

CANADA / JUDGMENT

Bonneau v. British Columbia

2023 BCSC 2451

COURT

Supreme Court of British Columbia

DECIDED

20 December 2023

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2023 BCSC 2451 Bonneau v. British Columbia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bonneau v. British Columbia ,

2023 BCSC 2451

Date: 20231220

Docket: S222492

Registry: Vancouver

Between:

Reynold John Bonneau and Mildred Rose Bonneau

Plaintiffs

And

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

Defendant

Before: The Honourable Madam Justice Ker

Oral Ruling on Voir Dire Number 5

Counsel for the Plaintiffs:

K.N. Ramji

Counsel for the Defendant:

J. Regehr

D.M.L. Black

Place and Date of Hearing:

Vancouver, B.C.

December 19, 2023

Place and Date of Judgment:

Vancouver, B.C.

December 20, 2023

- [1] These Reasons for Judgment were delivered as oral reasons. They have since been edited for distribution.

Introduction

- [2] This ruling addresses an application by the defendant, His Majesty the King in Right of the Province of British Columbia (the "Province"), to have two documents admitted into evidence for substantive purposes pursuant to the principled exception to the hearsay rule. The two documents are as follows:
- 1) Exhibit 33, an internal memorandum from H.F. Popoff, the District Highways Manager, to the Regional Director of Highways, Regional Property Negotiator, in the B.C. Ministry of Transportation and Highways ("MOTH"), dated April 19, 1988 (the "Popoff Memo"); and
 - 2) A statutory declaration made by Al Desimone, Area Manager for Enderby/ Sicamous in MOTH, made on August 31, 1993 (the "Desimone Statutory Declaration").
- [3] The content of both the Popoff Memo and the Desimone Statutory Declaration address some of the events and recollections from 1964 and relate to purportedly obtaining permission from various members of the Okanagan Indian Band (the "OKIB") whose possessory interests in land, held pursuant to an Allotment and Notice of Entitlement, were going to be affected by the realignment of a BC MOTH Highway known as the Westside Road over their properties.
- [4] The plaintiffs oppose the application of the Province to have the documents admitted for substantive use with respect to the truth of their contents. They contend that the Popoff Memo, admitted for a limited non-hearsay purpose, fails to satisfy the recognized criteria of necessity and reliability for admission under the principled exception to the hearsay rule.
- [5] Insofar as the Desimone Statutory Declaration is concerned, the plaintiffs oppose its admission on the basis of relevance, and that it fails to satisfy the criteria of necessity and reliability.

Background Facts

- [6] For the purposes of this ruling, I rely upon some of the background facts outlined by Justice Shergill in her reasons for judgment, dismissing the Province's summary trial application in this matter. In *Bonneau v. British Columbia*, 2023 BCSC 1676, Shergill J. wrote:
- [2] The Plaintiffs, Reynold John Bonneau and Mildred Rose Bonneau (collectively, the "Plaintiffs"), are both status Indians as that term is defined in the Indian Act, R.S.C. 1985, c. I-5 (the "Indian Act"). The underlying action centers on certain lands located within the Okanagan Indian Band ("OKIB") Reserve No. 1 (the "Lands").
- [3] The Lands were originally allocated to the late Harry Parker. Following Mr. Parker's passing, various family members held possessory rights over the Lands. Eventually, the Plaintiffs came into possession of the Lands. Ms. Bonneau is Mr. Parker's daughter; Mr. Bonneau is her husband. They are the current registered holders of the Lands.
- [4] The Plaintiffs claim that the Province is in trespass and has breached its fiduciary duties as a result of its unlawful taking and usage of the Lands over which they have a right of possession. In particular, the Plaintiffs say that a road ("Westside Road") and a creek ("Whiteman's Creek") are in trespass over their Lands. They allege that the trespass has existed since 1964 when Westside Road was realigned and the watercourse of Whiteman's Creek was altered. The Plaintiffs seek damages for the trespasses and breach of fiduciary duty owed to them and to Mr. Parker, as well as an order for possession that enjoins the Province and all other persons from using the realigned portion of Westside Road.
- [5] The Province submits that there is no legal basis for the Plaintiffs' claims in trespass and breach of fiduciary duty in relation to Westside Road and Whiteman's Creek because those areas are not included within the boundaries of the survey that defines the lands described in the Plaintiffs' Certificate of Possession. With respect to the claims advanced in relation to Harry Parker, the Province argues that the Plaintiffs have not pleaded facts to establish that they have standing to bring claims on behalf of Harry Parker's estate.
- [7] I note that since the dismissal of the Province's summary trial application, a new survey of the plaintiffs' property has been obtained by Indigenous Services Canada ("ISC") that clearly and unequivocally confirms what the plaintiffs have maintained throughout the decades of trying to rectify the issues about the 1964 realignment of the Westside Road through their property. The new survey confirms that the plaintiffs have always been in possession of the lands that the Westside Road bisects, since the late Harry Parker received his Allotment from the OKIB in 1959 and the Minister approved it through the issuance of a Notice of Entitlement in April 1960 (the "Parker Property").

