

CANADA / JUDGMENT

Mountain Ridge Road Users Cooperative Association v. Robson-Raspberry Improvement District

2025 BCSC 1907

COURT

Supreme Court of British Columbia

DECIDED

3 October 2025

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2025 BCSC 1907 Mountain Ridge Road Users Cooperative Association v. Robson-Raspberry Improvement District

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Mountain Ridge Road Users Cooperative Association v. Robson-Raspberry Improvement District,
2025 BCSC 1907

Date: 20251003

Docket: S31577

Registry: Cranbrook

Between:

Mountain Ridge Road Users Cooperative Association, Curtis James Smeltzer,

Jane Marie Smeltzer, David George Waskul, Jared James O'Meara, Fraser Nils

Hanson, Vanessa Ann Terwoort, Russell Jarod Terwoort, David Robert Bristow, Anni Claudia Nicole Muhlegg, Karli Beate Raine, Jordie Allan Raine, Patricia Jessup, Tobias Patrick Dyck, Bradley Grant Newton, Catherine Elizabeth Newton, Grant William Hutchinson, Rhonda Joyce Loewen Hutchinson, Duncan Lee Tait, Jason Kelly Tait, Joel Scott Audet, Dylan Armstrong Smith, Ava Stacey Marion Clark, Simon Sandor Young, Eric Hendrick Veiga Westra, Marie-Pier Gentes, Yuri Wayne Hadikin, Stephen William Harris, Rachael Elizabeth Ann Willis, Charles Bonham Harris, William Edward Good, Sandra Good, Justin Lawrence Evin, Elaine Pottery, Andrew George Evin, Vera Evin, Geeta Archna Gillespie, Sheldon Clark Gillespie, Scott Edward Godin, William Rory Scot Young, Andrew Alex Ziben, Cherie Leigh Gray, Joshua John Anderson, Keelan

Charles Rensch, Shawn Bradley Vammen, Sheena Marie Brister, Andre Raymond Joseph Girard, Jessica Lea Girard, Subah Sadiq, Myrla Sadiq, Sean Leo Hoodicoff, Ashley Ann Deshamais, and Anthony Kyle Gaigg

Petitioners

And

Robson-Raspberry Improvement District and His Majesty the King in Right of the Province of British Columbia

Respondents

- and -

Docket: S14741

Registry: Rossland

Between:

Robson-Raspberry Improvement District

Petitioner

And

Mountain Ridge Road Users Cooperative Association, Curtis James Smeltzer, Jane Marie Smeltzer, David George Waskul, Jared James O'Meara, Fraser Nils Hanson, Vanessa Ann Terwoort, Russell Jarod Terwoort, David Robert Bristow, Anni Cludia Nicole Muhlegg, Karli Beate Raine, Jordie Allan Raine, Patricia Jessup, Tobias Patric Dyck, Bradley Grant Newton, Catherine Elizabeth Newton, Grant William Hutchinson, Rhonda Joyce Loewen Hutchinson, Duncan Lee Tait, Jason Kelly Tait, Joel Scott Audet, Dylan Armstrong Smith, Ava Stacey Marion Clark, Simon Sandor Young, Eric Hendrick Veiga Westra, Marie-Pier Gentes, Yuri Wayne Hadikin, Stephen William Harris, Rachel Elizabeth Ann Willis, Charles Bonham Harris, William Edward Good, Sandra Good, Justin Lawrence Evin, Elaine Pottery, Andrew George Evin, Vera Evin, Greeta Archana Gillespie, Sheldon Clark Gillespie, Scott Edward Godin, William Rory Scot Young, Andrew Alex Ziben, Cherie Leigh Gray, Joshua John Anderson, Keelan Charles Rensch, Shawn Bradley Vammen, Sheena Marie Brister, Andre Raymond Joseph Girard, Jessica Lee Girard, Subah Sadiq, Sean Leo Hoodicoff, Ashley Ann Desharnais, Anthony Kyle Gaigg, Regional District of Central Kootenay and His Majesty the King in Right of the Province of British Columbia

Respondents

Corrected Judgment: The text of the judgment was corrected on the front page and page 26 on October 7, 2025.

