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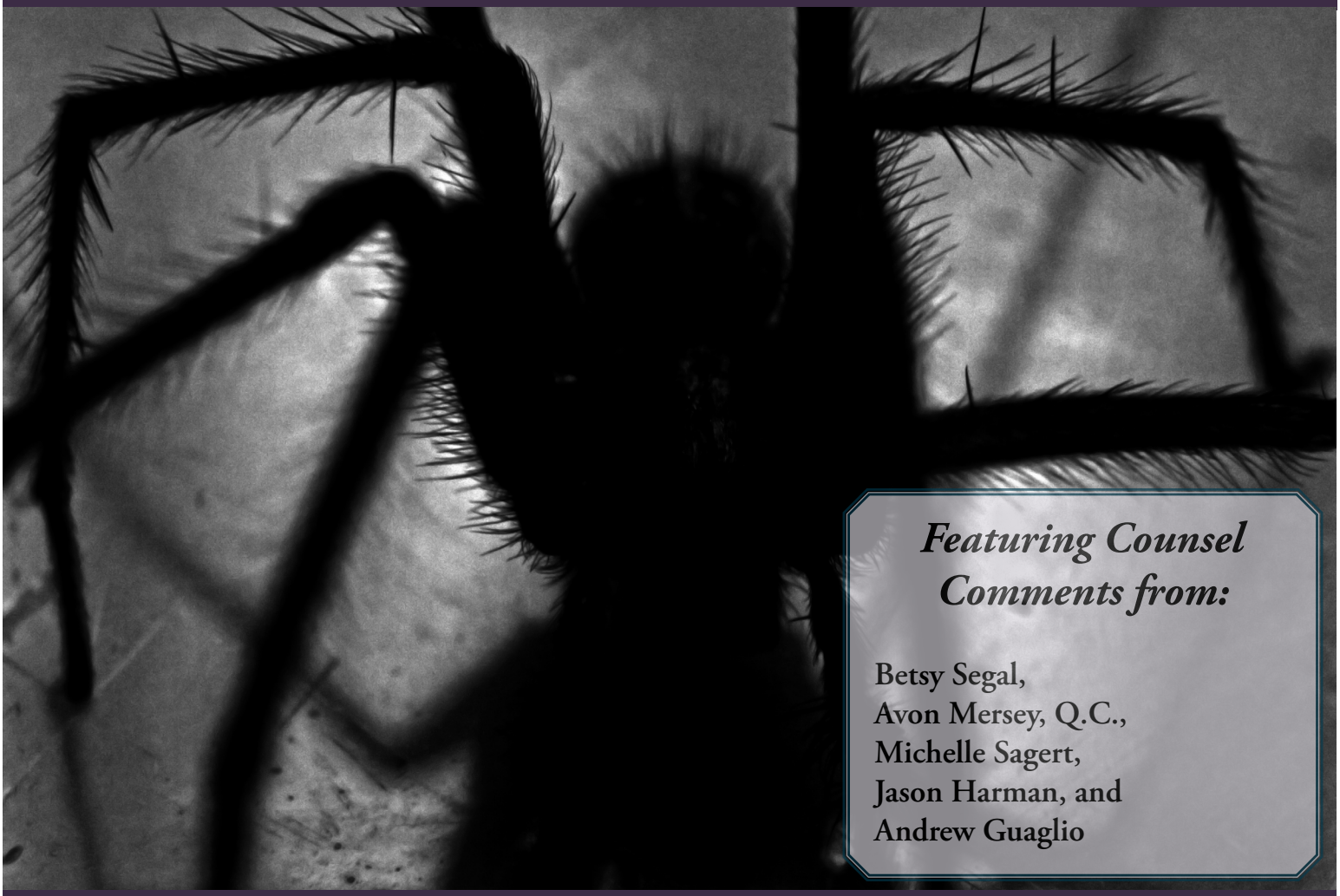
October 2021



Featuring Counsel Comments from:

Betsy Segal,
Avon Mersey, Q.C.,
Michelle Sagert,
Jason Harman, and
Andrew Guaglio

INSIDE THIS ISSUE:

Featured Cases:

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Neufeldt v. Insurance Corporation of British Columbia, 2021 BCCA 327

