COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Adam v. Insurance Corporation of British Columbia,* 2018 BCCA 482

Date: 20181220
Docket: CA43918

Between:

Robert Lucien Adam

Respondent
(Plaintiff)

And

Insurance Corporation of British Columbia, John Doe and/or Jane Doe

Appellants
(Respondents)

And

Attorney General of British Columbia

Intervenor

And

City of Chilliwack and District of Kent

Intervenors

Before: The Honourable Mr. Justice Frankel
The Honourable Madam Justice MacKenzie
The Honourable Mr. Justice Harris

On appeal from: An order of the Supreme Court of British Columbia, dated August 16, 2016 (*Adam v. Insurance Corporation of British Columbia*, New Westminster Docket No. M144536).

Counsel for the Appellants:	V.R.K. Orchard, Q.C. M. Baker
Counsel for the Respondent:	S. Hoyer R.W. Parsons
Counsel for the Intervenor, Attorney General of British Columbia:	D.R. Suntjens L.F. de Lima

Counsel for the Intervenors, City of Chilliwack and District of Kent:	P.A. Hildebrand
Place and Date of Hearing:	Vancouver, British Columbia November 22, 2018
Place and Date of Judgment:	Vancouver, British Columbia December 20, 2018

Written Reasons by:
The Honourable Madam Justice MacKenzie

Concurred in by:
The Honourable Mr. Justice Frankel
The Honourable Mr. Justice Harris

Table of Contents	Paragraph Range

Summary:

Mr. Adam was struck by an unidentified vehicle on a kilometre-wide sandbar adjacent to the Fraser River in Chilliwack. Mr. Adam commenced an action under s. 24 of the Insurance (Vehicle) Act against ICBC, which creates a cause of action against ICBC for hit-and-run collisions if the damage arose out of the use or operation of a vehicle on a "highway" in BC. At the summary trial, the judge found the sandbar was a "highway" under the applicable statutory definitions. ICBC appealed on the basis the judge erred in this finding. Held: Appeal allowed. The judge erred in law in interpreting the relevant statutory definitions. As a matter of statutory interpretation, the sandbar is not a "highway" for the purposes of the Insurance (Vehicle) Act.

Reasons for Judgment of the Honourable Madam Justice MacKenzie:

[1] The question on this appeal is whether a kilometre-wide sandbar appearing seasonally in the Fraser River is a "highway" within the meaning of s. 1.1 of the *Insurance (Vehicle) Act*, R.S.B.C. 1996, c. 231 [*IVA*]. The public drives on the sandbar for the purposes of fishing and camping.

[2] The Insurance Corporation of British Columbia and John Doe and/or Jane Doe ("ICBC") appeal the order dismissing their summary trial application to dismiss the respondent Robert Adam's action for damages for personal injuries sustained when an unidentified vehicle struck him while on the sandbar (the "Accident").

[3] Mr. Adam brought his action under s. 24 of the *IVA* which creates a cause of action against ICBC for hit-and-run collisions if the damage arose out of the use or operation of a vehicle on a "highway" in British Columbia. At the summary trial, ICBC argued Mr. Adam had no cause of action because the Accident occurred on the Peg Leg sandbar (the "sandbar"), which was not a "highway" within the definition in the *IVA.* The judge dismissed ICBC's application. He found the sandbar was a "highway" for the purposes of s. 24 of the *IVA.*

[4] ICBC contends the judge erred because the sandbar does not fall within the definition of "highway" in the *Transportation Act*, S.B.C. 2004, c. 44, as incorporated into paragraph (a) of the definition of "highway" in the *Motor Vehicle Act,* R.S.B.C. 1996, c. 318, or by any other definition in the *Motor Vehicle Act* itself. The

Attorney General of British Columbia ("Attorney General"), the City of Chilliwack and the District of Kent ("Chilliwack and Kent") intervene on this appeal and support ICBC's position.

[5] Mr. Adam applies to adduce fresh evidence, but as later explained, I find it unnecessary to address this application.

[6] For the reasons that follow, I conclude the judge erred in law in interpreting the relevant statutory provisions. The sandbar is not a "highway" for the purposes of the *IVA.* I would allow the appeal, set aside the order under appeal, and substitute an order dismissing Mr. Adam's personal injury action.

The Facts

[7] The judge accepted the facts set out in the affidavit of Mr. Adam, finding as follows:

> [2] On August 28, 2010, the plaintiff was struck by an unidentified vehicle near McSween Road in Chilliwack, British Columbia. He sustained injuries as a result of the collision and he is unaware of the identity of the motorist.
>
> [3] The accident occurred on what is known as the Peg Leg Sandbar, a sandbar close to the eastern shore of the Fraser River in the Chilliwack area. The plaintiff described the area in his affidavit as follows:
>
> > 3. The sandbar is, approximately, a one kilometre-wide sand and gravel bar and is accessed via McSween Road via Vedder Road.
> >
> > 4. At the time of the Accident, the Sandbar was a public thoroughfare. Vehicles had access to the Sandbar from the highway to park, fish and camp along the Fraser River. There were no gates, fences or signs that indicated this was not permitted. The majority of the people who drove onto the Sandbar and parked their vehicles went to fish off the bank of the Sandbar in the Fraser River.
> >
> > 5. At the time of the accident, members of the public regularly drove and parked their licensed motor vehicles on the Sandbar. I made the trip numerous times both before and after the Accident and I had a number of friends and fishing acquaintances who did the same.
> >
> > 6. The day prior to the Accident, I had parked my truck and camper on the Sandbar next to a number of other vehicles.
> >
> > 7. At the time of the Accident, the RCMP regularly patrolled the Sandbar in their vehicles, as did the Department of Fisheries.

