

**Supreme Court of British Columbia**  
**Delgamuukw v. B.C. (Govt.)**  
**Date: 1988-03-28**

*S.A. Rush, for plaintiffs.*

*P.G. Plant and T.A. Sigurdson, for defendant province.*

*M. Koenigsberg, for Attorney General of Canada.*

(Smithers No. 0843/1984)

[1] March 28, 1988. MCEACHERN C.J.S.C.:— The defendant province applies during the course of this trial under R. 28(1) for an order that Heather Harris be examined on oath. Heather Harris is a genealogist who has made an extensive investigation into the genealogy of the Gitksan people and the plaintiffs have delivered a copy of her report (81 pages plus some appendices). In the transmittal letter with which such report was furnished, plaintiffs' counsel stated the plaintiffs intend to rely upon such opinion at the trial of this action. There is no doubt Ms. Harris is an expert retained or specially employed by the plaintiffs, thus triggering the provisions of R. 28(2) and (3).

[2] In her report Ms. Harris says the main product of her research "is a set of 50 genealogical charts ... which names virtually all of the living Gitksan and many of their ancestors". Only one example of these 50 genealogical charts was attached to the copy of the report delivered by the plaintiffs to the defendants.

[3] At p. 5 of her report, Ms. Harris says:

I began the genealogical research in a position which is fairly unique and somewhat enviable to anthropologists. In addition to my formal training in anthropology, I am a member of the community I study. I am a member of the House of 'Niist, I have a minor chief's name and a seat in the feast hall. As a House member in my own right and especially as the wife of a chief, I am heavily involved in the feast system. As well, I have learned a considerable amount about Gitksan society from witnessing the rise in power of my husband, Hlex who holds a councillor's position and is heir to his head chief, Ts'iibasaa. Such involvement in the society diminished for me one of the anthropologist's biggest problems which is rapport with the people under study. Being a community member has afforded me opportunities for participant observation (the favoured anthropological methodology) not usually available to outside observers. The result has been a deeper understanding of the nature of Gitksan society.

[4] The purpose of R. 28 is described by McLachlin and Taylor, British Columbia Practice, 2nd ed., p. 28-3, as:

The purpose of R 28 is to provide "a new investigative technique" to facilitate full disclosure of the facts before trial, thus avoiding a party being taken by surprise at trial and ensuring that all relevant evidence is brought before the Court at trial: Aintree Investments Ltd et al v The Corporation of the District of West Vancouver et al (No. 2), *supra*. The purpose of the Rule is not to record evidence, nor to provide admissions which can be read in as evidence at trial, but rather to provide admissions which can be read in as evidence at trial, but rather to provide information: Classen v McNiece et al [1983] BCD Civ 1416-01 (SC).

[5] As I stated to counsel at the conclusion of argument in this matter, I have no doubt genealogical evidence may be relevant at this trial and further that the defendants are unable to obtain facts and opinions on the same subject by other means. This is because of the unique position of Ms. Harris and because the defendants are unable to retrace her steps as the Gitksan people are, in effect, plaintiffs in this action represented by counsel. With respect, I reject the suggestion that other anthropologists may have the same information because genealogy is not a static science and published genealogical works quickly become outdated and few academic studies would be conducted with the precision required for litigation. I decline to decide this important question on technical considerations about the sufficiency of material. In any event, there is a clear statement in the material that the province is unable to obtain the information it requires by other means.

[6] The only remaining question, to quote R. 28(3)(c), is whether Ms. Harris has refused or neglected to give a responsive statement. That rule provides:

(3) An application for an order under subrule (1) shall be supported by affidavit setting out ...

(c) that the proposed witness has refused or neglected upon request by the applicant to give a responsive statement, either orally or in writing, relating to his knowledge of the matters in question, or that he has given conflicting statements.

[7] In this case the defendant province delivered 110 questions and subquestions or interrogatories comprising 31 pages to Ms. Harris.