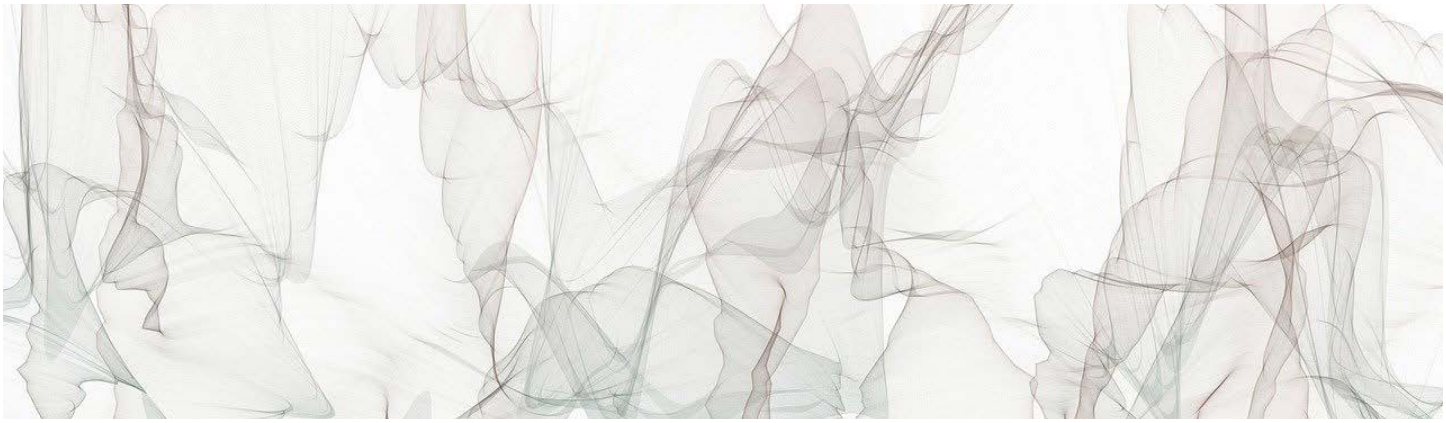
Areas of Law: Insurance; Causation; Damages; Personal Injury; Evidence

~The respondent's mild traumatic brain injury was indivisible between two motor vehicle accidents~

CLICK HERE TO ACCESS THE JUDGMENT

The respondent, Jeffrey Neufeldt, was born in 1979 and began working for the RCMP as a constable in January 2007. In September 2012, the respondent was struck by a vehicle he was pursuing while on duty. Following the accident he experienced neck and back pain and headaches, which he treated with physiotherapy, chiropractic treatments, massage therapy, and painkillers. He engaged in a graduated return to work program in March 2013 and eventually returned to full active duties in June 2015 after taking eight months of paternity leave. The respondent was then involved in a second motor vehicle accident in May 2016. That accident resulted in post-concussive symptoms and a mild traumatic brain injury that included sensitivity to noise and light, vision problems, poor memory and slow thinking speed. The respondent also began suffering from anxiety and depression. He attempted another graduated return to work program but was unsuccessful and remained on medical leave.

The parties involved in both motor vehicle accidents proceeded to trial. The judge concluded that the respondent's injuries from the first accident had not fully resolved prior to the second accident such that the injuries from the two accidents were indivisible. He awarded the respondent $2.4 million for loss of future income on a joint and several basis.



Neufeldt v. Insurance Corporation of British Columbia, (cont.)

APPELLATE DECISION

The appellant, Insurance Corporation of British Columbia ("ICBC"), argued that the trial judge erred by failing to engage in the proper causation analysis before concluding the respondent suffered one indivisible injury. The divisibility of the injuries was important since ICBC only had limited statutory liability for the second accident, which had involved an unidentified driver. While the Court agreed with the trial judge that the respondent's back and neck injuries were indivisible, it found the trial judge failed to apply the "but for" test when analyzing the divisibility of the mild traumatic brain injury. There was undisputed evidence that the mild traumatic brain injury was caused by the second accident and was unrelated to the first. The trial judge erred by finding the first tortfeasor liable for the brain injury and its associated symptoms, and

Neufeldt v. Insurance Corporation of British Columbia, (cont.)

further erred by not engaging in an assessment of the damages attributable to each distinct injury. The Court also found that expert evidence given by a neurologist testifying for the respondent ought not to have been admitted. The expert stated that the respondent's disability was a result of the "accidents in total", which went to the issue of causation despite causation not having been explicitly addressed in his written report. The trial judge erred by refusing the appellant's request to cross-examine the expert notwithstanding that he had expressed new opinions during the course of his testimony.

The Court also held that the trial judge erred in assessing the respondent's claim for future loss of earning capacity. While much of the respondent's evidence with respect to overtime, labour market contingencies, and life expectancy was not challenged at trial, the trial judge used more optimistic projections, without supporting evidence, for the respondent's anticipated promotions through the RCMP ranks. There was no allowance for basic contingencies to ensure the award was fair and reasonable in light of the evidence, and the trial judge erred by not giving specific consideration to the respondent's residual earning capacity. The Court allowed the appeal, set aside the awards, and remitted the actions for trial.

COUNSEL COMMENTS

Neufeldt v. Insurance Corporation of British Columbia, 2021 BCCA 327

Counsel Comments provided by
Elizabeth (Betsy) Segal and Avon Mersey, Q.C. ,
Counsel for the Appellant in CA46811

Elizabeth (Betsy) Segal

Avon Mersey, Q.C.