[4] The plaintiff deposed that the following occurred:

> 9. Very early in the morning, on the day of the Accident, I was asleep in my camper when an unidentified white Jeep occupied by young males pulled up to my camper and tried to steal my cooler. I heard some noise and chased away the young males in the vehicle. Approximately [half an hour] later the white Jeep returned. I exited the camper and observed the male picking up and putting my cooler of beer in the Jeep. I also observed that my generator was tipped on its side, apparently in an effort to be stolen. After I approached the Jeep, which I believe had B.C. license plates, it suddenly drove away, striking me and causing injuries including a right knee injury which required me to undergo surgery and miss a significant amount of work from my occupation as a marine mechanic. I was unable to identify the driver or owner of the Jeep because the incident happened so quickly.

[8] The evidence established that licensed vehicles accessed the sandbar after driving along McSween Road in the municipality of Chilliwack. McSween Road ends some undocumented distance before the shore of the east bank of the Fraser River. To access the sandbar, a motorist must leave the north end of McSween Road and drive on a strip of land connecting McSween Road to the sandbar. There is no other way vehicles can enter or leave the sandbar.

[9] When the water levels are low enough, the sandbar appears in the Fraser River near Chilliwack. When not underwater, the sandbar is described as being in the river to the north of the north end of McSween Road, which runs perpendicular to the river bank.

[10] Mr. Adam described the RCMP and the Department of Fisheries as regularly patrolling the sandbar in their vehicles. Other evidence reflected the RCMP responds to calls concerning motor vehicle incidents, vehicles set on fire, and drunken disturbances on the sandbar. The RCMP attended the scene of the Accident at Mr. Adam's request.

At Trial

[11] The judge began his analysis by stating the issue as being whether the Accident took place on a "highway". If it did not, he acknowledged Mr. Adam's action must be dismissed. The judge observed the *IVA* states that a "'highway' means a

highway as defined in the *Motor Vehicle Act*". In turn, s. 1 of the *Motor Vehicle Act* provides:

> **"highway"** includes
>
> (a) every highway within the meaning of the *Transportation Act*,
>
> (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and
>
> (c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited,
>
> but does not include an industrial road;

Section 1 of the *Transportation Act* defines "highway" as follows:

> **"highway"** means a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land or improvement that becomes or has become a highway by any of the following:
>
> (a) deposit of a subdivision, reference or explanatory plan in a land title office under section 107 of the *Land Title Act*;
>
> (b) a public expenditure to which section 42 applies;
>
> (c) a common law dedication made by the government or any other person;
>
> (d) declaration, by notice in the Gazette, made before December 24, 1987;
>
> (e) in the case of a road, colouring, outlining or designating the road on a record in such a way that section 13 or 57 of the *Land Act* applies to that road;
>
> (f) an order under section 56 (2) of this Act;
>
> (g) any other prescribed means;

[12] Mr. Adam principally argued the sandbar was either:

(a) a "passageway" within the definition of "highway" in paragraph (c) of the *Motor Vehicle Act* definition; or in the alternative

(b) a "public way" within the definition of "highway" in s. 1 of the *Transportation Act* (as incorporated by paragraph (a) of the *Motor Vehicle Act* definition).

The judge asked counsel for Mr. Adam whether he was also relying on paragraph (b) of the *Motor Vehicle Act* definition (" … right of way … used by the general public for the passage of vehicles"). Counsel responded he would rely on paragraph (b) of the *Motor Vehicle Act* definition "[i]f it helps". Counsel for ICBC then addressed that issue. In his reasons, the judge only dealt with paragraphs (a) and (c) of the *Motor Vehicle Act* definition. However, Mr. Adam also addressed paragraph (b) in this Court.

[13] For two reasons, the judge decided to apply a "broad purposive approach" to the interpretation of "highway". First, he noted the definition of "highway" in the *Motor Vehicle Act* is not exhaustive, as indicated by the word, "including", suggesting the sandbar could be a "highway" even if it fell outside the items listed in that definition. Second, the judge said ambiguities in provisions governing coverage under the *IVA* should be resolved in favour of the insured.

[14] Because the sandbar is not private property, the judge rejected Mr. Adam's argument that it is a "private place or passageway" within paragraph (c) of the *Motor Vehicle Act* definition. The judge found "private" modified both "place" and "passageway".

[15] Based on the sentence structure of the definition of "highway" in the *Transportation Act*, the judge found a "public way" need not become a highway via one of the means listed in paragraphs (a) to (g) of that definition. Rather, the judge found the criteria in paragraphs (a) to (g) only relate to the words "any other land or improvement". He said this:

> [24] The defendant argues that all of the provisions in paragraphs (a) to (g) of the section modify not only the last words of the definition but also "any other public way." They submit that even if the sandbar was a "public way", one of the subsections must still be satisfied. In my view, the natural meaning of the provision is that paragraphs (a) to (g) refer to "any other land or improvement that becomes or has become a highway by any of the following …" The "other" in "any other public way" makes reference to the proceeding words not the following.

[16] Ultimately, the judge accepted Mr. Adam's argument that the sandbar was a "public way", bringing it within the definition of "highway" under the *Transportation Act*. The sandbar could be so characterized because vehicles "traversed" it to access fishing areas. ICBC had argued the seasonal submersion of the sandbar precluded it from being a "public way", but the judge rejected this argument.

[17] The judge found the definition of "highway" sufficiently broad to include areas attracting little Ministry attention, such as the sandbar. He made these observations:

> [25] Further, the defendants go to some length discussing the Ministry of Transportation and Infrastructure's treatment of the sandbar. They note that the sandbar is not patrolled by Ministry staff, that it has not been labelled as a highway, that the Ministry has not erected any signs on the sandbar concerning regulations or warnings, and that the Ministry does not spend any public funds on the sandbar. …

[18] The judge concluded:

> [26] The sandbar was used both as a parking lot and as a means to drive to fishing areas. It was accessed by motor vehicles during the fishing seasons. While much of the evidence does suggest that the sandbar was used for parking, it is clear based on the description that vehicles use it to traverse. I find that there is evidence that this has become a "public way" and is used by the public as such. I do not find the fact that the sandbar is submerged for part of the year to be determinative. As was recognized by the judge in *Cleworth* [*v. Zackariuk* (1985), 32 M.V.R. 23 (B.C.S.C.), rev'd in part on other grounds (1987), 34 D.L.R. (4th) 722 (B.C.C.A.)], even a temporary path may be a "highway" under the legislation if it can be shown that it meets the legislative definition.

