages, Justice Young accepted the "Vickers factors" set out by Justice Vickers in the *Tsilhqot'in* trial. Those factors include:

1) some personal information concerning the witnesses' circumstances and ability to recount what others have told him or her;
2) who it was that told the witness about the event or story;
3) the relationship of the witness to the person from whom he or she learned of the event or story;
4) the general reputation of the person from whom the witness learned of the event or story;
5) whether that person witnessed the event or was simply told of it; and,
6) any other matters that might bear on the question of whether the evidence tendered can be relied upon by the trier of fact to make critical findings of fact.[48]

However, the Court accepted that these factors are non-exhaustive, and relied on *Mitchell* for the proposition that admissibility must still be determined on a case-by-case basis.[49]

Citing the Vickers factors, the plaintiffs argued that Musqueam's witnesses did not in certain cases sufficiently identify the sources of their oral history. In response, Justice Young refused to find that oral history evidence was always inadmissible where the identity of a source for a particular statement was not evident.[50] In any event, the Court acknowledged the "statuses and capacities of Musqueam's oral history witnesses" and found that for the most part, they did give evidence about the sources of their oral history knowledge and spoke to their sources' reputations within the Musqueam community as reputable and respected knowledge holders (e.g. Larry Grant speaking about his late mother Agnes Grant, or Chief Sparrow and Morgan Guerin testifying about the late Dominic Point).[51]

Previous judicial findings as measure of reliability

The plaintiffs argued that some of Morgan Guerin's oral history evidence was inadmissible because it was contradicted by the Federal Court's findings in *Squamish Indian Band v Canada*, 2001 FCT 480 [*Mathias*]. In particular, a source of Mr. Guerin's oral history in *Cowichan Tribes* was a witness in the *Mathias* case.[52] The plaintiffs submitted that the Federal Court's findings were the "best evidence" of that individual's oral history and effectively trumped Mr. Guerin's

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48 *William* at para 19.

49 Oral History Ruling at para 18, citing *Mitchell v MNR*, 2001 SCC 33 at para 31.

50 *Ibid* at para 55.

51 *Ibid* at paras 51, 54.

52 *Ibid* at para 203.

testimony. Musqueam argued that the *Mathias* reasons could not render Mr. Guerin's oral history inadmissible as they are the opinion of the judge, made in the context of a dispute involving different parties and different legal issues. The Court concluded that Mr. Guerin's oral history was admissible despite any inconsistency with the findings in *Mathias*, but that his comments on the findings in *Mathias* were not:

> [211] I do not consider the prior findings in *Mathias* to undermine the threshold reliability of Mr. Guerin's evidence. I will not reject his evidence on this basis. Rather, his testimony ought to be considered in light of all of the evidence at the end of trial, and with regard to any submissions the parties might make about the impact of the court's findings in *Mathias*.
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> [212] In my review of the following objections, I have ruled that Mr. Guerin's evidence that differs from the findings of Justice Simpson is admissible. Where Mr. Guerin challenges the correctness of Justice Simpson's conclusions, I have ruled that this is inadmissible opinion evidence.

In a subsequent application, the plaintiffs sought to enter the *Mathias* reasons into evidence, as *prima facie* proof of facts in issue in the *Cowichan Tribes* case, or in the alternative, as evidence to be weighed with other evidence. The central issue in *Mathias* was for whom was the False Creek Reserve set aside in 1869 where False Creek meets English Bay. The plaintiffs sought to enter the reasons into evidence under s. 23(1) of the *Canada Evidence Act* and/or s. 26 of the *BC Evidence Act*.

The Court rejected the plaintiffs' application and not admit the *Mathias* reasons into evidence.[53] First, the Court held that s. 28 of the *Canada Evidence Act* does not allow documents to be admitted into evidence pursuant to s. 23 unless the party intending to produce the document has provided reasonable notice. The Court held that the plaintiffs did not comply with this requirement.[54] The Court further held that the reasons were not admissible under s. 26 of the *BC Evidence Act* because that provision requires that the document be otherwise relevant and admissible.[55]

There was a debate before the Court on what the law is in British Columbia, and in particular, whether the reasons from a prior proceeding are only admissible if the parties are the same, pursuant to *Dhillon v Dhillon*, 2006 BCCA 524. The Court held that the *Mathias* reasons were not admissible because the parties are different and there was an insufficient nexus between the issues in the prior litigation and the case at bar.[56] Justice Young agreed that there may be circumstances where a lack of mutuality of parties is not a bar to admissibility, but in this case, there was also an insufficient connection between the issues in the two cases.[57] The *Mathias* case was about a different time period and the court in that case did not consider kinship ties amongst the plaintiff groups and Musqueam.[58] The Court also found that admission of the

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53 Contested Documents Ruling at para 61.

54 *Ibid* at para 62.

55 *Ibid* at para 64.

56 *Ibid* at para 64.

57 *Ibid* at para 68.

58 *Ibid* at para 69.

reasons would not further the objectives underpinning caselaw about admitting prior civil judgments, which include avoiding duplicative litigation and potentially inconsistent findings.[59] In addition, having been brought after over 400 days of trial, the application did not promote the goal of trial efficiency.

VI. Conclusion

In this ruling, Justice Young addressed the role and admissibility of the context of oral history, and clarified that opinion, belief and inferences may properly be part of oral history and therefore admissible. The Court reinforced existing jurisprudence about according due weight to Indigenous perspectives, including the perspective of an Indigenous party who is a defendant and not seeking a declaration of s. 35 rights. The Court confirmed that oral history need not be temporally or site specific in order to be admissible, provided it speaks to relevant Indigenous laws and traditions.

The Court firmly rejected expert evidence as a prerequisite to the admissibility of oral history evidence, or as a requirement for the Court to assess admissibility, and declined to find that evidence from knowledge holders about the transmission of oral history is inherently biased and unreliable. While evidence about the transmission of oral history within a community or group is necessary, this evidence can be given by the knowledge holders themselves, and not all individuals in the community need to receive and transmit oral history in the same way.

When it comes to assessing the reliability of oral history evidence, the Court accepted the Vickers factors as indicia of reliability but noted that they are not exhaustive, and admissibility must still be determined on a case-by-case basis. Applied to Musqueam, the Court found a formal process for keeping and sharing oral history is not a prerequisite to admissibility, and that it is not necessary for oral history witnesses to identify sources for every piece of oral history shared in order for it to be admissible.

In our view, these determinations and the Court's reasoning represent a significant and important clarification in the caselaw about how oral history should be received and treated by Canadian courts.

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[59] *Ibid* at para 71.