"The trial judge found the two accidents resulted in indivisible injuries, and made a substantial award for loss of income. The award was based on the trial judge adopting a loss calculation made by an expert, without any reduction for contingencies or for residual earning capacity, which the Court of Appeal found was wrong. The award was set aside and remitted to the Supreme Court for another trial.[1]

First, this decision is a helpful precedent on the complicated area of law on indivisibility. Clear evidence of separate and distinct injures should have resulted in a finding of divisibility.

An important evidentiary issue on appeal was that the trial judge erred in permitting the plaintiff's neurological expert, Dr. Cameron, to testify beyond the scope of the

[1] I was co-counsel with Avon Mersey, Q.C. for the appellant ICBC. Angus Gunn, Q.C. and Frank Lin represented the appellants in the companion action.

COUNSEL COMMENTS

opinions included in his report (in accordance with Rule 11-7), and, on top of that, denied the defendant the opportunity to cross examine Dr. Cameron on his additional opinion.

This error was significant. By allowing Dr Cameron to add a new opinion on the key issue of indivisibility and then to refuse cross examination on the new evidence of "causation going to that critical issue" was fundamentally in error and unfair. This aspect of the Court of Appeal's decision is also a reminder of the law on what evidence can be led by counsel when leading his or her own expert in B.C., in particular, given the Supreme Court's practice of keeping counsel, and their respective experts, on a very short leash in respect of the Rule 11-7 restrictions on expert evidence at trial.

In respect of the trial judge's assessment of the respondent's future income losses, the Court of Appeal found that the trial judge erred by failing to apply any negative contingencies to a mathematical calculation provided by an accountant, which assumed many career promotions up to retirement and no residual employment income of any kind.

The Court of Appeal stated that even where negative contingencies are not established by specific evidence, a judge must still assess the loss in accordance with the real and substantial possibility standard (i.e. not a certainty).

This decision clearly articulates it is an error to apply an "overly mathematical approach to the assessment" and to broadly accept "an estimate of loss that is simply an arithmetic calculation." The correct path requires allowances be made for contingencies, underlying assumptions that may prove to be wrong, and the overall fairness and reasonableness of the award in light of all of the evidence. In this case, the trial judge failed to complete this step of the analysis.

In further regard to contingencies, it was equally significant that the trial judge erred by failing to account or make any reduction for whether the respondent had <u>any</u> residual income earning capacity in the face of compelling evidence. Importantly, the Court of Appeal found the trial judge erred in essentially reversing the burden of proof from the respondent to prove his loss, to the appellant to prove that the respondent <u>had</u> residual capacity to earn income in the future.

COUNSEL COMMENTS

In this regard, the trial judge stated that the appellant did not lead any evidence to support the respondent's ability, citing a "lack of any concrete evidence."

The appellant submitted that there was "concrete" evidence, and the trial judge simply ignored making any estimation of the probability or likelihood of any of these possibilities occurring. There was no evidence the respondent was precluded from any employment, and, there was ample evidence that the respondent had capacity and the ambition to return to work.

The respondent, on the other hand, argued that the trial judge found he had established a loss of future earning capacity, and therefore a deduction for residual earning capacity was not warranted.

The Court of Appeal disagreed, finding there was evidence of a possibility the respondent could be employed, which had to be weighed in the assessment. The trial judge had "summarily dismiss[ed]" that assessment.

In summary, to accept an expert's basic calculation example on the loss of future capacity without considering the basis of the opinion (i.e. accepting all assumptions), any contingencies, or any residual capacity, is an error in principle. In other words, by just accepting a mathematical calculation without more analysis or consideration of the foregoing can result in error.

This decision is important for the Court of Appeal's clear direction on the detailed and fact specific analyses required for future income losses, and the evidence required to assist the Court to do so."

COUNSEL COMMENTS

Neufeldt v. Insurance Corporation of British Columbia, 2021 BCCA 327

Counsel Comments provided by
Michelle Sagert, Counsel for the Respondent,
Jeffrey Theodore Neufeldt

"The main issue in constable Neufeldt's case was indivisibility of his injuries between the two accidents and causation of the injuries in relation to that same issue. At trial, counsel for the defendants waived their right to cross-examination of constable Neufeldt's medical experts Dr. Cameron, Neurologist and Dr. David, Otolaryologist before they had been called and while the plaintiff was still in his examination-in-chief. The defendants also advised the trial court that they would not be calling their responding experts to Drs. Cameron and David. Constable Neufeldt called his medical experts to clarify complex medical terminology in their reports. One of the main questions on appeal was whether or not during the clarification evidence of Dr. Cameron, new opinion was elicited which should have been subject to cross-examination by the defendants particularly as it related to causation of injuries across the two accidents and Constable Neufeldt's level of disability arising after each collision.


Michelle Sagert

The Court of Appeal found that Dr. Cameron had provided new opinion and that the trial judge erred in denying the defendant's right to cross-examination after they had waived that right. Further, the Court of Appeal found that the new opinion given by Dr. Cameron provided a foundation for his finding of indivisibility of Constable Neufeldt's injuries and the finding of total disability with no residual earning capacity and which gave rise to the significant future wage loss award.