On Appeal

[19] The sole issue on appeal is whether the judge erred in concluding the sandbar is a "highway" for the purposes of s. 1.1 of the *IVA*, which states, "'highway' means a highway as defined in the *Motor Vehicle Act*".

[20] This broad issue requires the Court to address the definition of "highway" in the following provisions:

a) paragraph (a) of the *Motor Vehicle Act* definition, which incorporates the definition of "highway" in s. 1 of the *Transportation Act*;

b) paragraph (b) of the *Motor Vehicle Act* definition; and

c) paragraph (c) of the *Motor Vehicle Act* definition.

[21] In addition, I will consider certain adverse consequences and uncertainty arising from the judge's conclusion.

[22] On appeal, ICBC argues for the first time that s. 24 of the *IVA* is not a conventional provision of insurance coverage. This argument is intended to support ICBC's contention the judge erred in taking a liberal approach to interpretation that resolves any ambiguity in favour of the insured. Mr. Adam's application to adduce fresh evidence responds to ICBC's new argument.

Standard of Review

[23] The overall inquiry as to whether the sandbar is a "highway" involves mixed questions of fact and law. The first step in this Court's review of the judge's decision is to determine whether he properly interpreted the relevant provisions. Statutory interpretation is reviewable on a standard of correctness: *Teal Cedar Products Ltd. v. British Columbia,* 2017 SCC 32 at paras. 47, 50; *R. v. Ambrosi*, 2014 BCCA 325 at para. 18; *N.E.T. v. British Columbia (Attorney General)*, 2018 BCCA 380 at para. 23.

[24] If the judge correctly interpreted the relevant provisions, the application of his interpretation to findings supported by the evidence to determine whether the sandbar is a "highway" is fact-intensive and reviewable on the standard of palpable and overriding error.

[25] The judge's findings of fact are unchallenged. It is the correctness of his interpretation of the statutory definition under paragraph (a) of the *Transportation Act* that is called into question.

Governing Principles of Statutory Interpretation

[26] The modern approach to statutory interpretation is well-established, namely, "the words of an Act are to be read in their entire context and in their grammatical

and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21.

[27] For insight into how the current version of a statute should be interpreted, a court may consider the history of that statute and have regard to other statutes which make up the legislature's "statute book": *Ambrosi* at paras. 21-22.

[28] In addition, of particular relevance to this case, it is a well accepted principle of statutory interpretation that "no legislative provision should be interpreted so as to render it mere surplusage": *R. v. Proulx*, 2000 SCC 5 at para. 28.

Discussion

[29] The *IVA* incorporates by reference the definition of "highway" in the *Motor Vehicle Act.* The *Motor Vehicle Act* definition of "highway" has three parts, the first of which incorporates the definition of "highway" within the meaning of the *Transportation Act*.

[30] Mr. Adam says the definition of "highway" is broad, including various categories of "way" and "rights of way" travelled by the public in vehicles, on bicycles or on foot, in addition to "every private place or passageway" which the public accesses by right or invitation for the purposes of parking or servicing vehicles. He submits the judge's interpretation follows well-established principles of statutory interpretation, informed by the settled common law meaning of the phrase "public way".

[31] Mr. Adam also submits when a legislature incorporates by reference definitions from another statute, the legal effect is to write those definitions into the new statute such that they are to be interpreted having regard to the incorporating statute's legislative scheme, object, intent and relevant context. He says because the *IVA* provides a form of statutory insurance coverage, if there are multiple possible meanings, the one more favourable to the insured should be applied: *Ocean Park Ford Sales Ltd. v. Insurance Corporation of British Columbia*, 2016 BCCA 337 at para. 21; *Somersall v. Friedman*, 2002 SCC 59. These

propositions form the foundation for his argument that under the *IVA*, a "highway" need not be a "true" highway. Instead, if interpreted in the context of the *IVA*, which he characterizes as remedial legislation to be given a fair, large and liberal interpretation, "highway" can be interpreted expansively or flexibly so as to include the sandbar.

[32] I cannot accept this argument. Although Mr. Adam cites various authorities, none are of assistance. For example, in *In re Wood's Estate; Ex parte Her Majesty's Commissioners of Works and Buildings* (1886), 31 Ch. D. 607 (C.A.), the court considered the effect of an enactment that referred to the former version of the enactment. But this authority is distinguishable on the basis that the subsequent statute that referred to clauses of the former statute deemed those clauses to be repeated in the subsequent statute. Here, the *IVA* incorporates a definition from a different and extant statute. In *In re Wood's Estate,* the sections in question were not definitions.

[33] The words of incorporation in the *IVA* give this instruction: "'highway' means a highway as defined in the *Motor Vehicle Act*". These words, taken with the ordinary meaning of the words in s. 1 of the *Motor Vehicle Act,* are clear: a "highway" for the purposes of the *IVA* is that which is a "highway" under the *Motor Vehicle Act*. If the legislature intended otherwise, it would have inserted into the *IVA* its own distinctive definition, just as contained, for example, in the *Land Title Act*, R.S.B.C. 1996, c. 250 and the *Community Charter*, S.B.C. 2003, c. 26. I consider there is no reinterpretation exercise to conduct in the *IVA* as suggested by Mr. Adam.

Paragraph (a) of the *Motor Vehicle Act* Definition incorporating s. 1 of the *Transportation Act*

Section 1 of the Transportation Act: Ordinary Sense and Plain Meaning

[34] I will first address the definition of "highway" in paragraph (a) of the *Motor Vehicle Act* definition, which takes us directly to s. 1 of the *Transportation Act*. First, does the definition's restrictive clause, "that becomes or has become a highway by any of the following: …" (then the steps in paragraphs (a) to (g) are

enumerated) modify only its immediate antecedent, “any other land or improvement”, or instead, does that clause modify the entire list of antecedents in the definition, beginning with “a public street”?