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for Petitioners in Action 31577 and Respondents in Action 14741:

J.A. Bird

Counsel for Robson-Raspberry Improvement District:

J.T.E. Gelber

Place and Date of Hearing:

Nelson, B.C.

September 13-15, 2023

Rossland, B.C.

October 22-23, 2024

Place and Date of Judgment:

Rossland, B.C.

October 3, 2025

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Introduction

- [1] In or about 1989, Andy Ziben owned various properties located on an escarpment overlooking Robson, British Columbia. He constructed a road and bridge over lands belonging to the Robson-Raspberry Improvement District ("RRID"), without permission, to provide access to his properties and other properties on the escarpment. RRID immediately objected to the works done on its land and made efforts to stop the use of the road and bridge. The parties were temporarily able to resolve their differences by entering into a 20-year easement agreement in 1999, filed as instrument KN8541. However, in 2019 they were unable to agree on an extension of the easement, which has resulted in the two petitions before me.
- [2] The petitioners in action #31577 are the Mountain Ridge Road Users Co-operative Association and its members who own properties on the escarpment overlooking Robson (collectively "MRRUC"). Some of them are successors in title to Andy Ziben. The lands owned by MRRUC are: Lots 69-71, 75-79, and 83-111 of District Lot 301A and Lots 1-3 of District Lot 7457 (the "MRRUC lands"). They say that they are entitled to an easement over adjoining lands owned by RRID, namely, Lot A of District Lot 301A and Lot 2 District Lot 8092 (the "RRID lands"). They say they are entitled to an easement on three grounds: First, they submit they are entitled to an easement of necessity; second, they submit they are entitled to an easement based on implied terms the easement agreement entered into in 1999 and the failure of RRID to renegotiate that easement in good faith; third, they rely on the doctrine of proprietary estoppel and representations allegedly made by RRID at the time of a 1966 subdivision.

- [3] RRID is the petitioner in action #14741 against MRRUC. It seeks: a declaration that easement KN8541 is expired; an order cancelling the easement pursuant to s.35 of the Property Law Act, R.S.B.C. 1996, c. 377; and ancillary orders to deactivate the easement area, bridge and roadway.
- [4] For the reasons that follow, action #31577 commenced by MRRUC is dismissed and action #14741 commenced by RRID is allowed.

Objections to Evidence

- [5] At the commencement of the hearing in this matter, RRID made an application to strike portions of the affidavit evidence of Andy Ziben and Vanessa Terwoort on the grounds that the evidence was hearsay or argument in the guise of evidence. The paragraphs of affidavit #1 of Andy Ziben that are objected to are: 6-10, 12-13, 35-37. The paragraphs of affidavit #1 of Vanessa Terwoort that are objected to are: 8, 10, 17, 18, 20, 27, 43 and 44.
- [6] After hearing the submissions of counsel in relation to the objected evidence, I declined to then strike the impugned paragraphs but advised counsel that I would discount any evidence that was inadmissible hearsay or otherwise contained argument or legal opinions.
- [7] The objections to the evidence of Vanessa Terwoort relate primarily to expressions of legal opinion and argument. For example: at para. 8 she deposes that Mountain Ridge Road is the only way to access the MRUCC properties "both legally and practically"; at para. 17 she deposes "[t]here is no legal access..."; at para. 18 she deposes that there is no legal access over Marshall Road or Rialto Road; and, at para. 20, she deposes that MRRUC members have no legal right to access Marshall Road. Counsel for MRRUC did not seriously dispute that these paragraphs were inadmissible legal opinions.
- [8] I found the affidavit of Ms. Terwoort to be excessively argumentative and agree that it contains multiple incidents of expressions opinion on the legality or illegality of access routes. These opinions are inadmissible. Similar expressions in the affidavit of Andy Ziben, in particular paras. 10 and 13 of his affidavit, are also inadmissible.
- [9] The more substantive objections raised by RRID relate to hearsay. Although there is some hearsay in the affidavit of Ms. Terwoort, the objections primarily relate to Mr. Ziben's affidavit. He repeatedly deposes to things he was told by his father or heard his father say. I address these objections in detail later in these reasons but, for now, I note that the impugned statements do not meet the reliability requirement for admissibility.