The prejudice to the defendants found by the Court of Appeal in conjunction with the Court of Appeal's finding that the trial judge did not engage in a proper

COUNSEL COMMENTS

consideration of the law with respect to indivisibility was the basis for reversing the judgment. In this respect, the Court of Appeal provided instructive clarification on what is required in the assessment of indivisibility, particularly as it relates to that analysis in contemplation of an award for future earnings loss. Notably, the Court of Appeal found that where there is a constellation of injuries some of which are divisible and some of which are indivisible (as was their assessment in the present case) an analysis of those divisible injuries, even ones that overlap, must be done with respect to assessing the damages associated with each injury. Specific reference in the reasons was made to the approach in *Long v. Thiessen* (1968), 65 W.W.R. 577 at 591 (B.C.C.A.) and that the approach in *Long* requires modification in that an assessment of damages must occur twice when a plaintiff suffers multiple injuries across several accidents and some of those injuries are divisible. The first assessment of damages must be done in relation to the initial injury as aggravated by the second accident without accounting for those damages which are only attributable to the second accident injury and then the second assessment is to be done with respect to the divisible second injuries. Both assessments are to be done with reference to the trial date. However, the Court of Appeal confirmed that approach to be taken when the trial judge does find indivisibility of all injuries is that such finding is also the end of the causation analysis with respect to liability and that no further assessment is required in apportioning damages between the two collisions. In this respect, the Court of Appeal found that the trial judge did not err in failing to apportion damages between the two tortfeasors once he had made a finding of indivisibility of all injuries, though they disagreed with that finding on its own. Instead, the Court of Appeal found error in the trial judge's application of contingencies in the plaintiff's calculation of his future pecuniary losses and this in conjunction with their finding that the trial judge erred in his finding that all of Constable Neufeldt's injuries were indivisible was the basis for reversing the judgment and remitting it back to the Supreme Court.

The Court of Appeal's reasons are instructive in confirming the analysis of causation that must be undertaken with respect to each injury caused by any one or more of a series of accidents. When all injuries are indivisible then it is not an error in principle for the trial judge to fail to apportion damages across the accidents. However, the same cannot be said when some injuries are found to be divisible and others are not. That finding requires the Court to engage in the difficult task of trying to assess those damages which can be apportioned to the divisible injuries and those for which the tortfeasors are jointly and severally liable by virtue of the finding of indivisibility."

Kent v. Panorama Mountain Village Inc., 2021 BCCA 332

Areas of Law: Real Property; Strata Lots; Contractual Interpretation; Covenants

~A covenant requiring strata owners to place their units in a rental pool was not impermissibly uncertain~

CLICK HERE TO ACCESS THE JUDGMENT

The appellant, Panorama Mountain Village Inc. ("PMVI"), is the current owner of 1000 Peaks Summit, a strata-titled building located in Panorama that operates as a condominium hotel. Under this model, the residential units are individually owned but the complex is run as a hotel with various centralized services, including a rental management system. In 2004, the previous owner of 1000 Peaks Summit, Intrawest Corporation, registered a covenant against each of the 48 residential units in the building providing that "the Residential Lot Owner will not occupy, use or permit or cause to be occupied or used, all or any portion of any Residential Lot for the purpose of Rental Use except through a Rental Management System operated and managed by the Management Lot Owner

and/or the Manager" (the "Covenant"). The respondents acquired their unit from Intrawest in 2004. Twice they joined the Rental Management System and entered into rental management agreements with Intrawest and then PMVI respectively, and twice they terminated those agreements and rented out their unit privately. The respondents ultimately filed a petition under s. 35 of the *Property Law Act*, RSBC 1996, c 377 seeking to cancel the Covenant. The chambers judge found the Covenant was "impermissibly uncertain" because: (1) it required owners to enter into a rental management agreement without knowing the exact terms of that agreement; and (2) because it lacked an independent mechanism for settling the terms of the agreement. In reaching this conclusion the chambers judge relied heavily on two Court of Appeal decisions involving similarly-worded covenants: *585582 BC Ltd. v. Anderson*, 2015 BCCA 261 and *1120732 BC Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101.

APPELLATE DECISION

The Court looked carefully at the language of the covenants at issue in the *Anderson* and *Whistler* decisions, which both involved disputes over prohibitions on renting strata lot units to the public outside of a centralized rental pool management system. The covenant in *Anderson* prohibited rentals except in accordance with a rental pool management agreement, but the terms of that agreement were not attached to the covenant or incorporated by reference, and in fact did not exist at the time the covenant came into force. The Court found this lacked certainty and instead constituted an agreement to agree; further, the covenant contained no provision for establishing the terms of a rental pool management agreement in the event the parties could not otherwise come to terms. In *Whistler*, the Court clarified that *Anderson* does not stand for the proposition that a covenant will be vague or uncertain unless it sets out all the terms of a rental pool arrangement, and in that case the Court found the covenant was sufficiently certain because it only required lot owners to place their units in a rental pool and did not require them specifically to enter into rental management agreements.