- [8] The Province now concedes, with this new survey completed November 13 and 14, 2023, approved by the OKIB Chief and Council through a Band Council Resolution ("BCR") on December 4, 2023, and registered in the Indian Land Registry System ("ILRS") on December 7, 2023, that it has been trespassing on the Parker Property since it realigned the Westside Road in 1964, moving it from abutting the Parker Property by straightening the road so that it bisects the corner of the Parker Property.
- [9] The issue at trial is really focused on the issue of damages and the nature of the damages to be ordered against the Province.
- [10] Justice Shergill went on in her reasons for judgment to outline the following history with respect to the lands in issue:
- [29] I turn now to the rather complex history of how the Lands came into the possession of the Plaintiffs. I have noted the disputes in the evidence on this issue, where necessary.
- [30] The Plaintiffs' land is legally described as "Lot 39 Block 5 CLSR 68978" ("Lot 39"). The parties agree that the previous legal description for Lot 39 was "Lot 9 Block D Parcel 1 Sketch Attached" ("Lot 9" or "Mr. Parker's Lands"). Westside Road abutted Lot 9 on the western side of the property, running in a northerly direction. Whiteman's Creek ran along the southern boundary of the property.
- [31] On December 4, 1959, the Chief and Council of the OKIB passed a Band Council Resolution ("BCR") that allotted Lot 9 to Harry Parker. On July 26, 1960, the Minister issued Notice of Entitlement No. 1137 ("NE 1137") to Mr. Parker in relation to Lot 9. There is a dispute as to whether NE 1137 authorized only temporary occupation rights to Mr. Parker.
- [32] Prior to 1964, Mr. Parker had an irrigation ditch that flowed to his property from Whiteman's Creek. In 1964, the Province relocated Westside Road, such that the realigned Westside Road (the "Realigned Road") now cut through Mr. Parker's Lands. The Plaintiffs allege that as a result of the Realigned Road, the irrigation ditch was destroyed and the original watercourse of Whiteman's Creek was permanently altered (the "Altered Watercourse"), thus causing damage and loss for which Mr. Parker (and the subsequent Locatees) have never been compensated.
- [33] There is a dispute as to whether the Province obtained permission from the necessary parties with respect to the Province's decision to relocate Westside Road.
- [34] A land transfer registered on February 24, 1970 indicates that Mr. Parker subsequently held Lot 9 under Notice of Entitlement 1352 ("NE 1352").
- [35] In 1973, Mr. Parker granted "Lot 9 Block D Parcel 3 Sketch Attached" to Wallace Stephen Parker, following which Wallace Parker held Notice of Entitlement 6106. Harry Parker was given Notice of Entitlement 6126 ("NE 6126") in relation to "Lot 9 Block D Parcel 1 Sketch Attached". The Province relies heavily on NE 6126, arguing that it is the earliest relevant Notice of Entitlement produced by the parties, and it states that the land allotted to Mr.

Parker in 1973 is "subject to the determination of the boundaries and area of this parcel by survey".

