

CANADA / JUDGMENT

McDonald v. Comox (Town)

2025 BCSC 2062

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 2062 McDonald v. Comox (Town)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McDonald v. Comox (Town),

2025 BCSC 2062

Date: 20251021

Docket: S203981

Registry: Victoria

Between:

Kenneth R. McDonald and Norine L. McDonald

Plaintiffs

And

Town of Comox

Defendant

Before: The Honourable Mr. Justice Baird

Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Dates of Trial:

Nanaimo, B.C.

April 29-30, 2025

Place and Date of Judgment:

Victoria, B.C.

October 21, 2025

INTRODUCTION

- [1] The plaintiffs, Mr. and Mrs. McDonald, allege that the water in a creek that flows past their residential property is being polluted by the upstream stormwater management practices of the defendant, the Town of Comox. They have been granted an order by the Court of Appeal permitting them to set down this hearing pursuant to Rule 9-4(1) of the Supreme Court Civil Rules, B.C. Reg. 168/2009 on the following point of law: Is there an unabrogated riparian right at common law in British Columbia to receive water of a quality substantially undiminished from its natural state?
- [2] The plaintiffs' original notice of civil claim against the defendant sounded in nuisance and negligence, but their amended claim is based on nuisance, common law riparian rights, and statutory rights under the Water Sustainability Act, S.B.C. 2014, c. 15 (the "Act"). Their Rule 9-4 application failed on its first attempt in this Court in December 2022, the presiding justice having concluded that their case for an affirmative answer to their legal question was arguable, but that its interlocutory determination was unlikely to abbreviate the proceedings or save substantial court costs: see 2023 BCSC 18.
- [3] The Court of Appeal disagreed, referring to the fact that the plaintiffs have committed to discontinue their underlying claim if the answer to their legal question is "no". The Court observed that "if the ultimate result of the R. 9-4 application is that the plaintiffs do not have a cause of action, much time and expense, both in terms of the parties and the justice system, will have been saved. Even if the plaintiffs are successful, the possibility of settlement once the applicable law is known may well increase": see 2024 BCCA 180 at para. 30. The legal question was remitted to this Court to be answered.

DISCUSSION

- [4] I heard submissions and legal argument over a most interesting and informative two-day hearing, including from counsel on behalf of the provincial government (the "Province") participating as an interested party as permitted by Rule 8-1(7). All concerned agree that my role is not to make findings of fact or weigh evidence, but only to answer a clear question of law that comes down to the correct interpretation of s. 5(1) of the Act, (the "vesting provision") which reads:

Vesting water in government

5 (1) The property in and the right to the use and flow of all the water at any time in a stream in British Columbia are for all purposes vested in the government, except insofar as private rights have been established under authorizations.

- [5] Legislative provisions in like terms have been in force for most of the Province's history: see, for starters, s. 4 of the Water Privileges Act, S.B.C 1892 c. 47. The plaintiffs do not - and cannot - claim any right to use the creek water in question, or dispute that the pre-existing common law right to do so has been abrogated except by authorisation obtained from the Province. For clarity, the plaintiffs have no such authorisation, and, with reference to the wording of their legal question, they are not entitled to "receive" the creek water in any beneficial, possessory or proprietary sense. They maintain, however, that they enjoy an unabrogated "stand alone" common law right to insist that the creek water flowing by their property should be of a purity or quality undiminished from its natural state.
- [6] As I have said, the Province filed pleadings and presented argument on this application because, though not a party to the underlying lawsuit, its authority to regulate and manage a valuable resource - fresh water - in the public interest would be materially affected by a positive answer to the question asked. It has done so on the footing that the Province:
- a) owns all rights to the use and flow of water in British Columbia that have not been assigned under statute;
 - b) owns the bed and banks of all bodies of water that have not been disposed of by Crown grant; and,
 - c) regulates watercourses throughout the Province under a comprehensive statutory framework.
- [7] The Province acknowledges that there is a common law riparian right to water quality but says that it is and has always been allied with, and has no application without, the concomitant right to use water. It says that there is no "stand alone" right to water quality, and that the plaintiffs are urging upon me the unprecedented recognition of a "radical and expansionist" riparian right, namely "that a landowner who does not enjoy any right to the use or flow of water nevertheless has the right to have water pass by their land in a quality that they deem acceptable." There may be room for debate about this, but the more

important question is whether the right, however configured, has been abrogated by the Act.