Kent v. Panorama Mountain Village Inc., *(cont.)*

In the present case, the Court concluded there was no uncertainty in the terms of the Covenant. While it did not contain an independent mechanism for resolving potential uncertainties or disputes, this was not fatal. The language of the Covenant was closer to the language of the covenant in *Whistler* than to the one in *Anderson*, especially in that it did not refer to any specific form of agreement and simply required strata owners to place their units in a rental management system. While as a practical matter this may require strata owners to enter into rental management agreements, the Covenant itself did not direct it. Finally, and in any event, the respondents were well aware when they purchased the unit of the terms and conditions of the rental pool management agreement they were to sign since a draft agreement had been disclosed to them and was in substantially the same form as the final version. The chambers judge misapprehended the ratio of *Anderson* and in doing so erred in his interpretation of the Covenant. The Court allowed the appeal.

UPCOMING PROGRAMS 2021

Advanced Advocacy Conference
Friday 5 November
Seminar| 9:00 AM - 5:00 PM

"Making the Most of Expert Evidence"
Criminal Defence Series 2:
Communicating With Your Expert Witness
Tuesday 9 November
Webinar| 12:35 - 1:35 PM

BC Family Maintenance Agency:
An Overview
Wednesday 10 November
Webinar| 12:35 - 1:35 PM

Forward Thinking: The Future of Personal Injury Law and Rehabilitation in the Post "No-Fault" World
Friday 3 December
Medical-Legal Seminar | 9:00 AM - 5:00 PM

"Making the Most of Expert Evidence"
Criminal Defence Series 3:
What Makes You the Expert? Practice Tips for Qualifying, and Disqualifying, Expert Witnesses
Wednesday 15 December
Webinar| 12:35 - 1:35 PM

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Snaw-Naw-As First Nation v. Canada (Attorney General), 2021 BCCA 333

Areas of Law: Aboriginal Law; Easements; Statutory Interpretation

~A right of way over reserve land was still required for "railways purposes", at least pending funding determinations by Canada that the majority mandated be made within 18 months~

CLICK HERE TO ACCESS THE JUDGMENT

In July 1912, in accordance with the *Railway Act*, RSC 1906, c 37 and the *Indian Act*, RSC 1906, c 81, a federal Order in Council granted consent to the E&N Railway Company to take up a right of way over reserve lands of the appellant, the Snaw-naw-as First Nation (then referred to as the Nanoose Indian Reserve). In September 1912, Canada issued a grant of Letters Patent for the right of way that the parties agreed conveyed the land subject to a condition that the lands were "actually required for railway purposes."

The railway includes three main segments: (1) the Victoria to Courtenay line; (2) the Parksville to Port Alberni line; and (3) the Wellcox Spur, which connects to a barge loading facility in Nanaimo. All three lines were eventually transferred to the respondent, the Island Corridor Foundation ("ICF"), a federally incorporated society and registered charity, and ICF contracted with Southern Railway of Vancouver Island ("SVI") to operate the railway. Passenger rail services were discontinued in 2011 and currently only the Wellcox Spur remains in use for freight traffic arriving by barge. SVI continues to hold an operating permit and various levels of government have taken steps to assess the state of the rail corridor and the costs necessary to restore services. In light of the decline of the rail corridor, the appellant sought a declaration that its lands subject to the right of way were no longer being used for railway purposes such that the lands should revert back to them or to Canada for their use and benefit. While the appellant argued at trial that an alienation of the lands to ICF created a reversionary interest, the trial judge found the issue had not been properly pled and declined to rule on it. On the remaining issues, the trial judge found that the right of way was still required for railway purposes based on ICF's efforts to maintain the railway and its intention to continue doing so. He determined there was no right of reversion.

Snaw-Naw-As First Nation v. Canada (Attorney General), (cont.)

APPELLATE DECISION

The Court upheld the trial judge's treatment of the pleadings issue and agreed that the notice of civil claim did not put into issue the alienation of lands to ICF (which the appellant argued was not actually a railway company), and in any event, the appellants still had the opportunity to argue their claim on other grounds.

The Court split on the issue of whether the right of way continued to be used for railway purposes. The majority accepted the trial judge's conclusions that while the future may look bleak for the rail corridor, its future use nevertheless remains a possibility in light of options for restoration being explored, and that the mere cessation of rail service will not necessarily trigger the right of reversion. The majority, however, found the trial judge erred in law by failing to consider the principle of minimal impairment, as applied in *Osoyoos Indian Band v Oliver (Town)*, 2001 SCC 85, when interpreting the railway purposes condition and that any interpretation of the grant should be favourable to the Indigenous interests at stake. The majority chided Canada for failing to take a position in the litigation and for putting its infrastructure funding decision on hiatus pending the outcome of the litigation. They dismissed the appeal, but held that Canada had to re-engage on the issue and make a decision within the next 18 months on whether restoration would be in the public interest, failing which the appellant would be entitled to return to court to enforce its right of reversion.