- [36] In 1975, Dave Nielson undertook a survey of the Westside Road, ostensibly in contemplation of a possible land transaction with the Province. The survey depicted the location of Westside Road including the Relocated Westside Road. The survey was incorporated into CLSR Plan 62704, which was registered on January 10, 1977 with the Legal Surveys Division of the Federal Crown (the "Nielsen Survey").
- [37] Mr. Parker passed away on February 21, 1980. His interest in NE 6126 was transferred to his spouse, Sarah Parker, on July 7, 1980. The Indian Lands Registry System ("ILRS") Parcel Abstract Report states that Sarah Parker held the lands pursuant to "NETI". According to the ILRS Manual, "NETI" is an acronym for "No Evidence of Title Issued". The ILRS Manual explains that a NETI is issued in lieu of a Certification of Possession.
- [38] In 1983, the predecessors in title of Mr. Parker's Lands had a survey completed of the property by Russell Shortt. Lot 9 became legally described as "Lot 39 Block 5 CLSR 68978".
- [39] The CLSR Plan 68978 dated November 30, 1983 (the "Shortt Survey") does not include the Relocated Westside Road or Whiteman's Creek within the perimeters of Mr. Parker's Lands. The Plaintiffs say this exclusion was in error, as no transaction for the Relocated Westside Road had been completed in association with the Nielson Survey.
- [40] By Transfer dated October 27, 1986, and registered March 7, 1989, Sarah Parker granted her children, Mildred Rose Bonneau and Wallace Stephen Parker, an interest as joint tenants in "Lot 39 Block 5 CLSR 68978". The joint tenants were issued CP 48316. The Province argues that the Shortt Survey was incorporated into the CP for Lot 39 by reference.
- [41] Sarah Parker passed away on December 11, 2002. Consequently, Ms. Bonneau and Wallace Stephen Parker became the surviving joint tenants of Lot 39. They were issued CP 143553.
- [42] In 2009, Ms. Bonneau and Wallace Stephen Parker added Mr. Bonneau as a joint tenant of Lot 39. The three joint tenants were issued CP 164422.
- [43] Wallace Stephen Parker passed away in 2014. The Lands were then transferred to both the Plaintiffs as surviving joint tenants under CP 403038904.
- [11] It is in this context--the history of the Parker Property and the plaintiffs' dispute with the Province--that this admissibility issue arises.
- [12] The Popoff Memo has already been admitted into evidence for the limited non-hearsay purpose of fixing in time when the plaintiff, Mr. Bonneau, first became aware of the Desimone Statutory Declaration. His knowledge is fixed to a period in 2001.

- [13] The Province now seeks to have the document admitted for the truth of its contents, contending that, if admitted, it provides context to the circumstances that occurred in 1964 with the realignment of the Westside Road through the Parker Property insofar as it relates to the plaintiffs' claims for equitable compensation and punitive damages in this case.
- [14] The Province seeks the admission of the Desimone Statutory Declaration largely for the same purpose, and to provide the Court with evidence from the one person who was actually in attendance at the time in 1964 that there were discussions about moving the road with some of the impacted locatees.
- [15] Before turning to my analysis of each document under the relevance and principled exception to the hearsay rule legal principles, it is important to provide a brief review of the legal framework insofar as the hearsay issue is concerned.

Legal Framework

- [16] It is trite law that hearsay evidence is presumptively inadmissible unless an exception to the hearsay rule applies. Of course, the essential defining features of hearsay are twofold:
- 1) the out-of-court statement is introduced to prove the truth of its contents; and
 - 2) the absence of a contemporaneous opportunity to cross-examine the declarant.
- [17] The principal reason for the exclusion of hearsay is the absence of the opportunity for cross-examination. It is through cross-examination that exposure of defects in perception and memory as well as ambiguity in communication and want of sincerity are usually revealed.
- [18] In this case, the Province relies upon the principled approach to the reception of the hearsay evidence it is tendering to be admissible. Under the principled approach to hearsay evidence, the parties seeking its admission must establish that the document satisfies the principles of necessity and reliability.
- [19] Justice Charron, writing for the Court in *R. v. Khelawon*, 2006 SCC 57, provided this succinct encapsulation of the rule:
- [2] As a general principle, all relevant evidence is admissible. The rule excluding hearsay is a well-established exception to this general principle. While no single rationale underlies its historical development, the central reason for the presumptive exclusion of hearsay statements is the general inability to test their reliability. Without the maker of the statement in court, it may be impossible to inquire into that person's perception, memory, narration or sincerity. The statement itself may not be accurately recorded. Mistakes, exaggerations or deliberate falsehoods may go undetected and lead to unjust verdicts. Hence, the rule against hearsay is intended to enhance the accuracy of the court's findings of fact, not impede its truth-seeking function. However, the extent to which hearsay evidence will present difficulties in assessing its worth obviously varies with the context. In some circumstances, the evidence presents minimal dangers and its exclusion, rather than