Facts

Parties

- [10] The MRRUC is an association incorporated in 2016 under the Cooperative Association Act, S.B.C. 1999, c. 28. Its mandate is to maintain Mountain Ridge Road, which provides access to the properties of its members. The individual petitioners in action #31577 and the individual respondents in action #14741 are members of MRRUC and own properties that are accessed via Mountain Ridge Road.
- [11] The RRID was created by order in council dated June 16, 1983. It is an amalgamation of the Robson Irrigation District and the Raspberry Irrigation District. Its mandate is the acquisition, maintenance and operation of works for the storage, diversion, conveyance and distribution of water.
- [12] I observe that the Province of British Columbia was originally included as a party in both petitions but was removed as a party from both petitions on July 26, 2023. I further observe that the Regional District of Central Kootenay is named as a respondent in action #14741. It takes no position on the orders sought and has not participated in the hearing. Its inclusion is due to the provisions of s. 35 of the Property Law Act, R.S.B.C. 1996, c. 377.

Layout of the Lots

- [13] The lands subject to the petitions comprise portions of District Lots 301A, 7457 and 8092. District Lot 301A straddles the Columbia River. District Lot 7457 adjoins the northeast corner of District Lot 301A. District Lot 8092 lies to the east of District Lots 301A and 7457. Also relevant are District Lots 237, 4598 and 7372, all of which border on Lot 301A. District Lot 4598 lies to the south of District Lot 8092. District Lot 237 lies to the south of District Lot 4598 and to the east of District Lot 301A. District Lot 7372 lies along the Columbia River to the west of District Lot 301A.
- [14] The below image very roughly situates the various District Lots relative to each other and the Columbia River.
- [15] The MRRUC lands are located on District Lot 7457 and the north-eastern parts of District Lot 301A. As indicated, these lands comprise lots 69-71, 75-79, and 83-111 of District Lot 301A and lots 1-3 of District Lot 7457. These lands generally lie on an escarpment to the north of, and overlooking, the Columbia River, Robson and Castlegar.
- [16] As indicated, the RRID lands comprise Lot A of District Lot 301A and Lot 2 District Lot 8092. A creek dissects Lot A and Lot 2 of the RRID lands. The creek has been alternately referred to as Pass Creek or Norns Creek. (For the sake of consistency, I will refer to it as "Pass Creek".) Lot A lies on the west side of Pass Creek. Lot 2 lies on the east side of Pass Creek. Lot A adjoins the MRRUC lands at lots 100, 101 and 102 of District Lot 301A.

Historical Grants, Transfers etc.