Justice Willcock in dissent held that the "railway purposes" condition should be read in a way that minimally impairs a First Nation's interest in reserve lands, and that any ambiguity should be resolved in favour of the appellant. He did not think the findings of fact supported a "reasonable likelihood" of renewed use of the right of way, and that to continue taking reserve lands for a purely speculative purpose supported a broad interpretation of the grant rather than a minimally impairing one that would require ongoing or likely active use. Justice Willcock would have allowed the appeal and granted an order that the lands be vested in Canada as reserve lands for the use and benefit of the appellant.

COUNSEL COMMENTS

Snaw-Naw-As First Nation v. Canada (Attorney General), 2021 BCCA 333

Counsel Comments provided by
Jason Harman, Counsel for the Appellant

"What does reconciliation look like?" It's a question frequently put before Canadian courts. In this case, the answer to the question was stark: the Court of Appeal, in a split decision, left reconciliation for another day – precisely 18 months from the date of judgment – and created uncertainty for Indigenous and non-Indigenous Canadians facing similar circumstances.

Jason Harman

The critical facts were clear and undisputed. There were no asserted but unproven Aboriginal rights by the Indigenous claimant nor a compelling public purpose for infringement proffered by the Crown. Instead, the history of the land in question is one of established reserve land pitted against an initially compelling, but progressively diminishing, public purpose.

The land in question was expropriated from the Snaw-naw-as in 1912 as part of an extension to the Esquimalt & Nanaimo (E&N) Railway, a work required under the *Terms of Union* and a series of provincial and federal statutes championing its national importance and securing the terms of its operation. The expropriated right-of-way bifurcated the Snaw-naw-as' solitary reserve right down the middle leaving no means of access save from the outside.

Decades later, the line fell into disrepair as demand for its services diminished. Canadian Pacific (CP) sought to abandon the line but was prevented by its regulator and political powers that viewed the E&N as a historical and national promise. The situation dramatically changed when, in 1994, the Supreme Court of Canada ruled that Canada was

not obliged to maintain the failing railway.[1] A few years later, legislation facilitating the deregulation of uneconomic railways allowed CP to offload the E&N, first to RailAmerica, and then, after RailAmerica abandoned operations in the Province, to the Island Corridor Foundation (ICF). By 2005, the former work of national importance was merely an inter-urban line subject only to the skeletal regulations of the province.

The transfer to a non-profit charitable organization did not reverse its long history of decline. In 2011, passenger rail service was halted due to safety concerns arising from serious track and trestle deterioration. In 2014, the remaining freight operations ceased. Since that time, no rail traffic has occurred over the E&N mainline between Victoria and Courtney, nor over the Port Alberni spur. The only remaining operations are localized at the Nanaimo port. A recent study suggested the cost of rehabilitation is in the hundreds of millions of dollars. The ICF cannot afford the cost.

Despite these facts, the majority opinion interprets the fiduciary obligation to minimally impair the rights of First Nations as capable of accommodating "bleak" possibilities. In so doing, the majority gave a lifeline to the ICF by punting the question of whether the E&N continues to have a compelling and substantial public purpose to Canada. While Canada took no position on the question of reversion – its definitive statement being the clear absence of financial support for the E&N over decades – the majority of the Court chose to prolong ICF's control over the Snaw-naw-as reserve on the purely speculative basis of what Canada might choose to do (when compelled by the Court). Canada is now required to decide whether to declare the E&N a work of national importance and invest hundreds of millions of dollars in public funds to propel its reconstruction and operation.

While the majority opinion imposed on Canada a deadline of eighteen months, whereupon Snaw-naw-as may return to court to enforce its reversionary interest, the judgment provides little clarity for landholders. Instead, the precedential value of the majority decision is that those First Nations whose land rights are being infringed presently may find courts unsympathetic if there is a mere possibility that a future

[1] *British Columbia (Attorney General) v. Canada (Attorney General); An Act respecting the Vancouver Island Railway (Re),* 1994 CanLII 81 (SCC), [1994] 2 SCR 41

COUNSEL COMMENTS

justification could be offered by the Crown. Questions regarding the form, quality, and timeline of a future Crown commitment are also left unresolved – potentially requiring additional litigation to be borne by First Nations.

In contrast, the dissenting opinion of Justice Willcock provides clear and cogent precedent for Indigenous and non-Indigenous alike: Aboriginal title or reserve lands expropriated for a public purpose must be returned to the Nation unless the land is being actively used, or there is (now) a demonstrable probability that the land will be actively used, for a valid public purpose. The divergence in the opinions on appeal suggests that the matter is ripe for adjudication in the Supreme Court of Canada."