its admission, would impede accurate fact finding. Hence, over time a number of exceptions to the rule were created by the courts. Just as traditional exceptions to the exclusionary rule were largely crafted around those circumstances where the dangers of receiving the evidence were sufficiently alleviated, so too must be founded the overarching principled exception to hearsay. When it is necessary to resort to evidence in this form, a hearsay statement may be admitted if, because of the way in which it came about, its contents are trustworthy, or if circumstances permit the ultimate trier of fact to sufficiently assess its worth. If the proponent of the evidence cannot meet the twin criteria of necessity and reliability, the general exclusionary rule prevails. The trial judge acts as a gatekeeper in making this preliminary assessment of the "threshold reliability" of the hearsay statement and leaves the ultimate determination of its worth to the fact finder.

[20] In *R. v. Bradshaw*, 2017 SCC 35, Justice Karakatsanis, writing for the majority, expanded further on the principled exception to the hearsay rule:

[20] Hearsay is an out-of-court statement tendered for the truth of its contents. Because hearsay is declared outside of court, it is often difficult for the trier of fact to assess whether it is trustworthy. Generally, hearsay is not taken under oath, the trier of fact cannot observe the declarant's demeanor as she makes the statement, and hearsay is not tested through cross-examination (*R. v. B. (K.G.)*, [1993] 1 S.C.R. 740, at p. 764). Allowing a trier of fact to consider hearsay can therefore compromise trial fairness and the trial's truth-seeking process. The hearsay statement may be inaccurately recorded, and the trier of fact cannot easily investigate the declarant's perception, memory, narration, or sincerity (*Khelawon*, at para. 2). As Fish J. explains in *R. v. Baldree*, 2013 SCC 35, [2013] 2 S.C.R. 520:

First, the declarant may have misperceived the facts to which the hearsay statement relates; second, even if correctly perceived, the relevant facts may have been wrongly remembered; third, the declarant may have narrated the relevant facts in an unintentionally misleading manner; and finally, the declarant may have knowingly made a false assertion. The opportunity to fully probe these potential sources of error arises only if the declarant is present in court and subject to cross-examination. [Emphasis in original; para. 32.]

[21] Given the dangers that hearsay evidence presents, "[t]he fear is that untested hearsay evidence may be afforded more weight than it deserves" (*Khelawon*, at para. 35). Therefore, while all relevant evidence is generally admissible, hearsay is presumptively inadmissible (*Khelawon*, at paras. 2-3).

[22] However, some hearsay evidence "presents minimal dangers and its exclusion, rather than its admission, would impede accurate fact finding" (*Khelawon*, at para. 2 (emphasis in original)). Thus, categorical exceptions to the rule excluding hearsay developed through the common law over time. These traditional exceptions are based on admitting types of hearsay statements that were considered necessary and reliable, such as dying declarations (*Khelawon*, at para. 42; *R. v. Youvarajah*, 2013 SCC 41, [2013] 2 S.C.R. 720, at para. 20; J. H. Wigmore, *Evidence in Trials at Common Law* (2nd ed. 1923), vol. III, at p. 152).