- [17] District Lot 301A was originally created and conveyed by crown grant to the BC Railway and Navigation Company on February 9, 1893.
- [18] District Lot 7457 was originally created and conveyed by crown grant to John August Erickson on September 5, 1906.
- [19] District Lot 4598 was created and conveyed by crown grant to the Columbia and Western Railway Company on October 3, 1901. This was a large tract of land comprising 47,360 acres and spanning from the City of Trail to what is now the City of Castlegar.
- [20] District Lot 7372 was created and conveyed by crown grant to Andrea Bjerkness on November 15, 1906.
- [21] The evidence before me does not address District Lot 237, which lies to the south of District Lot 4598.
- [22] On December 28, 1906, Kootenay Columbia Fruit Lands Ltd. acquired title to various lands including what became the MRRUC lands. It acquired title to Sublot 3 of Lot 4599, Sublot 54 of Lot 4598, Part of Lot 301A, Lot 7372, and Lot 7457.
- [23] On January 11, 1907, surveyors certified two subdivision plans, NEP 794 and NEP 795, which were registered in September 1907. Subdivision plan NEP 795, subdivided District Lot 7457, subplot 54 of District Lot 4598 and part of Lot 301A. This plan includes what became the MRRUC lands. The parties agree that plan NEP 795 also included a road allowance. Although the presence of such an allowance is difficult to ascertain from the exhibits filed, it is highlighted in Exhibit "D" of Vanessa Terwoort's affidavit. This road allowance did not connect to any road at either its eastern or western terminus. To the west, it terminated at lands covered by NEP 794. To the east, it appears to terminate at the border of Lot 99 of District Lot 301A and what was then Crown land but later became District Lot 8092. NEP 795 also contains a notation of a trail leading north from the Columbia River through subplot 54 of District Lot 4598 and terminating at Pass Creek just to the east of Lot 102 of District Lot 301A. I foreshadow my later findings by observing that the path of this trail corresponds to what eventually became an access road to the MRRUC lands used until 1988.
- [24] The below image is of NEP 795. The borders have been added by me to denote the MRRUC lands (lots owned by MRRUC members), as depicted in Exhibit A to the Affidavit of Vanessa Terwoort. I have also added arrows to denote the road allowance, as depicted in Exhibit D of Ms. Terwoort's affidavit, and the trail that became an access road to the MRRUC lands.
- [25] On October 15, 1907, District Lot 8092, was created and conveyed by crown grant to Allison Gibson. Exceptions from the grant are "all traveled streets, roads, trails". District Lot 8092 borders on Lots 1 to 3 of District Lot 7457 and Lots 99 to 101 and part of 102 of District Lot 301A. Significantly, the drawing attached to the grant does not show a road allowance or road connecting to the road allowance on NEP795. The drawing attached to the grant merely

shows a trail traversing the east side of Pass Creek, which appears to roughly follow the course of what is now Pass Creek Road. The image below is the drawing attached to the grant.

- [26] When Lot 8092 was conveyed in 1907 to Allison Gibson, the MRRUC lands were owned by Kootenay Columbia Fruit Lands Ltd.
- [27] In 1954, Lot 8092 was subdivided into two lots, Lots 1 and 2. The subdivision plan, NEP 2659, shows a road called Pass Creek Road which traverses the east side of Pass Creek. It does not show the presence of any roads connecting to Lots 301A or 7457.
- [28] On November 23, 1955, the predecessor of RRID, the Robson Improvement District ("RID"), purchased Lot 2 of District Lot 8092.

Ziben Purchase

- [29] At some point in time, Alex Ziben acquired a number of the lots that are included in the MRRUC lands. The exact number of lots and the dates he acquired them are unclear.
- [30] Andy Ziben, the son of Alex Ziben, deposes in his affidavit that his father acquired 38 lots of 12 acres each in 1947. In its written submissions, RRID accepts this evidence as fact. However, in its written submissions, MRRUC submits Alex Ziben acquired 28 lots in 1965. In doing so, it references the title documents of the various lots that are included as exhibits to the affidavit of Ms. Janacek.
- [31] I have reviewed the affidavit of Ms. Janacek and the attachments thereto. Those attachments indicate that, in 1965, Alex Ziben acquired Lots 1-3 of District Lot 7457 and Lots 86, 87, and 89-111 of District Lot 301A. Based on this evidence, I find as a fact that Alex Ziben acquired 28 lots in 1965, including Lots 100-102, which lay on the western side of Pass Creek opposite Lot 2 of District Lot 8092, then owned by RRID or its predecessor.
- [32] In submissions before me, counsel for MRRUC stated that Alex Ziben at one time owned all of the 37 lots now owned by the individual named petitioners in action #31577. Although nothing turns on this statement, it is not accurate. Alex Ziben is the predecessor in title to only those individual petitioners who now own one of the lots he acquired in 1965. According to the Affidavit of Ms. Janacek, the current owners of Lots 69-85, and 88 had different predecessors in title.

1966 Subdivision and Alleged Agreement

- [33] On November 14, 1966, Alex Ziben subdivided lots 100, 101 and 102 of District Lot 301A creating Lot A of District Lot 301A. Lot A, which fronts on Pass Creek, was then sold to RID, the predecessor of RRID. With this transaction, RRID's predecessor became the owner of lands on both sides of Pass Creek. The image below is of the subdivision.

- [34] The circumstances of the subdivision and sale are the subject of some of the disputed hearsay evidence.