[35] Mr. Adam submits the restrictive clause only modifies “any other land or improvement”. Therefore, none of the positive steps in paragraphs (a) to (g) are required to make the sandbar a highway. If, on the other hand, paragraphs (a) to (g) modify the entire list of places, then Mr. Adam says the sandbar is a highway within paragraph (c), “a common law dedication made by the government or any other person”.

[36] Mr. Adam also contends the judge’s interpretation recognizes the “preamble” of the definition operates as a stand-alone basis upon which a trier of fact may determine whether a particular “way” (e.g., a street, road, trail, lane, bridge, trestle, tunnel, ferry landing, or ferry approach) has become a highway. He submits paragraphs (a) to (g) have been “tacked on” to this stand-alone portion to provide mechanisms by which “any other land or improvement” can become, or has become, a highway.

[37] I cannot agree with Mr. Adam’s argument. In considering the ordinary grammatical meaning of the sentence structure of the definition in the *Transportation Act*, and in the context of the *Transportation Act* as a whole, I see no ambiguity as to the meaning of “highway” in the *Transportation Act*. I conclude paragraphs (a) to (g) apply not only to “any other land or improvement”, but also to every antecedent or place preceding that phrase, for these reasons:

a) The “last antecedent doctrine” does not apply as it is rebutted by the context of the statute or by a reading of the statue as a whole;

b) The following factors support this unambiguous interpretation:

   i. section 87(2)(a) of the *Transportation Act*;

ii. the legislative history of the *Transportation Act* and jurisprudence, including the *Highway Act*, R.S.B.C. 1996, c. 177, which is the predecessor to the *Transportation Act*; and

iii. the *Hansard* debates.

[38] I will address each of the above in turn.

Last Antecedent Doctrine is rebutted

[39] Turning first to the restrictive clause in s. 1 of the *Transportation Act*, Mr. Adam relies on a rule of grammar called "the last antecedent doctrine". Its application would mean the restrictive clause only modifies the immediate antecedent, "or any other land or improvement". This rule applies unless it would make nonsense of the resulting interpretation. Mr. Adam says his submission is supported by the lack of a comma [,] after "any other public way". He submits that if the drafter wished the reader to interpret the restrictive or relative clause as applying to the entire list of antecedents, this would have been achieved by placing a comma directly before the last of the antecedents (i.e., "any other public way[,] or any other land or improvement").

[40] The strict grammatical rule of construction whereby the restrictive clause is limited to modifying the immediate antecedent may give way when the context requires a deviation from the rule: *Rex v. Stronach*, [1928] 3 D.L.R. 216 at 218 (Ont. C.A.). According to Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis Canada, 2014) at 470, Canadian courts are "rightly cautious of attaching too much significance to a single punctuation mark". The Supreme Court of Canada has said, "[a] debate on punctuation cannot take the place of an interpretation based on the legislative context and ordinary meaning of words": *Laurentide Motels Ltd. v. Beauport (City)*, [1989] 1 S.C.R. 705 at 755.

[41] In this case, even if Mr. Adam were correct about the lack of a comma, I would not let its absence dictate the result on this statutory interpretation exercise,

particularly in light of today's less rigid approach to the use of commas. Mr. Adam's contention yields an unreasonable result.

[42] If the judge's construction is correct, then every "public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, and any other public way" is already a "highway" by virtue of being included in the list of places in the definition in s. 1 of the *Transportation Act*. None of the positive acts in paragraphs (a) to (g) apply to any of those places. I agree with the Attorney General that this result is demonstrably wrong.

[43] For example, if a "road" is already a highway by virtue of the preamble in s. 1 of the *Transportation Act* (that is, none of paragraphs (a) to (g) of the definition apply to "road"), then paragraphs (b) and (e) are superfluous. Paragraph (b) of the definition refers to s. 42 of the *Transportation Act*, which provides, "… <u>if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway</u>" (emphasis added). Section 42 clearly contemplates there are "travelled roads" in the province that are not highways. If the judge's interpretation is correct, then once a road is "travelled" by the public, it would already be a highway. It would not be necessary to inquire into the expenditure of public money on it, and s. 42 would be surplusage.

[44] Similarly, paragraph (e) of the definition only applies to roads. The modifier refers to roads that are coloured, outlined or designated on a record in such a way that ss. 13 and 57 of the *Land Act*, R.S.B.C. 1996, c. 245 apply to them. These sections exempt these roads from Crown grants and other dispositions of Crown land, and provide for a road width of 20 to 20.1168 metres, depending on the date of disposition. If these roads were already "highways" through public use, then this paragraph would be superfluous.

[45] I also observe that paragraph (g) of the definition, "any other prescribed means", is a catch-all category apparently designed to specify other means that may be established by the legislature from time to time. It supports the interpretation that paragraphs (a) to (g) applies to all of the antecedents in the definition of "highway"

because it would be redundant to include two such general terms *viz* “any other prescribed means” and “any other public way” in the definition.

[46] In my view, the effect of these indicia leads to the inevitable result that the legislative intent and correct interpretation of s. 1 of the *Transportation Act*, and therefore paragraph (a) of the *Motor Vehicle Act* definition, is that paragraphs (a) to (g) modify the complete list of antecedents.