Rab v. Prescott, 2021 BCCA 345

Areas of Law: Personal Injury; Loss of Future Earning Capacity; Future Care Costs

~The trial judge erred by using the respondent's highest income years as a reference point when determining loss of future earning capacity since those earnings did not represent her average income and she had long since retired~

CLICK HERE TO ACCESS THE JUDGMENT

The respondent was injured in a motor vehicle accident in April 2017 when she was 57 years old. She claimed to suffer from neck and back pain, migraines and "myalgic encephalomyelitis/chronic fatigue syndrome". The respondent had worked in the telecommunications industry with Bell and Telus, and later as an independent consultant, for over 20 years, and during her prime working years she earned in the range of $200,000 to $300,000. Around 2010 she became an entrepreneur and started an ATM business that began yielding passive income four years later. In 2012 she began trying to commercially develop a perfume and in 2016 she started investigating the possibility of selling iguana meat from Puerto Rico into China. At the time of the accident she was earning between $62,500 and $70,800, which included drawing down on savings.

The trial judge awarded the respondent damages of $329,463.41, which included $150,000 for loss of future earning capacity and $100,000 for costs of future care. The trial judge concluded that the accident aggravated the respondent's underlying neck and back conditions, as well as migraines, but that she had not suffered a new syndrome as a result of the accident. He also concluded that her energy levels had been reduced but that she was still able to work on her various business ventures for at least a few hours a day. With respect to future earning capacity, the trial judge used the capital asset approach to quantify the respondent's losses and based this on the "*Pallos* Approach" of awarding one or two years' income; he took the plaintiff's top income range of $300,000 from her consulting work and applied a 50% discount to factor in negative contingencies.

Rab v. Prescott, *(cont.)*

APPELLATE DECISION

The appellant appealed the trial judge's awards for loss of future earning capacity and costs of future care. On the former, the Court found the trial judge erred by failing to consider whether the respondent's loss of capacity actually gave rise to a real and substantial possibility of a pecuniary loss in the future. It endorsed a three-step process for loss of future earning capacity claims, especially where there is no evidence of a loss of income at the time of trial: (1) whether the evidence discloses a potential future event that could lead to a loss of capacity; (2) whether, on the evidence, there is a real and substantial possibility that the future event in question will cause a pecuniary loss; and (3) if so, assess the value of that possible future loss. Regardless of the trial judge's process error, the Court found there was enough evidence to support the ultimate conclusion that the respondent had proven there was a real and substantial possibility that her loss of capacity could potentially cause a future loss. However, the trial judge erred by purporting to use the "*Pallos* Approach" to quantify the loss and specifically by using her top earnings of $300,000 as a reference point even though that was not her average annual income from consulting and she had long since been retired from that career by the time of the accident. The Court substituted its own award of $100,000 (representing an average annual income of $25,000 for each of her new ventures for a two year period) and reduced that by 60%, resulting in a total award of $40,000 for loss of future earning capacity.

With respect to future care costs, the appellant took issue with the inclusion of trigger point injections ("TPI"). Although currently covered by MSP, there was some evidence they might be delisted in future. The trial judge erred by failing to assess whether there was a real and substantial possibility the service would be delisted in the near future and the likelihood of same. The Court ascertained that $12,771 had been allocated for TPI and it reduced this award by half.

Roberts v. British Columbia (Attorney General), 2021 BCCA 346

Areas of Law: *Criminal Code* Part XXI.1; Post-Conviction Disclosure

~The Crown has an obligation to disclose such evidence as may reasonably be required by an applicant in support of an application for ministerial review, subject to certain criteria~

CLICK HERE TO ACCESS THE JUDGMENT

The appellant was convicted of first-degree murder in the deaths of his wife and two sons. He filed a petition seeking an order compelling the British Columbia Prosecution Service to produce physical evidence in the possession of the RCMP for the purpose of DNA testing after Crown counsel and the RCMP refused to release the evidence. The appellant sought the DNA testing in order to obtain evidence that would constitute a new matter of significance in support of an application for ministerial review of his convictions pursuant to Part XXI.1 of the *Criminal Code*, RSC 1985, c C-46. He took the position that his s. 7 *Charter* rights had been violated and that production of the evidence would serve as a remedy pursuant to s. 24(1) of the *Charter*.

The chambers judge held that the Minister of Justice can order DNA tests as part of an investigation under Part XXI.1 of the *Criminal Code* in order to determine whether there is a reasonable basis to conclude that a miscarriage of justice likely occured. He held that the ministerial review process was a "complete answer to the *Charter* application" and that the issues raised in the petition should be considered by the Minister rather than the court, with the Minister's decision remaining subject to judicial review. In light of his conclusions, the chambers judge did not address whether the Crown had an ongoing duty to provide post-conviction disclosure. After the chambers judge's ruling confirming that the Minister could order DNA testing, the appellant applied for a review pursuant to s. 696.1 of the *Criminal Code*; however, the Minister had not issued a decision before the hearing of the appeal.

