COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bonneau v. British Columbia,* 2024 BCCA 260

Date: 20240618
Docket: CA49847

Between:

Reynold John Bonneau and Mildred Rose Bonneau

Appellants
(Plaintiffs)

And

His Majesty the King in Right of the Province of British Columbia

Respondent
(Defendant)

Before: The Honourable Madam Justice Fenlon
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated April 5, 2024 (*Bonneau v. British Columbia*, 2024 BCSC 674, Vancouver Docket S222492).

Oral Reasons for Judgment

Counsel for the Appellant:	K.N. Ramji
Counsel for the Respondent:	J. Regehr D.J. Macauley
Place and Date of Hearing:	Vancouver, British Columbia June 18, 2024
Place and Date of Judgment:	Vancouver, British Columbia June 18, 2024

Summary:

The respondent seeks to stay the appellants' appeal of a mid-trial decision until final judgment in the underlying trial is made.

Held: Application granted. Allowing the appeal to proceed would amount to litigating in slices and would not resolve the proceedings below. Further, the prejudice to the appellants of staying the appeal is minimal since the prejudice they rely on relates to the judge's reasoning, rather than the order made. The judge's stated reasons do not prevent the appellants from seeking the remedy they wish to pursue in closing submissions at trial which have yet to be made.

[1] **FENLON J.A.**: Before me today is an application brought by the Province to stay the appeal filed by Reynold John Bonneau and Mildred Rose Bonneau.

Background

[2] The Bonneaus are both Indigenous. They hold a Certificate of Possession over property falling within the Okanagan Indian Band reserve lands (the "Property"). In 1964, the Province straightened a road that, at the time, ran north-south along the western border of the Bonneaus' property. In the result, the road bisected the Property and altered the course of a creek that had run through the Property. For the past 40 years, the Bonneaus and their predecessors in possession have been trying to obtain redress from the Province for what they say is an unauthorized taking and use of their property. That part of their property affected by the road and the creek is now designated and legally described as Lot 455 and I will refer to it that way from this point on.

[3] After years of negotiations made more complex by the related interests of the Okanagan Indian Band and the obligations of the Federal Crown under the *Indian Act*, R.S.C. 1985, c. I-5, the Bonneaus started the action underlying this appeal in March 2022. They claimed damages against the Province for trespass and breach of fiduciary duty.

[4] The Province initially relied on a survey of the Okanagan Indian Band reserve which showed Lot 455 as falling outside of the Bonneaus' allotment. After the Federal Crown prepared a corrected survey showing the opposite to be true, the

Province admitted to the trespass and amended their response to civil claim to reflect that change in position.

[5] The trial proceeded, with the evidence portion taking place on December 11–21, 2023 and final arguments scheduled for five days beginning the week of July 22, 2024—one month from today.

[6] On March 1, 2024 (that is, after the evidence portion of the trial and before the closing submissions) the judge heard the Bonneaus' application to amend their notice of civil claim. The Province consented to almost all of the proposed amendments. However, it opposed certain amendments that sought an order requiring the Province to pay the appellants an amount determined by the Court to be the value of Lot 455 to support its potential transfer to the Okanagan Indian Band, under s. 24 of the *Indian Act*.

[7] The Bonneaus decided to add a s. 24 transfer to their claim for relief after hearing the evidence of one of the Province's witnesses, Ms. Drummond, who had tried to use this as a creative way to settle the dispute, since it would remove the Bonneaus from the equation and leave only the Okanagan Indian Band, the Province and the Federal Crown to sort out the transfer and required approvals.

[8] On April 5, 2024, the trial judge allowed the amendments consented to by the Province, but dismissed those proposed in relation to the valuation and transfer of Lot 445 under s. 24 of the *Indian Act.*

The Appeal

[9] On May 3, 2024, the Bonneaus filed a Notice of Appeal from the judge's dismissal of their application to add the s. 24 valuation and transfer to their notice of civil claim.

[10] The Province sought to quash that appeal on the basis that the judge's refusal to amend was simply a mid-trial ruling and not an order. If not an order, this

Court has no jurisdiction to hear an appeal: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2017 BCCA 287 at paras. 27, 29–30, 39–40, 65.