- [23] Eventually, a more flexible approach to hearsay developed through the jurisprudence. Under the principled exception, hearsay can exceptionally be admitted into evidence when the party tendering it demonstrates that the twin criteria of necessity and threshold reliability are met on a balance of probabilities (Khelawon, at para. 47).
- [24] By only admitting necessary and sufficiently reliable hearsay, the trial judge acts as an evidentiary gatekeeper. She protects trial fairness and the integrity of the truth-seeking process (Youvarajah, at paras. 23 and 25). In criminal proceedings, the threshold reliability analysis has a constitutional dimension because the difficulties of testing hearsay evidence can threaten the accused's right to a fair trial (Khelawon, at paras. 3 and 47). Even when the trial judge is satisfied that the hearsay is necessary and sufficiently reliable, she has discretion to exclude this evidence if its prejudicial effect outweighs its probative value (Khelawon, at para. 49).
- [21] As Karakatsanis J. noted, insofar as reliability is concerned, it is only threshold reliability that is assessed at this stage: Bradshaw at para. 26. In assessing threshold reliability, the trial judge must identify the specific hearsay dangers presented by the statement and consider any means of overcoming them. The dangers relate to the difficulties of assessing the declarant's perception, memory, narration, or sincerity.
- [22] Justice Karakatsanis went on to outline in Bradshaw at para. 27 that the hearsay dangers can be overcome and threshold reliability can be established by showing that:
- 1) there are adequate substitutes for testing truth and accuracy (referred to as procedural reliability); or
 - 2) there are sufficient circumstantial or evidentiary guarantees that the statement is inherently trustworthy (referred to as substantive reliability).
- [23] Justice Karakatsanis went on to define procedural and substantive reliability as follows:
- [28] Procedural reliability is established when "there are adequate substitutes for testing the evidence", given that the declarant has not "state[d] the evidence in court, under oath, and under the scrutiny of contemporaneous cross-examination" (Khelawon, at para. 63). These substitutes must provide a satisfactory basis for the trier of fact to rationally evaluate the truth and accuracy of the hearsay statement (Khelawon, at para. 76; Hawkins, at para. 75; Youvarajah, at para. 36). Substitutes for traditional safeguards include a video recording of the statement, the presence of an oath, and a warning about the consequences of lying (B. (K.G.), at pp. 795-96). However, some form of cross-examination of the declarant, such as preliminary inquiry testimony (Hawkins) or cross-examination of a recanting witness at trial (B. (K.G.); R. v. U. (F.J.), [1995] 3 S.C.R. 764), is usually required (R. v. Couture, 2007 SCC 28, [2007] 2 S.C.R. 517, at paras. 92 and 95). In this respect, I disagree with the Court of Appeal's categorical assertion that safeguards relevant to assessing procedural reliability are only "those in place when the statement is taken" (para. 30). Some safeguards imposed at trial, such as cross-examination of a recanting witness before the trier of fact, may provide a

satisfactory basis for testing the evidence.

- [30] A hearsay statement is also admissible if substantive reliability is established, that is, if the statement is inherently trustworthy (Youvarajah, at para. 30; R. v. Smith, [1992] 2 S.C.R. 915, at p. 929). To determine whether the statement is inherently trustworthy, the trial judge can consider the circumstances in which it was made and evidence (if any) that corroborates or conflicts with the statement (Khelawon, at paras. 4, 62 and 94-100; R. v. Blackman, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 55).
- [31] While the standard for substantive reliability is high, guarantee "as the word is used in the phrase 'circumstantial guarantee of trustworthiness', does not require that reliability be established with absolute certainty" (Smith, at p. 930). Rather, the trial judge must be satisfied that the statement is "so reliable that contemporaneous cross-examination of the declarant would add little if anything to the process" (Khelawon, at para. 49). The level of certainty required has been articulated in different ways throughout this Court's jurisprudence. Substantive reliability is established when the statement "is made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken" (Smith, at p. 933); "under such circumstances that even a sceptical caution would look upon it as trustworthy" (Khelawon, at para. 62, citing Wigmore, at p. 154); when the statement is so reliable that it is "unlikely to change under cross-examination" (Khelawon, at para. 107; Smith, at p. 937); when "there is no real concern about whether the statement is true or not because of the circumstances in which it came about" (Khelawon, at para. 62); when the only likely explanation is that the statement is true (U. (F.J.), at para. 40).