Transportation Act s. 87(2)(a)

[47] In my view, the scope of the regulation-making power in s. 87 of the *Transportation Act* is inconsistent with Mr. Adam’s interpretation of the *Transportation Act*. Section 87 provides:

> 87 (1) The Lieutenant Governor in Council may make regulations referred to in section 41 of the *Interpretation Act.*
>
> (2) Without limiting subsection (1) of this section, the Lieutenant Governor in Council may make regulations as follows:
>
> (a) respecting means by which a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, other public way or other land or improvement may become a highway;
>
> …

[48] ICBC submits that if paragraphs (a) to (g) did not apply to “any other public way”, then s. 87(2)(a) would only need to say, “respecting means by which other land or improvement may become a highway”. All the other places listed in s. 87(2)(a) would already be highways by virtue of the definition in s. 1. This would make superfluous the words “public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, other public way” in s. 87(2)(a). I do not accept Mr. Adam’s submission that s. 87(2)(a) is simply a “drafting infelicity”. I agree with ICBC that s. 87(2)(a) would be unnecessary if the judge’s interpretation of “highway” were sustained.

[49] Section 1 of the *Transportation Act* definition should not be interpreted so as to make s. 87(2)(a) surplusage. Section 87(2)(a) fortifies the conclusion that there is no ambiguity in the definition of “highway” in s. 1 of the *Transportation Act.*

Legislative History and Jurisprudence

[50] A court may consider the history of legislation to inform the interpretation of its current version. In this case, the *Highway Act*, the predecessor to the *Transportation Act* (which came into force in 2004), contained only this definition of "highway":

> "**highway**" includes all public streets, roads, ways, trails, lanes, bridges, trestles, ferry landings and approaches and any other public way;

[51] This definition has been judicially considered several times. In the context of this definition and other legislation, this Court in *Brady v. Zirnhelt* (1998), 57 B.C.L.R. (3d) 144 (C.A.) set out the four ways a highway could then come into existence:

> 7 A highway can come into being in four ways:
>
> 1. exemption from a Crown grant (now *Highway Act*, R.S.B.C. 1996, c. 188, s. 2 and *Land Act*, R.S.B.C. 1996, c. 245, ss. 13 and 57);
> 2. expenditure of public money on a travelled road (now *Highway Act*, R.S.B.C. 1996, c. 188, s. 4) or entry on lands by the Minister of Highways and Public Works for the purpose of establishing a highway (now *Highway Act*, R.S.B.C. 1996, c. 188, s. 5(1));
> 3. common law dedication of a road by owner, whether a private owner or the Crown;
> 4. dedication by deposit of a subdivision plan showing a portion of the land as a highway (now *Land Title Act*, R.S.B.C. 1996, c. 250, s. 107).

[52] *Brady* reflects that the criteria now found in paragraphs (a) to (g) of the *Transportation Act* definition existed in a combination of ss. 2, 4, and 5(1) of the *Highway Act*, the *Land Title Act* and the *Land Act*. One might say the *Transportation Act* gathered the requirements for a "highway" into one definition section, expanding it to include "any other land or improvement".

[53] This legislative history supports the interpretation advanced by ICBC and the intervenors that the steps or mechanisms described in paragraphs (a) to (g) of the *Transportation Act* definition apply to each place enumerated in s. 1 of the *Transportation Act.* In *Brady,* evidence of being a "travelled road" without more,

including the “significant” expenditure of public funds, was insufficient to make the travelled road a highway.

[54] This Court reached the same conclusion in *Emmett v. Arbutus Bay Estates Ltd.* (1994), 88 B.C.L.R. (2d) 72 (C.A.). In that case, the Court reversed the decision at trial and found the evidence that public funds had been expended on part of the travelled road was sufficient to render the entire road a “highway” pursuant to the statutory provisions then in force (the equivalent of s. 42 of the *Transportation Act*). Again, evidence of public use was not dispositive.

[55] I agree with the Attorney General the definition in the *Transportation Act* now establishes a complete code: the only means by which a highway can come into existence in British Columbia are set out in s. 1 of the *Transportation Act*. Given this result, the principle that ambiguity in statutory insurance coverage is resolved in favour of the insured has no application.

[56] In light of this conclusion, it is unnecessary to consider extrinsic aids to determine the meaning of “highway” under the *Transportation Act,* but it is instructive to do so.

Hansard

[57] In introducing the new *Transportation Act* (Bill 47) at First Reading, the Minister of Provincial Revenue, the Honourable R. Thorpe, explained that one of the purposes of the *Transportation Act* is to “[clarify] the definition of a highway, including rural and municipal highways”: British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl., 5th Sess., Vol. 25, No. 5 (6 May 2004) at 10914.

[58] At the Second Reading of Bill 47, the Minister of Transportation, the Honourable K. Falcon, further explained the old legislation simply defined a highway as a “public way”, but the new definition “requires that a public highway must be established as a highway according to specified methods. This provides government and the public with greater clarity and certainty around what a highway is in British

Columbia": British Columbia, Legislative Assembly, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37th Parl., 5th Sess., Vol. 25, No. 7 (10 May 2004) at 10965 (emphasis added). Thus, *Hansard* offers further support that one of the means in paragraphs (a) to (g) of s. 1 of the *Transportation Act* is required to create a highway.

Transportation Act s. 1(c): Common Law Dedication

[59] Although ICBC and the intervenors say none of the positive acts required by paragraphs (a) to (g) have occurred regarding the sandbar, Mr. Adam makes the alternative submission that the sandbar is a highway by common law dedication as subsumed in paragraph (c) of the *Transportation Act* definition. He did not make this argument in the court below but no objection was made before us. Mr. Adam contends the open and unrestricted seasonal use by the public of the sandbar for a substantial period supports both an inference of an intention to dedicate the sandbar as a highway and acceptance by the public. He says the judge's findings of fact concerning the open, public use of the sandbar to "traverse" in vehicles support the sandbar being a "highway" under the *Transportation Act* as a matter of common law dedication.

[60] In *Brady*, this Court reiterated (at para. 37) the two elements of common law dedication:

> (1) intention on the part of the owner to dedicate the road to the public for the purpose of a highway; and
>
> (2) acceptance by the public of the road as a highway.

Evidence about the use of a road commonly supports inferences of both elements of common law dedication. The onus of proof on a balance of probabilities is on the party seeking to prove a common law dedication.