Hearsay Ruling

- [35] Andy Ziben addresses the subdivision at paras. 8-10 of his affidavit. He deposes that in 1966, the RID approached his father and requested that he subdivide parts of Lots 100, 101 and 102 so they could purchase the newly subdivided lot. He deposes they wanted the land for the protection of water quality. He deposes they told his father "we would have full uninterrupted use of the land for whatever other purpose we wanted", and that they "had no intention of landlocking him". He deposes his father told him "he would not sell the property unless he had an agreement to build a bridge leading to Lot 100". He deposes "[t]he RID assured my father that they would have no problem with installation of a bridge and road crossing the short section of RID's land". He deposes that with these assurances, his father subdivided the land and sold Lot A to RRID. He finally deposes, at para. 11, that before his father could build the bridge, he passed away in 1974.
- [36] RRID objects to paras. 8-10 of Mr. Ziben's evidence on the basis of hearsay. MRRUC submits the statements made by Alex Ziben to his son are admissible under the modern hearsay rule in that they meet the requirements of necessity and reliability.
- [37] Hearsay evidence is an out-of-court statement tendered to prove the truth of its contents. Such evidence is presumptively inadmissible, unless: (1) it falls within an existing recognized exception; or (2) the party tendering the evidence demonstrates, on a balance of probabilities, that the evidence is both necessary and has sufficient threshold reliability: *R. v. Bradshaw*, 2017 SCC 35, [2017] 1 S.C.R. 865, at paras. 20-24; *Fontaine v. Canada (Attorney General)*, 2015 BCSC 1597, at para. 33.
- [38] There is no question that the statements made by Alex Ziben to Andy Ziben are tendered for the truth of what was said. Further, MRRUC does not suggest the statements are admissible under any recognized exception to the hearsay rule but relies solely on the principled modern rule. Thus, the statements are inadmissible unless MRRUC, establishes, on a balance of probability, the evidence is both necessary and reliable.
- [39] Given the death of Alex Ziben, I accept that the necessity requirement has been met. But, is the evidence sufficiently reliable?
- [40] Reliability has two components: procedural reliability and substantive reliability. These were addressed in *Bradshaw* at paras. 29 and 30-31:
- [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 CanLII 74 (SCC), [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 CanLII 79 (SCC), [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).
- [41] In my view, MRRUC has failed to establish on a balance of probabilities that the evidence is either procedurally or substantively reliable.
- [42] Concerning procedural reliability, there are absolutely no safeguards or substitutes for testing the evidence. The full circumstances under which the alleged statements were made are not known.
- [43] Concerning substantive reliability, there are multiple factors that lead me to question the reliability of the statements made. These are:

- a) First, Andy Ziben was only 10 years of age when the events took place. His young age and the passage of time lead me to doubt the reliability of his evidence;
 - b) Second, Andy Ziben is not an uninterested witness. He has much to gain or lose in these proceedings. Not only is he a current owner of lots on the MRRUC lands, he is also the predecessor in title for many of the lots and is, by his own admission, the developer of the road network;
 - c) Third, the evidence is vague as to the circumstances in which the statements were made. In particular, no dates are provided and the persons from RID who are alleged to have made the statements are not identified;
 - d) Fourth, the evidence of Andy Ziben has already been shown to be not completely reliable. He swore under oath that his father acquired 38 lots in 1947 whereas, in fact, Alex Ziben acquired 28 lots in 1965;
 - e) Fifth, between 1966 and 1974 no steps were taken by Alex Ziben to construct the bridge or road that RID purportedly agreed to and, no explanation has been provided for why he did not do so. If he had permission to build a road and bridge, why did he not do so;
 - f) Finally, there is absolutely no evidence corroborating any aspect of the alleged statements. In this regard, I note that Jennifer Holt, an RRID board member deposes that she "diligently searched all of the archives of the RRID" and found no records of any agreement or anything "that supports the narrative alleged in paras. 8-10 of the affidavit of Andy Ziben filed on October 11, 2022."
- [44] Accordingly, although I accept that the subdivision was done to effect a sale of what ultimately became Lot A to RID, the alleged contemporaneous statements made by undisclosed persons from RID to Alex Ziben are not admissible. More particularly, I do not admit or accept that the sale was subject to any representations, qualifications, reservations or conditions.
- [45] I add that even if I admitted the impugned evidence, I would have given it no weight because of my concerns about reliability.