Roberts v. British Columbia (Attorney General), *(cont.)*

APPELLATE DECISION

The Court first determined that its jurisdiction to hear the appeal was not barred by s. 674 of the *Criminal Code* since the nature of the proceedings and relief sought were administrative, not criminal. The application did not directly impact any ongoing or pending criminal proceedings nor did the appellant rely upon the *Criminal Code* or *Criminal Rules* in support of his application. Further, this was the appellant's only avenue to raise the *Charter* rights issue, which would otherwise be limited even if raised in the context of a judicial review. Additionally, the appeal was not moot simply because the appellant had made a s. 696.1 application subsequent to the chambers decision.

The chambers judge erred by finding Part XXI.1 of the *Criminal Code* was a complete answer to the production question. The right to urge the Minister to order DNA testing is not equivalent to a right to access that evidence, and the right to compel production of that evidence from the Crown need not wait until the Minister decides whether to exercise his or her discretion to conduct an investigation. The Court specifically noted the difference between an application supported by new DNA test results and an application alleging that better evidence may be available. It held the Crown has an obligation to disclose

Roberts v. British Columbia (Attorney General), *(cont.)*

such evidence as may reasonably be required by an applicant in support of an application for ministerial review, which is not limited only to new, exculpatory evidence. This right to disclosure requires the applicant to establish: (1) the preconditions for a ministerial review have been satisfied; (2) the evidence or information sought may establish that there exists a new matter of significance not considered by the courts or previously considered by the Minister; and (3) the new matter of significance will be material to the Minister's assessment of whether there may be a reasonable basis to conclude that a miscarriage of justice likely occurred. The guiding question is whether the evidence sought is material to the Minister's preliminary assessment.

The Court went on to consider the application on its merits and found the appellant met all three criteria. It allowed the appeal "to ensure effective access to the minister review process established by Parliament."

COUNSEL COMMENTS

Roberts v. British Columbia (Attorney General), 2021 BCCA 346

Counsel Comments provided by
Andrew Guaglio, Counsel for the Intervenor, Innocence Canada

"*Roberts* is a landmark decision that will significantly assist those who have been wrongly convicted of criminal offences and the individuals and organizations that seek to help them prove their innocence. Never before *Roberts* has an appellate court addressed the issue of whether a convicted person who has exhausted their appeals has the constitutional right to disclosure of the case materials that remain in the possession of the state.


Andrew Guaglio

The lack of recognition of such a right has been a source of ongoing difficulty for those doing innocence work in Canada, such as the UBC Innocence Project, which is assisting Mr. Roberts in obtaining materials that might prove his innocence, and Innocence Canada, which intervened in *Roberts* to inform the Court about the broader implications that its decision would have on innocence work in Canada. Under the current post-conviction review system (established in Part XXI.1 of the *Criminal Code*), those claiming innocence who have exhausted their appeal rights must apply to the Minister of Justice for relief. The Criminal Conviction Review Group ("CCRG"), which acts on behalf of the Minister, will investigate a potential wrongful conviction only where the applicant presents new matters of significance in their application. As a result, there exists a burden on applicants to amass materials and information that could meet this burden *before* applying to the Minister.

There is a problem, however. The post-conviction review scheme in the *Criminal Code* does not provide those seeking to make ministerial review applications with a right to access the materials that may provide them with the evidence that they need to have the CCRG investigate their cases, including physical samples

COUNSEL COMMENTS

and other materials collected during an investigation, which typically remain in the possession of the state after trial. Consequently, to date, decisions about whether to release such materials to those investigating potential wrongful convictions have been left to the discretion of the Crown and police. In some cases, such as Mr. Roberts's case, the Crown and police have refused to provide access. This refusal can cause significant delay in the investigation of a potential wrongful conviction (in Mr. Roberts's case, he has been seeking to do DNA testing since September 2011), or impede the investigation entirely, leaving the person claiming wrongful conviction without the ability to demonstrate that a wrongful conviction occurred.

During the hearing, Innocence Canada drew on its decades of experience in advocating for the wrongly convicted to identify the consequences of this legislative gap to the Court and to explain the important role that investigative file review has played in uncovering wrongful convictions. For example, post-conviction DNA testing/re-testing of physical samples has led to the exoneration of James Driskell, David Milgaard, Guy Paul Morin and Kyle Unger. As well, a review of the investigative file has regularly led to the discovery of materials supporting innocence that were not previously disclosed, as occurred in the cases of James Driskell, Frank Ostrowski, Romeo Phillion, Thomas Sophonow, Stephen Truscott and Erin Walsh, as well as numerous others. Further, investigative file review has led to the discovery of serious reliability issues with the evidence used against the wrongly convicted person at trial, as happened in the Dr. Charles Smith cases, the case of Leighton Hay and the cases of John Salmon and Stephen Truscott.

With the BC Court of Appeal's acknowledgement of a qualified constitutional right to post-appeal disclosure, those investigating wrongful convictions now have a powerful tool to compel the Crown and police to provide these sorts of evidence. It is hoped that this tool will lead to the speedier identification and correction of wrongful convictions."

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