[61] In my view, the evidence does not permit an inference that whoever owns the sandbar intended to dedicate it by word, deed or conduct to the public for the purpose of a highway. There is no evidence as to who owns the sandbar, so one cannot determine whether the owner was aware of the public use so as to acquiesce

in it. For example, a private owner might know in a relatively short time that the general public is using the land. On the other hand, it may take years for a public owner to become aware of such use. Therefore, I do not consider the sandbar a "highway" by way of common law dedication within paragraph (c) of the *Transportation Act* definition.

[62] In summary, there is no evidence any of the positive steps in paragraphs (a) to (g), as required by s. 1 of the *Transportation Act*, has occurred with respect to the sandbar. The sandbar is therefore not a "highway" within paragraph (a) of the *Motor Vehicle Act* definition.

[63] In light of this conclusion, it is unnecessary to address whether the sandbar is a "public way" at common law, but I will do so briefly.

Common Law Definition of "Public Way"

[64] Even if paragraphs (a) to (g) did not apply to all the antecedents in the definition of "highway", I conclude the sandbar does not fall within the common law definition of "public way" as used in s. 1 of the *Transportation Act*. When the sandbar emerges, members of the public regularly drive their vehicles onto it for the recreational purposes of fishing and camping. Such use is unrestricted. I accept for the purposes of this analysis that the sandbar is "public".

[65] In my view, the judge's error arises because the sandbar is not a "way" as defined at law. Instead, it is a destination in itself.

[66] The common law requires that a public way be a route or passage from one place to another, used as of right by the general public as a route or connection: *Insurance Corp. of British Columbia v. Routley* (1995), 14 B.C.L.R. (3d) 279 (C.A.) at paras. 10, 18, 23-25; *ICBC v. Bruneau et al.,* 2000 BCSC 786 at paras. 51-52; *Cleworth v. Zackariuk* (1985), 32 M.V.R. 23 (B.C.S.C.) at 32, rev'd in part on other grounds (1987), 34 D.L.R. (4th) 722 (B.C.C.A.). Justice Wood in *Cleworth* opined, for example, that a highway might be established if there was evidence that a route

was “accepted by the public” as a public way and was “resorted to for the passage of vehicles between two highways [situated] on the lands adjacent to the lake”.

[67] In summary, a “way” is for the “passage” of vehicles or a “path, a track for travelling along”. In this case, I conclude the sandbar is not captured by the definition of “passage”, “path”, or “track”.

[68] Mr. Adam says the question of whether the general public's use of the sandbar transformed it into a public way and thus a highway, was a question of fact open to the judge on the evidence. In support of his finding, the judge found the public accessed the sandbar seasonally from McSween Road, another municipal highway. The public traversed the sandbar's one-kilometre width, without restriction, for a variety of purposes: to drive upon it with their licensed vehicles to park and camp along its banks, and to fish in the Fraser River.

[69] In my view, to find the sandbar is a “highway” because vehicles “traverse” it does not logically follow. The evidence does not show the public uses the sandbar to go anywhere other than to park in order to camp or fish. Again, the sandbar is the destination, not a route or a passage. Viewed as a whole, the paramount use of the sandbar is to park or camp for recreational purposes. The vehicular use is limited to this purpose. I consider the fact vehicles drive onto the sandbar in an unrestricted manner and “traverse” it insufficient to make it a highway.

[70] Similarly, the judge relied on the fact the RCMP and the Department of Fisheries “patrol” the sandbar. This could mean any number of things. Apart from the attendance of the RCMP to deal with motor vehicle incidents and drunken disturbances, there is no evidence to show why either federal authority was or is present from time to time. For example, there is no evidence the RCMP issued tickets for driving infractions or conducted breathalyzer tests. The authorities can patrol many areas, including campgrounds and parking lots, but this fact alone does not make them highways.

[71] I conclude the sandbar does not fall within the definition of "other public way" in s. 1 of the *Transportation Act* because it is not a "way".

Paragraph (b) of the *Motor Vehicle Act* Definition

[72] I turn to address whether the sandbar is captured by paragraph (b) of the *Motor Vehicle Act* definition, which provides:

> (b) every road, street, lane or right of way designed or intended for or used by the general public for the passage of vehicles, and
>
> [Emphasis added.]

[73] ICBC contends this is a new issue on appeal. However, this issue was raised in the court below.

[74] Mr. Adam says the sandbar is a "right of way" within paragraph (b) above. He relies on *Routley*, which involved a collision on an abandoned rail bed between a police vehicle and a stolen vehicle operated by an unlicensed driver. The rail bed was owned by Canadian Pacific Railway. Railway tracks and ties were removed a few years before the accident. At issue was whether the rail bed constituted a "highway" under the *Motor Vehicle Act*. A majority of this Court held the rail bed, used by cyclists, hikers, skiers, horseback riders and various motorized vehicles, was a right of way. Significantly, the majority held a "right of way" was a physical, not a legal, term saying:

> 19 … "Highway" includes "... every road, street, lane or right-of-way designed or intended for or used by the general public for the passage of vehicles". If it is not a road it is certainly a right-of-way (which, I observe parenthetically, and applying the *ejusdem generis*, I take to be a physical description rather than a term embodying a legal concept). …

[75] Justice Southin, in dissent, said:

> 31 …
>
> 3. This strip of land was not a "right-of-way" within the meaning the words bear in this provision. It is true that in this Province, we speak of land upon which a railway is constructed as the railway's "right-of-way". For instance, the term is so used in the British Columbia *Railway Act*, R.S.B.C. 1979, c. 354. But the true meaning is "the legal right, established by usage, of a person or persons to pass and repass through grounds or property

> belonging to another"; see the *Oxford English Dictionary*, vol. 2, p. 1833. I would add to the words "by usage" the words "or by grant". As I understand it, at the relevant time, the Canadian Pacific Railway owned this land. It did not have merely a right-of-way over it.
>
> [Emphasis added.]