Access to MRRUC Lands Prior to 1988

- [46] There are three deponents who have sworn affidavits deposing to how the MRRUC lands were accessed before 1988. They are Andy Ziben, Kenneth Wyllie and Vanessa Terwoort. Andy Ziben and Kenneth Wyllie both give personal accounts of how the lands were accessed. Their evidence is helpful and admissible, except when Mr. Ziben strays into providing his opinion as to the legality of the access. Ms. Terwoort, however, has only lived on the MRRUC lands since 2016 and, therefore, has no factual information to give relating to how the lands were actually accessed before 1988. However, her affidavit does contain exhibits that are admissible and that corroborate the evidence of both Mr. Ziben and Mr. Wyllie.

- [47] Andy Ziben was born in 1955 and has lived his entire life on Lots 101 and 102 of District Lot 301A. He deposes, at para. 7, that access was by way of a dirt road that commenced at the end of Marshall Road.
7. After acquiring the lots, my father and our family used a dirt road that started at the end of Marshall Road to access the properties. Though we had no legal rights to use this dirt road it crossed multiple vacant lots without any problems.
- [48] He further deposes at para. 14, that they continued to use Marshall Road to access their property until 1988 when someone erected a gate.
14. In 1980's, many of the vacant lots that Marshall Rd. crossed were sold and new houses were built. The new landowners, now that they had houses there, did not want to keep the dirt road open with traffic passing through their yards. In around 1988, a gate was installed at the end of Marshall Rd. at the beginning of the dirt road. The location of the gate is shown on Exhibit C, which is a printout from ParcelMap BC that shows Marshall Road going through a small residential subdivision at the base of the escarpment, and the location of the gate marked as "End of exiting Marshall Road at private property". Marshall Road has not been used beyond the gate since then, and it could not be used now, as it goes over private property and houses have been constructed where the road was located.
- [49] I again note that Mr. Ziben's evidence that they had no legal right to access Marshall Road is inadmissible opinion evidence.
- [50] Exhibit "C" to Mr. Ziben's affidavit indicates that the gate was installed roughly at the intersection of what is now Marshall Road and Daye Road.
- [51] Kenneth Wyllie is a former board member of RRID and a resident of Robson since 1947. He deposes that when he was a child and teenager, there was a public shooting range on the MRRUC lands and that access to the range was by driving up Marshall Road. He deposes the road was used by logging companies and by the general public. He describes the road as a well-maintained gravel road. He further deposes that in 1964 another road, the Borrow Pit Haul Road, was built to access the bench above Robson. Finally, he deposes that when he joined RRID as a board member in 1984, the RRID lands were a riparian protection area of pristine forest and creek bank and there was no road or bridge across the RRID lands.
- [52] Ms. Terwoort deposes, at para. 20 of her affidavit, that "there is an old road/trail that extends from the gate [at the end of Marshall Road] up to Mountain Ridge Road". She has marked that road/trail on Exhibit "Q" to her affidavit. Exhibit Y to her affidavit also includes a Fire Service map which shows a road extending north from the intersection of Daye Road and Marshall Road.

- [53] Given the consistent and undisputed evidence of these witnesses, I find as a fact that from approximately 1950 to 1988, the MRRUC lands were primarily accessed via a gravel road which ran from the intersection of what is now Marshall Road and Daye Road to the MRRUC lands where it connected with Mountain Ridge Road. In addition, from 1964, the lands could be accessed via Borrow Pit Haul Road.
- [54] Neither Mr. Ziben nor Mr. Wyllie are able to testify from personal knowledge as to how the MRRUC lands were actually accessed before approximately the 1950s. However, given Mr. Wyllie's evidence that the road was well established and maintained in his childhood and adolescence, I infer that the road existed for some time prior to the 1950s. Additionally, given that the road described by Mr. Ziben and Mr. Wyllie, and as depicted in Exhibit Q of the affidavit of Ms. Terwoort, corresponds to the trail shown on Plan NEP 795, I infer that the road existed in trail form in 1907.
- [55] Further, and importantly, based on the evidence of Mr. Wyllie that the RRID lands were pristine forest and creek bank in 1984, I infer and find as a fact that the road used to access the MRRUC lands was to the south of the RRID lands and did not traverse any part of the RRID lands.