[Emphasis in original.]

- [24] The "threshold reliability standard always remains high -- the statement must be sufficiently reliable to overcome the specific hearsay dangers it presents": Bradshaw at para. 32.
- [25] With this legal framework in mind, I turn to the two documents in issue.

Analysis

The Popoff Memo

- [26] This document was written on April 19, 1988. It is not a sworn document. Rather, it is an internal memorandum written in response to the April 12, 1988 letter from Lyle Brewer, the Band Manager of the OKIB, to Harold Popoff, the District Highways Manager (the "Brewer Letter").

- [27] The Brewer Letter is Exhibit 1 in this proceeding. This letter is said to be the earliest documentation that MOTH, now known as the Ministry of Transportation and Infrastructure ("MOTI"), had of concerns about a trespass by the Westside Road on OKIB reserve lands. In response to the Brewer Letter, Mr. Popoff wrote the Popoff Memo seven days after the Brewer Letter, essentially flagging for the Regional Director of Highways in the Kamloops regional office of MOTH that there might be a trespass issue.
- [28] In the memo, Mr. Popoff appears to outline information that he received from both a file review and possibly discussions with Mr. Desimone, who was the engineering aide in charge of the survey of the area and drafting plans for the Whiteman's Creek Bridge.
- [29] The Popoff Memo was described by Ms. Dawn Drummond in her evidence as being a summary of what occurred in 1964 and was said to go to the issue of whether MOTH had permission to do the road and bridge relocation at Whiteman's Creek.
- [30] Mr. Popoff passed away in early 2020 and so the principle of necessity is satisfied on that basis. It also meets the necessity criteria insofar as there is an acknowledged information gap in MOTI's files between 1961 and 1977. And so, the Popoff Memo is necessary to fill that gap.
- [31] On the issue of threshold reliability, however, I am not satisfied that either procedural or substantive reliability are satisfied. The document is not a sworn document, and while it may well have been prepared by a public servant fulfilling his duties, the difficulty I have with it is that it is not entirely clear that the Popoff Memo was made under circumstances which substantially negate the possibility that the declarant was untruthful or mistaken. While I do not doubt that Mr. Popoff had no reason to be untruthful, there is the distinct possibility that he could be mistaken for two reasons.
- [32] First, he appears to be relying upon information from Mr. Desimone to outline the circumstances of the obtaining of permissions:

Mr. Desimone, the Engineering Aide who was in charge of survey and drafted the plans for Whitemans Creek Bridge at that time recalled the events. Mr. Desimone also accompanied Mr. Ernie Brewer and Mr. Joe Avender, the District Technician for the Ministry of Highways, to each home and witnessed the granting of permission to improve the Westside Road.

- [33] Mr. Desimone's account could well be flawed, given that in 1988 he was describing events from 24 years earlier and it was unclear what was assisting him on his recollection.
- [34] Second, the Popoff Memo appears to rely upon some sort of account by Mr. Desimone that is repeated by Mr. Popoff, and so there is an element of double hearsay to this document.
- [35] Accordingly, I am not satisfied that the Popoff Memo meets the criteria of threshold reliability in these circumstances. It is not admissible for the truth of its contents under the principled exception to the hearsay rule. It remains admissible for the limited purpose for which it was tendered during Mr. Bonneau's cross-examination.