[76] In my opinion, the difficulty with Mr. Adam's argument is the right of way in *Routley* was used extensively by the general public for the passage of vehicles. "Farmers, hunters, 4x4 enthusiasts, governmental personnel, snowmobilers, logging contractors, campers, R.C.M.P., motorcyclists" and nearby property owners travelled on it to get from one place to another (at para. 10). The majority also relied on evidence of track marks of vehicles to conclude the travelled portion of the rail bed was a road that led to the backwoods. The rail bed went somewhere – it connected two points. *Routley* is therefore distinguishable from this case.

[77] The same phrase used in paragraph (b) of the *Motor Vehicle Act* definition that the right of way be "designed or intended for or used by the general public for the passage of vehicles" (emphasis added) was considered in *Shah v. Becamon*, 2009 ONCA 113, which addressed this definition in the *Highway Traffic Act*, R.S.O. 1990, c. H.8:

> 1(1) In this Act,
>
> "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, any part of which is intended for or used by the general public for the passage of vehicles and includes the area between the lateral property lines thereof; ("voie publique").
>
> [Emphasis added.]

[78] The court in *Shah* relied on *Gill et al. v. Elwood* (1969), [1970] 2 O.R. 59 (Ont. C.A.) and *R. v. Mansour*, [1979] 2 S.C.R. 916, which addressed the definition of "highway" in the older versions of the *Highway Traffic Act*, R.S.O. 1960, c. 172 and the *Highway Traffic Act*, R.S.O. 1970, c. 202, respectively, which read:

> "highway" includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, designed and intended for, or used by, the general public for the passage of vehicles;
>
> [Emphasis added.]

[79] Given the remarkable similarity in the definitions, these cases assist in interpreting the meaning of "designed or intended for, or used by, the general public for the passage of vehicles" in paragraph (b) of the *Motor Vehicle Act* definition.

[80] In *Shah*, the issue was whether a parking lot in a small strip mall constituted a "highway" under the provincial statute regulating drivers and vehicles in Ontario. The court noted the analysis was governed by the "paramount use" test in *Gill* and the "established primarily for" formulation in *Mansour*.

[81] In *Gill*, the question was whether a small mall with an entrance, exit and marked parking spaces was a "highway" as defined under the statute. The court said at 59-60:

> The people invited to park are not the public as a whole, but the people who have business to transact with the stores surrounding the parking space. Thus the premises involved are of a composite nature and in our view in deciding the applicability or non-applicability to those premises of the Act, *one is not permitted to cut up the premises as it were into various parcels and minutely analyse the particular uses of the particular parcels*. On the contrary, in our view, and realistically the premises must be viewed as a whole and so viewing the premises *the paramount use* thereof will emerge as a parking lot with ingress and egress to and fro and with passages within it, but all subordinate to *the paramount use* of parking vehicles.
>
> [Emphasis added in *Shah*.]

[82] The Supreme Court of Canada in *Mansour* reached a similar conclusion, stating at 921:

> I conclude that the term "highway" in its ordinary and popular sense and as illustrated by the words employed in s. 1(1)11 of the Act does not embrace the concept of a parking lot and particularly, a parking lot adjacent to an apartment building, and presumably one which was *established primarily for* the provision of parking to its inhabitants.
>
> [Emphasis added in *Shah*.]

[83] Based on *Gill* and *Mansour*, the court in *Shah* upheld the trial judge's finding that the parking lot was not a highway. The court concluded (at para. 31) that even though a mall parking lot was used by some drivers as a shortcut, the intended use and actual use were "overwhelmingly as a parking area for customers". Therefore, the parking lot could not be considered a highway.

[84] These authorities were considered in *Persaud v. Bratanov and Unifund Assurance Co.*, 2012 ONSC 5232, where the court held:

> [36] … [*Gill*, *Mansour* and *Shah*] collectively hold that, in order to determine whether or not a particular area falls within the definition of "highway," the area must be viewed as a whole, and the court must determine the "paramount" or "primary" use of the area.
>
> [37] Despite the fact that parking lots allow the entry and exit of motor vehicles, and permit the movement of motor vehicles within them, these three leading cases all held that parking lots did *not* fall within the statutory definition of "highway" because the paramount or primary use of the parking lots was for the *parking* of vehicles. If parking lots are not properly viewed as a "highway" it is hard to imagine how a public park could be properly viewed as a "highway." Indeed, these three decisions, all of which are binding on me, legally compel the conclusion that the public park in the present case is not a "highway." I was not directed to any cases to the contrary, nor am I aware of any such contrary decision.
>
> [Emphasis in original.]

[85] I consider the sandbar as akin to the parking lot in *Persaud* or to a campground where people drive to park or camp for recreational purposes. Members of the public drive their vehicles onto the sandbar to park while they fish or camp. The sandbar is not "used for the passage of vehicles" because that suggests at least a dominant purpose of passing and repassing. Viewed as a whole, the paramount use of the sandbar is for the purposes of fishing or camping. It does not connect two points or lead anywhere.

[86] I conclude the sandbar is not a "highway" as defined in paragraph (b) of the *Motor Vehicle Act* definition.

Paragraph (c) of the *Motor Vehicle Act* Definition

[87] Mr. Adam also contends the judge erred when he concluded paragraph (c) of the *Motor Vehicle Act* definition had no application. The provision reads:

> (c) every private place or passageway to which the public, for the purpose of the parking or servicing of vehicles, has access or is invited,

[88] The judge disagreed with Mr. Adam's assertion that "passageway" could include the sandbar. He said, "[p]aragraph (c) refers to <u>every private place or</u>

passageway. It is clear to me that the adjective 'private' modifies both 'place' and 'passageway'. Here, we are not concerned with private property and I am therefore of the view that paragraph (c) does not apply" (emphasis in original).