Access 1988-1989

- [56] Following the installation of a gate across Marshall Road in 1988 by an unknown person, Andy Ziben deposes that he accessed his property by way of Rialto Service Road and an ATV trail. He further deposes that he continued to access his property via the Rialto Service Road until he completed construction of a new access road and bridge over Pass Creek, as detailed next.
- [57] I observe that Mr. Ziben also deposes that his use of Rialto Service Road and the ATV trail was not legal access. Once again, this evidence of the legality of his use is not admissible.

1989 Bridge and Road Construction

- [58] The circumstances of the construction of the bridge and road construction are addressed at paras. 12-18 of the affidavit of Andy Ziben:
- At para. 12 he deposes that in the late 1970s or early 1980s, he approached the RRID and informed them he intended to construct a bridge over Pass Creek to access his property, as had been agreed between RID and his father. He deposes that "they" informed him "they" knew nothing of any such agreement and refused to allow him to construct a bridge;
 - At para. 13 he deposes that "[o]ver the next few years" he began developing the Mountain Ridge Road network;
 - At para. 17 he deposes that he "installed a small log stringer bridge across Pass Creek to attach to [his] driveway and the road network "he" was building. He does not specify when he installed the bridge;

- d) At para. 18, he deposes that "RRID protested the installation and made several attempts to stop the installation, however the bridge stayed out of necessity".
- [59] Mr. Wyllie also deposes to the construction of the road and bridge. He deposes that in or around March of 1989, it came to his attention that a road and bridge had been constructed on RRID lands and across Pass Creek. He and other board members attended to inspect the construction. He attaches photographs that were taken during March of 1989. He deposes that the construction was done without any prior notice to RRID and that RRID immediately protested the installation.
- [60] Mr. Wyllie also deposes that RRID took steps to have the Ministry of Transportation and Highways remove the road and close the bridge but nothing came of this.
- [61] I note a conflict between the evidence of Mr. Ziben and that of Mr. Wyllie in relation to whether there were discussions or meetings between Mr. Ziben and RRID before the road and bridge were built. In this regard, I prefer the evidence of Mr. Wyllie over that of Mr. Ziben. Mr Ziben's evidence is overly vague as to the dates of the alleged discussions and as to the persons he allegedly spoke with. Mr. Wyllie was an RRID board member at the time of the alleged discussions and would have known if there had been prior discussions. Moreover, a request to build a bridge and road over lands belonging to someone else is a significant matter and one would expect it would be reflected in letters or minutes. The absence of any such contemporaneous documents suggests that there was no prior notice.
- [62] The evidence also includes correspondence between Andy Ziben and the Ministry of Transportation and Highways. By letter dated July 31, 1989, Andy Ziben references a meeting with representatives of the Ministry of Transportation and Highways on June 16, 1989 and a request for permission from the Ministry to construct a bridge over Pass/Norns Creek. Interestingly, he did not appear to copy this letter to RRID.
- [63] On August 11, 1989, the Ministry of Transportation and Highways denied him permission to construct the bridge as follows:
- I'm sorry to advise you we are standing by our original decision not to allow legal vehicle access to Pass Creek Road at the point you desire. The unsafe site distance to the south places user in a dangerous situation, albeit, there may be other existing situations that were allowed many years ago when traffic volumes and speeds were much lower. Our policy changes from time to time, so our standards are much higher in order to maintain a safer highway system.
- [64] On August 17, 1989, Andy Ziben wrote the Ministry advising that he was going to build the bridge notwithstanding their refusal of permission. He wrote:

Even though I'm very level headed in dealing with situations of lesser or greater importance than this one, I've finally hit the end. I can't seem to get through to the ministry concern [sic]. No offence. I need this access, there is no other way. I'm going to build this bridge, for light traffic, legal or not. I'm denied the right to access public roads and to enjoy my property. I don't know if you realize or not, I am also a tax payer and I also pay for both sides of road [sic] and not only one.