[11] In the alternative, the Province sought to stay the appeal until final judgment in the underlying trial is made. It is only this alternative application which is before me today, although the Province says the lack of jurisdiction remains a live issue and is another reason supporting a stay.

The Law

[12] Section 30 of the *Court of Appeal Act*, S.B.C. 2021, c. 6, gives a justice in chambers authority to stay an appeal pending the outcome of related proceedings in another court: *Facebook, Inc. v. Douez*, 2023 BCCA 40 at para. 17 and *Hollander v. Nelson*, 2013 BCCA 83 at para. 21.

[13] In deciding whether to stay an appeal pending a decision from another body, such as a trial court, a justice must consider two principles. The first is the need to efficiently manage judicial resources and avoid excessive delays and unnecessary expense associated with appealing separate issues in the same litigation. Second is the need to balance the prejudice to one party from a delay in the proceeding below and the prejudice to the other party from a delay in the appeal: *Habitat for Humanity Canada v. Hearts and Hands for Homes Society*, 2015 BCCA 443 at paras. 24–25.

[14] In *Hollander*, this Court emphasized that appeals against interlocutory orders that will not have the effect of resolving the underlying action risks “litigation in slices” and are not an effective use of judicial resources: at paras. 25–28.

1. Efficient management of judicial resources

[15] I agree with the Province that allowing the appeal from the mid-trial decision to proceed would amount to litigating in slices. Even if the appeal is successful, the proceedings below will not be resolved. The trial will have to resume and the parties may well end up appealing again from the orders made at the conclusion of the trial. It would be a more efficient use of court resources for the Bonneaus to appeal all aspects of the proceedings below at one time.

[16] Further, staying the appeal and allowing the trial to proceed may result in the Bonneaus receiving an award of damages under the two causes of action they have on foot—trespass and breach of fiduciary duty—that is satisfactory to them. If that occurs, the absence of the s. 24 route to compensation will be of no moment, and the amendment appeal would not have to proceed at all.

[17] Finally, allowing the appeal to proceed would delay significantly the closing arguments in the trial, making it more difficult for the parties and the judge to recall and connect the evidence heard in December 2023 to the arguments to be made at the close of the trial. It will also certainly delay the making of the final order at trial, and that too is inefficient.

2. Prejudice

[18] I turn now to consider the prejudice to the Province if the appeal proceeds and the trial below is delayed, and the prejudice to the Bonneaus if the appeal is stayed and the trial proceeds without inclusion of the s. 24 amendment. The Province will be prejudiced if the appeal proceeds because the parties' long-standing dispute will remain unresolved, with all of the cost and uncertainty associated with that. A final decision on liability and compensation is the only way forward and it is within reach with the trial set to conclude next month.

[19] In my view, the prejudice to the appellants due to delay is minimal. If it turns out that denial of the s. 24 amendment has a negative impact on the trial judge's disposition of the action, that issue can be raised as a ground of appeal, along with any other grounds of appeal taken from the order entered at the conclusion of the trial. That appeal can be taken relatively soon given that the judge's reasons would be expected within three to six months at the outside of the conclusion of the trial.

[20] Furthermore, the real prejudice identified and relied on by the Bonneaus is that the appeal is necessary to set right the judge's view, expressed in her reasons on the amendment application, that there must be evidence of market value of Lot 455 and that the cost avoidance approach cannot be used. In this regard, the judge said:

> [32] Second, are the amendments consistent with evidence already tendered by the plaintiffs and their witnesses at trial?
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> [33] In this respect again, broadly speaking, the amendments are not entirely inconsistent with the proposed equitable compensation route the plaintiffs contend ought to inform the analysis. Relying on the principles of equitable compensation discussed in *Southwind v. Canada*, 2021 SCC 28, and the cost avoidance approach as the basis for compensation as set out in *British Columbia (Ministry of Forests) v. Teal Cedar Products Ltd.*, 2012 BCSC 543 at para. 67, the plaintiffs contend that their expert report from CH2M on the cost avoidance to move the Westside Road back to its pre-trespass position of 1964 would be approximately six million dollars at 2017 costs level. The plaintiffs argue that the evidence of Ms. Drummond in the defence case provides a path to resolution through a s. 24 transfer of Lot 455 back to the OKIB and that valuation of Lot 455 by the Court will provide the basis for compensation to the plaintiffs.
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> [34] The difficulty, however, with this position is that there is no evidence of valuation of Lot 455. That is, the market price it would attract in a sale. The cost to move the road back is not a substitute for what Lot 455 might be worth in a sale scenario. As the Province correctly points out, the CH2M cost estimate to move the Westside Road back to its pre-trespass position is not evidence of the value of Lot 455, but rather is an estimate of the construction costs associated with relocating Westside Road.
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> [35] Accordingly, there is no evidence before the Court that assists in appraising the value of Lot 455. The proposed amendments do not speak to any evidence led at trial—there simply is an evidentiary vacuum on this point which militates against permitting the amendment.
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> [Emphasis in original.]

[21] The Bonneaus' concern is that if this reasoning stands, the judge has effectively determined that the damages for the trespass or breach of fiduciary duty with respect to Lot 455 cannot be based on avoidance costs—which is the only value of Lot 455 established in the evidence at trial and the only basis, say the appellants, that makes sense. Relying on *Southwind v. Canada*, 2021 SCC 28, and *British Columbia (Ministry of Forests) v. Teal Cedar Products Ltd.*, 2012 BCSC 543, the appellants say this measure—the cost to the defendant of having to move the trespassing road—is the only way to value a road, which by its very nature has no market value as roads are not bought and sold. It is a way of measuring the value to the defendant of that property because it avoids the defendant having to pay the cost of making the trespass or the breach right. The appellants say the judge effectively determined on the amendment application that the avoidance basis

cannot be used for valuing Lot 455; the appellants say this is a problem since damages are the object of the proceeding below.

[22] I must respectfully disagree that the alleged prejudice favours allowing the appellants to proceed with the appeal. First, an appeal must be from the order made, not the reasons given for that order. The order appealed is the denial of the amendment. The judge denied the amendment for a number of reasons, including the absence of market value in the record, but primarily on the basis that a s. 24 transfer, which would require the consent of two non-parties to the proceeding below (the Okanagan Indian Band and the Federal Crown), was entirely speculative. Further, the judge reasoned that setting a valuation to be used if such a transfer were to occur would not resolve the litigation: at paras. 40–52. It would simply send the parties off to more negotiating.

[23] A division of this Court could well uphold the order on the basis of this reasoning alone—that is, the reasoning the judge expressed unrelated to the valuation evidence in the record—and say nothing about cost avoidance as a means of valuing a road and in particular Lot 455. The appeal would not, then, resolve the problem the appellants see with the judge's reasoning. Put simply, the appellants rely on prejudice they say they will experience if they are not allowed to appeal one of the reasons given by the judge for her decision to deny the amendment. But appeals lie from orders only; this Court has no jurisdiction to hear appeals from reasons.

[24] Second, there is no prejudice to the appellants in any event since the current pleading claims damages for breach of fiduciary duty based on cost avoidance, and that claim remains a live issue in the trial. The judge has not made a final order on that question. In the five days of argument next month the appellants will have every opportunity to persuade the judge, based on *Southwind*, *Teal Cedar Products Ltd.* and other cases, that cost avoidance is the appropriate measure of damages in relation to Lot 455. That issue has not yet been determined. In short, the appellants

have the opportunity at trial to address the very error in reasoning they contend the judge made, and now wish to raise on appeal.

[25] Having considered the helpful submissions of both sides, and recognizing the sincere desire of the Bonneaus and the Province to bring this longstanding dispute to a satisfactory resolution, I conclude that this appeal should be stayed pending the outcome of the trial. Costs of this application will be in the cause.

[26] I wish to clarify that I may in these reasons have referred inadvertently to the judge's decision on the amendment application as an "order". The respondents take the position that it is a mid-trial ruling only that cannot be appealed. As it was not necessary for me to decide that issue, it remains an open question in this Court.

"The Honourable Madam Justice Fenlon"