[89] Mr. Adam submits the sandbar is "private" within paragraph (c) from the perspective of an owner's power to give (or deny) access to or invite the public to use its private place and passageways. He relies on *R. v. Red Line Ltd.* (1930), 66 O.L.R. 53 (C.A.) at 60, *per* Riddell J.A., and at 73 *per* Orde J.A., and on *Nadeau v. Okanagan Urban Youth & Cultural Assn.,* 2013 BCSC 55 at paras. 96, 115. I do not accept this submission. I agree with the judge that "private" modifies both a "place" and "passageway". There is no evidence the sandbar is private property.

[90] *Nadeau* is distinguishable. The accident in that case occurred on private property to which the public was given access for the purposes of parking to attend a music concert at an outdoor venue called "The Bluffs" located on an Indian Reserve, which was private land. The issue regarding coverage under s. 24 of the *IVA* was whether the place where the accident happened was a "highway" within paragraph (c) of the *Motor Vehicle Act* definition. The court reasoned:

> [115] The area has been described as a field and physically it was a field. It is private property. However, it was being used as a parking lot when the accident occurred. … The public had access to this area for the purposes of parking. … The public at this time included concert goers who might proceed through this secondary gate and clearly included anyone who was there in order to carry on the business of putting on or assisting in some way with the concert, or their friends or supporters. The people that had access at that time was a broad enough group to fall within the definition of the public in s. 1(c) of the *Motor Vehicle Act*.
>
> [Emphasis added.]

[91] In summary, none of the means of becoming a highway as required by paragraphs (a) to (g) of the *Transportation Act* definition apply to the sandbar. Nor is the sandbar a "highway" within the meaning of paragraph (b) or (c) of the *Motor Vehicle Act* definition. I therefore conclude the judge erred in finding the sandbar is a "highway" within the meaning of s. 24 of the *IVA.*

[92] I will address briefly other arguments presented by the parties that I view as relevant to the correct interpretation of “highway”.

Other Statutes

[93] The Attorney General submits the judge’s interpretation is inconsistent with other legislation concerning roads and highways. As discussed above, consideration of the entire context of a statute includes other statutes involving the same subject matter, to be interpreted in harmony. For example, s. 23(2)(e) of the *Land Title Act* provides that one of the exceptions to the indefeasibility of a title in fee simple is “a highway or public right of way, watercourse, right of water or other public easement”. Section 1 of the *Land Title Act* defines “highway” to include “a public street, path, walkway, trail, lane, bridge, road, thoroughfare and any other public way”. Although the definition in the *Land Title Act* does not specifically refer to the *Transportation Act* definition, a broadening of the *Transportation Act* definition could unduly affect the indefeasibility of fee simple lands. If the judge’s decision were to stand, then every place in British Columbia used by members of the public to traverse in motor vehicles would become a “highway”, and therefore be excluded from fee simple title.

Adverse Consequences and Uncertainty

[94] I agree with the Attorney General that the judge’s interpretation would result in a variety of adverse consequences. It would result in uncertainty as to the dimensions and location of a highway. *Emmett* affirms the legal principle “once a highway always a highway”: para. 39. The sandbar is intermittent and seasonal. The location where people drive and park their vehicles changes. It is impossible to know at any time where the “highway” is actually located on the ground. The decision at trial presents an ill-defined patch of sandbar and riverbed as becoming a highway, surely an unintended and unsustainable result.

[95] The judge’s finding that the sandbar is a highway within the meaning of the *Transportation Act* could be applied to essentially every location in British Columbia where people can drive motor vehicles (including Crown land), turning them into “highways” in perpetuity by public use. This expansive interpretation would greatly

increase the number of highways in British Columbia, affecting the potential liability of road authorities and creating uncertainty about the legal status of lands that may have been traversed by the public's vehicles.

[96] Uncertainty as to the ownership of the sandbar also raises complications. As stated, there was no evidence before the judge as to the ownership of the sandbar. While the sandbar is possibly owned by the Province, a review of Crown grants of adjacent lands and historical air photos would be required to ascertain ownership of the entirety of the sandbar.

[97] Highways are divided into: (a) "provincial public highways", the soil and freehold of which vests in the Province per s. 57 of the *Transportation Act*; and (b) municipal highways. If the sandbar is a highway and is entirely within the boundary of Chilliwack, which was the only evidence before the judge, then the "highway" portion of the sandbar would likely also be vested in that municipality pursuant to s. 35(1)(a) of the *Community Charter*. Chilliwack and Kent submit the approach of the judge has serious implications for municipal governments because of the role accorded to them under the *Community Charter* in the ownership and management of highways.

[98] It is unnecessary to address in detail Chilliwack and Kent's argument. It is sufficient to say the effect of the judge's interpretation would result in problems for municipalities, including expanded liability. For example, municipalities generally owe a duty of care to users of a highway in respect of the maintenance and repair of a highway. The scope of these powers and responsibilities cannot be determined according to whether recreational motorists decide to drive on the sandbar.

Fresh Evidence

[99] Mr. Adam applies to adduce fresh evidence in the event this Court permits ICBC to advance a new argument on appeal. Briefly, the new argument is that s. 24 of the *IVA* does not provide victims of unidentified drivers with a form of "insurance coverage" in the conventional sense. The judge erred in proceeding on the basis it did, adopting an overly broad reading of the relevant statutory provisions

and applying interpretive principles relevant to statutory insurance coverage to resolve any ambiguity in the *Transportation Act* definition.

[100] As I have concluded that interpretive principles relevant to statutory insurance coverage are not applicable in this case, it is unnecessary to address this new argument or Mr. Adam's responding application to adduce fresh evidence.

[101] As a final observation, in fairness to the summary trial judge, the arguments before him were not nearly as well-developed as they were before this Court. We also had the benefit of the intervenors' most helpful submissions.

Disposition

[102] In the result, I would allow the appeal, set aside the order appealed from and substitute an order dismissing Mr. Adam's action for damages for personal injury.

"The Honourable Madam Justice MacKenzie"

I AGREE:

"The Honourable Mr. Justice Frankel"

I AGREE:

"The Honourable Mr. Justice Harris"