The Desimone Statutory Declaration from August 31, 1993

- [36] Five years after the Popoff Memo was written, Al Desimone, the engineering aide referred to in the Popoff Memo, provided a statutory declaration outlining his recollections of his personal involvement in the reconstruction and improvements made on the Westside Road in 1964 (defined above as the Desimone Statutory Declaration). His statutory declaration, made in 1993, attests to events that occurred approximately 29 years before. Mr. Desimone was employed by MOTH in 1964, and was still employed by them in August 1993 when he provided the Desimone Statutory Declaration.
- [37] Attached to the Desimone Statutory Declaration are three documents: a BCR from October 30, 1967, pertaining to the use of gravel at Whiteman's Creek, and two purported permissions for the Westside Road to pass through the properties of Della Saddleman and Ella Alexis. There is no such document from Harry Parker or George Parker.
- [38] Counsel for the plaintiffs contends this document is inadmissible, as it is not relevant to any issue raised by the pleadings. Moreover, they contend that it is irrelevant because it does not mention Harry Parker, the locatee, who did not grant permission to MOTH to realign the Westside Road over his Allotment of land - the Parker Property.
- [39] The plaintiffs also contend that the fact that Chief Ernie Brewer may have given permission to relocate Westside Road across Harry Parker's lands is meaningless. He did not have the authority to do so, as outlined in s. 2(3)(b) of the Indian Act, R.S.C., 1985, c. I-5. Once reserve land is allocated to an individual, as it was in the case of Harry Parker, it ceases to be Band land. Essentially, Chief Brewer had no authority to grant any sort of permission to MOTH to relocate the road so that it bisected the Parker Property.
- [40] As I understood the Province's argument, this document is relevant as it pertains to facts pleaded in paras. 16 and 45 of its amended response to civil claim. Moreover, it is said to be relevant to the assessment of the plaintiffs' claim for equitable compensation and punitive damages. The relevance is said to pertain to the circumstances that led to the Province being in trespass over Harry Parker's allotment, and continues to be in trespass over a strip of the Parker Property since 1964.
- [41] In the circumstances, I am satisfied the document is marginally relevant to the pleadings and issues in this case.
- [42] I turn now to whether the Desimone Statutory Declaration is admissible under the principled exception to the hearsay rule.
- [43] Insofar as necessity is concerned, Mr. Desimone died in 2021 and so his unavailability satisfies the necessity criterion. Moreover, it is the only available evidence from someone actually involved in the road relocation. Accordingly, I am satisfied that the necessity criterion has been established.

[44] Insofar as threshold reliability is concerned, it is important to note that procedural reliability is evidenced by the fact that this document or statement was made as a solemn declaration. Indeed, the concluding sentence of the document before the jurat area contains the following quote:

AND I make the solemn declaration conscientiously believing it to be true and knowing that it is of the same force and effect as if made under oath and by virtue of the Canada Evidence Act.

[45] The admissibility inquiry into threshold reliability is not so focused on the question of whether there is reason to believe the statement is true, as it is on the question whether the trier of fact will be in a position to rationally evaluate the evidence. The question becomes whether there is an adequate substitute for the process that would have been available, had the evidence been adduced in the usual way, with sworn evidence from a live witness.

[46] The solemn declaration provides a measure of procedural reliability that is sufficient for the purposes of establishing the admissibility of the document.

[47] The plaintiffs' objections to the reliability of the Desimone Statutory Declaration are directed more to the issue of ultimate reliability. Mr. Desimone was a public servant who swore this declaration before a commissioner for taking oaths. While the Province seeks to tender the document to support the inference that the mention of George Parker relates actually to Harry Parker, that may well be a long bow to draw.

[48] The more relevant and pithy piece of information in the document, in my view, is the acknowledgment, relied on by the plaintiffs in resisting the summary trial application, that Mr. Desimone made in respect of not having a right-of-way agreement "signed, sealed and delivered", suggesting that that did not really affect what MOTH was doing at the time.

[49] Additionally, he makes a further acknowledgment that while it was a normal business practice at the time and acceptable, it also may not have been right.

[50] Having considered the Desimone Statutory Declaration in light of the principles governing the admission of this evidence under the principled exception to the hearsay rule, and in light of the submissions made by counsel, I am satisfied that the threshold reliability criterion has been satisfied. The Desimone Statutory Declaration is admissible under the principled exception to the hearsay rule.

[51] The issue of its ultimate reliability and the weight to be attached to it is a matter to be assessed at the conclusion of the trial with the full evidentiary record and submissions in hand.

[52] That concludes my ruling. Thank you.

"Ker J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/23/24/2023BCSC2451.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bonneau-v-british-columbia-2023-bcsc-2451>

Prepared on 26 October 2026 · Esheria