- [8] The words of a statute "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.*, [1998] 1 S.C.R. 27 at para. 21), and s. 8 of the Interpretation Act, R.S.B.C. 1996, c. 238 mandates that an enactment must "be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." The legislative objects of the Act have been judicially confirmed in *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378 at para. 257 as being the management of public water in the public interest by granting the Province exclusive authority over not only the use of water, but also over the making of changes in and about streams.
- [9] These objects are enabled by a necessarily broad vesting provision which, on my reading at least, accords with the general scheme of the statute and is perfectly clear: the water in all the streams of British Columbia is owned by the Province on behalf of the public for all purposes, including the exclusive authority to permit or prohibit changes to the natural quality of water in streams according to the public interest, and to establish, regulate and enforce water quality standards for the benefit of everyone. A reading of the entire enactment is required to evaluate legislative intention. In support of my conclusion, without claiming that it is an exhaustive inventory, I would emphasise the following provisions:
- Section 13: which obliges statutorily authorised decision makers to direct any applicant for water use or change approval to give notice to riparian owners who may be detrimentally affected and to hear and determine their objections to the application, if any;
 - Section 14: which gives authorised decision makers the discretion, even if no riparian owners object, to refuse applications, to require their amendment, or to order the applicant to provide more information, including about existing water users, riparian owners, or others whose rights are likely to be detrimentally affected if the application is granted;
 - Section 15: which obliges authorised decision makers to consider the environmental flow needs of a stream in evaluating applications;
 - Section 16: which gives authorised decision makers the discretion to require an applicant to implement mitigation measures if a proposed change is likely to have a significant adverse impact on the water quality or aquatic ecosystem of a stream;
 - Section 43: which mandates the Province's authority to make regulations to sustain water quality and aquatic ecosystems by the establishment of "water objectives" in any "watershed, stream, aquifer or other specified area or environmental feature or matter";

- Section 46: by which it is prohibited for any person to introduce or cause to be introduced into a stream any substance in such quantity or manner as to cause a significant adverse impact on the stream, the existing uses of water from the stream, the property of riparian owners on the stream, an aquifer that is hydraulically connected to the stream, or the aquatic ecosystem of the stream;
- Section 47: by which an engineer designated by the Province may order a person who contravenes s. 46 to stop, remove, remediate or mitigate the effects of the introduction of an adversely impactful substance introduced into a stream, or take mitigation measures, or compensate the government or its agents for doing so;
- Section 65: by which the Province has authority to designate an area for the purpose of the development of a water sustainability plan if it considers that such a plan will assist in preventing or addressing risks to water quality or aquatic ecosystem health in the area;
- Section 106(2)(b): which establishes that it is an offence for any person without government authorisation to make changes in or about a stream;
- Section 106(4)(n): which establishes that it is an offence for a person to contravene s. 46 (introduction of an adversely impactful substance into a stream);
- Section 106(6): which prescribes that a person who commits either of the aforementioned offences is liable upon conviction, (a) if the offence is not continuing, to a fine not exceeding \$200,000, and (b) in the case of a continuing offence, to a fine not exceeding \$200,000 for each day the offence is continued, or imprisonment for not longer than 6 months, or both;
- Section 107(1)(c): which establishes that a person commits an offence who fails to comply with an order under s. 47 (remediation order in relation to the introduction of an adversely impactful substance into a stream);
- Section 107(2): which prescribes that a person who commits an offence under s. 107(1)(c) is liable upon conviction, (a) if the offence is not continuing, to a fine of not exceeding \$1,000,000, or imprisonment for not more than one year, or both; or (b) if the offence is continuing, to a fine not exceeding \$1,000,000 for each day the offence is continued, or imprisonment for not more than one year, or both.

[10] In my view, there can be no doubt that the scheme of the Act is intended to repeal the common law right of riparian landowners - assuming the plaintiffs are correct that the right extends this far - to have water of pure and undiminished natural quality arrive at or flow past their property, and to replace it with a modern system of government or public water ownership for all purposes. This includes matters related to water use regulation and allocation, proposed changes to water flow, the maintenance and sustainability of water quality, the protection of aquatic ecosystems across BC, and the prosecution and punishment of anyone who introduces unauthorised changes in and about streams, including by pollution.