[8] In reply, Ms. Harris answered or furnished answers to parts of 29 questions. Mr. Grant's letter of 2nd February 1988 suggests answers would be given to questions about her methodology but some answers are not related just to methodology.

[9] As I mentioned to counsel, my conclusion on this question must necessarily be a matter of impression. My impression is that the answers furnished by Ms. Harris are not sufficiently responsive because they assist only partly in the search for information on this important issue. I shall give four examples.

(1) On the most important product of her study, the 50 genealogical reports, Q. 3 was in the following terms:

3. (a) As of January 1987 - the date of the Report - did a set of fifty genealogical charts exist naming "virtually all of the living Gitksan and many of their ancestors"?

(b) If so, attach a copy of each of the charts, or so many of the fifty as were then in existence.

To this Ms. Harris answered Q. 3(a) by stating that, as of the date of the report, "the fifty genealogical charts existed in various states of completion", but there is no confirmation or explanation about whether the reports named virtually all the living Gitksan and many of their ancestors as stated in the text quoted above, and no response was made to Q. (b).

(2) Question 20 asks:

20. Please identify the "recent amalgamations and divisions" (see p. 4) which are demonstrated on the genealogies.

This refers to a passage in the report at p. 4 which mentions "Some recent amalgamations and divisions [of Houses] can be demonstrated on the genealogies". There is no answer to Q. 20.

(3) Question 38, which is not answered, is .in the following terms:

38. Please identify all the Gitksan Houses which your research has uncovered, naming each head chief, the English name of the person presently holding that position (or the most recently-known holder) and the Gitksan and English names of the major sub-chiefs of each House.

(4) Question 54, to which no answer was given, is in the following terms:

54. (a) Please identify the time frame for the paragraph at page 24 which begins "A typical residential group".

(b) Please state your evidence for the statements made in that paragraph.

[10] It is my view that clarification of the kind required in QQ. 38 and 54 and others may be necessary for a proper understanding of Ms. Harris' report.

[11] My conclusion, therefore, is that there has not been a sufficiently responsive statement to exclude the operation of R. 28 in this case and the defendant province is entitled to an order for examination on oath accordingly.

[12] To assist the parties further, I wish to comment briefly upon the submission made by Mr. Rush relating to privilege. It is my view, based mainly upon *Thunderbird Tours & Charter Ltd. v. Vancouver Axle & Frame Ltd.* (1981), 28 B.C.L.R. 140 (S.C.), and *S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 45 B.C.L.R. 218, [1983] 4 W.W.R. 762, 35 C.P.C. 146 (S.C.), that the delivery of Ms. Harris' report to the defendants destroyed the solicitor's privilege which previously attached to it. As a result, now that a R. 28 "cross-examination" has been ordered (see R. 28(7)), Ms. Harris must disclose on her examination the underlying facts known to her upon which her report is based, for without such information the defendants would not be able to use R. 28 for the information-gathering purposes for which it is intended.

[13] It is not my view, however, that Ms. Harris is required on her examination to produce the other genealogical reports because such were prepared for the purposes of litigation and the privilege which attaches to them has not been destroyed unless it can be said that they are part of her report and should have been delivered with it. That question did not arise on this application and I did not have the benefit of counsel's argument.

[14] As this case is presently at trial, and has been for some time, it is my view that some terms must be imposed upon the parties regarding the length of the examination. An examination of this kind cannot at this stage be enlarged interminably and I propose to hold the defendants to the estimate made by Mr. Plant that the examination may be completed in three days. That time may, of course, be extended reasonably upon proper grounds being shown.

[15] I am disposed to say, on the basis of fairness and mutuality, that perhaps the plaintiffs should be entitled to examine the defendants' genealogist, even though there is no application before me in that connection. But I cannot do that because I do not know whether there has been a request for a responsive statement or whether there has been any or any sufficient reply to such demand.

*Application allowed.*