- [11] The plaintiffs argue, the Province acknowledges, and the defendant agrees, that certain common law riparian rights have not been abrogated by the vesting provision, including the riparian owner's right of entitlement to land created by accretion (*Bryan's Transfer Ltd. v. Trail (City)*, 2010 BCCA 531), and the right to protect property from erosion (*Fonseca v. Gabriola Island Local Trust Committee*, 2021 BCCA 27). The plaintiffs are quite right to maintain that there is no such thing as a "blanket abrogation theory", which is the name that they have given to the broad assertion made by the Court of Appeal in *Saik'uz First Nation v. Rio Tinto Alcan Inc.*, 2015 BCCA 154 at para. 44, to the effect that the Province has abolished all common law riparian rights in British Columbia.
- [12] Be that as it may, my interpretation of the vesting provision, and what I consider to be the clear statutory terms built around it, is not affected by the fact that there continue to be unabrogated common law riparian rights unrelated to the Province's all-purpose ownership, regulation and management of our collective water resources in the public interest. Considering the whole of the Act, starting with the vesting provision, and giving it the required fair, large, liberal construction and interpretation that best ensures the attainment of its objects, I conclude that the Province has clearly, expressly, deliberately and unequivocally abrogated or repealed the common law riparian right to water quality, however it may be conceived. The presumption of legislative respect for common law principle has been decisively rebutted.
- [13] It goes without saying, as well, that I am bound to follow and apply the Court of Appeal's clear pronouncements on the subject, and it cannot be denied that such a pronouncement was made in *Saik'uz*. The plaintiffs in that case claimed, amongst other things, that the defendant company's diversion and alteration of the water flowing into the Nechako River by means of a hydro-electrical dam constituted a breach of their riparian rights by negatively altering the quality of the water, including its temperature, with resultant damage to the river's ecosystem generally and its fish habitat particularly. The trial judge determined, and the Court of Appeal agreed, that all common law riparian rights were extinguished by legislation going back to the previously-mentioned Water Privileges Act, and held that this had been confirmed in successor legislation through to the relevant statutory provision then in force, s. 2(1) of the Water Act, R.S.B.C. 1996, c. 483, a vesting provision in terms substantially identical to the one under consideration in this case.
- [14] The result was that the part of the plaintiffs' claim based on common law riparian rights was struck out, a drastic order made only in cases where the court considers it plain and obvious that an action has no reasonable prospect of success or is bound to fail. This was in a significant, high-profile lawsuit, an important aspect of which addressed the competing interests of Aboriginal plaintiffs as riparian property holders and a large corporation whose statutorily authorised damming activities drastically altered the flow and quality of a major watercourse. The plaintiffs urge me to consider the *Saik'uz* decision "with great caution", inferring without saying directly that it must be wrong because it was based upon a legally unsustainable "blanket abrogation theory". They argue that their point of law "cannot be

resolved on the basis of conclusory statements from the caselaw."

- [15] I accept and appreciate that the Court of Appeal, in other cases, has confirmed that common law riparian rights unrelated to water ownership and its natural incidents continue in force. In my view, however, there can be no doubt that the result in Saik'uz is conclusive and binding authority that the vesting provision, considered in light of all the provisions of the Act in force today, abrogates the common law right to water quality, whether it is correctly considered as a "stand alone" right or one that applies only in association with the right to use water. The defendant's alteration and impairment of water quality in the Nechako River was central to the plaintiffs claim as common law riparian landholders, and the decision to strike out their pleadings on the issue cannot have been other than closely and carefully considered.
- [16] I should like to stress, before I go, that I have read with interest the various authorities cited by the plaintiffs on the state of common law riparian rights in other provinces, but as they were at pains to emphasise during argument, their legal question is targeted and limited, and has nothing to do with water quality in Ontario or Nova Scotia, but only with the proper interpretation of the Act in force here at home.
- [17] Finally, this ruling says nothing at all about the availability of remedies based on the law of negligence or nuisance for damage caused to riparian property by unauthorised upstream water users or polluters, and s. 29 of the Act specifically provides that parties such as the present defendant, who introduce authorised changes in and about a stream, must exercise reasonable care to avoid damaging the land, works, trees or other property of another person, and are liable for any damage or loss resulting from their failure to do so.

CONCLUSION

- [18] For these various reasons, my answer to the question posed by the plaintiffs is "no". I note their commitment to withdraw their underlying lawsuit because of it, and I will leave them to it. Costs may be spoken to if necessary.

"Baird J."

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