[65] I observe that the correspondence between Andy Ziben and the Ministry of Transportation and Highways is dated July and August 1989, whereas Mr. Wyllie deposes that it was in or around March of 1989 that RRID became aware of the completed construction of the road and bridge. If Mr. Wyllie is correct, this means that the road and bridge had already been completed when Mr. Ziben sought permission from the Ministry. I need not resolve this conflict as nothing turns on it. However, it is clear that the road and bridge were constructed without the permission of the Ministry of Transportation and Highways or RRID.

[66] I also emphasize that Mr. Ziben deposes RRID protested the installation and made several attempts to stop it and Mr. Wyllie deposes the RRID took unsuccessful steps in 1994 to block the use of the road and bridge by erecting a fence.

[67] Based on the above evidence, I find as facts that:

- a) Andy Ziben constructed the road and bridge over RRID lands without giving RRID any prior notice;
- b) Andy Ziben constructed the road and bridge without the permission of the Ministry of Transportation and Highways or RRID;
- c) RRID became aware of the road and bridge only after construction was completed; and
- d) RRID immediately objected to the road and bridge and made several unsuccessful attempts to stop its use.

The 1999 Easement

[68] Following the construction of the bridge and road, Andy Ziben deposes that he developed the Mountain Ridge Road network and developed and sold several lots. He deposes that after five permanent houses were established, the owners created MRRUC to negotiate an easement with RRID. He deposes that after two years of negotiation, they concluded an easement agreement.

[69] Mr. Wyllie deposes to a series of incidents involving the road and bridge that undermined the water quality of Pass Creek. He references an erosion incident in 1995 that led to the negotiation and implementation of an easement agreement.

[70] The easement agreement was signed on various dates in July through September 1999. The preambles to the agreement include an acknowledgement that the bridge and road were constructed without the consent of RRID and an acknowledgement that RRID could cancel the agreement for specified reasons.

AND WHEREAS there is a bridge and existing road system providing access to the Private Owners Lots over Lot A and Lot 2, which said bridge and existing road have been constructed without the consent of Robson-Raspberry improvement District;

AND WHEREAS Robson-Raspberry Improvement District is entering this Agreement on the specific condition that it has the right to cancel the grant of easement over Lot 2 and Lot A if the Private Owners neglect or fail to maintain the Bridge, Road or Drainage Facilities, or if the Private Owners fail to meet any other of their commitments contained herein including, without limiting the generality of the foregoing, payment of the Access Fee and/or the Annual Access Fee as defined herein, or if for any good and sufficient reason Robson- Raspberry Improvement District determines that cancellation of the grant of easement over Lot 2 and Lot A is or would be beneficial to the operation of the Robson water supply system;

[71] By clauses 3.1 and 3.2 of the agreement, RRID granted an easement over Lot A and Lot 2 until March 1, 2019.

3.1 Robson-Raspberry Improvement District, as the owner of Lot A the "Servient Tenement" herein, hereby grants, conveys, and transfers to each of the persons listed the rights set out in Schedule "A" for the period commencing with the registration of the Agreement at the Land Title Office and ending on March 1, 2019.

3.2 Robson-Raspberry Improvement District, as the owner of Lot 2 the "Servient Tenement" herein, hereby grants, conveys, and transfers to each of the persons listed the rights set out in Schedule "A" for the period commencing with the registration of the Agreement at the Land Title Office and ending on March 1, 2019.

[72] By clause 3.3, the parties acknowledged the temporary nature of the easement but agreed that, provided certain conditions were met, the parties would meet by March 1, 2019 to consider renegotiating and extending the terms of the easement.

3.3 While the parties acknowledge that the easements herein granted by the Robson-Raspberry Improvement District are of a temporary nature and are subject to cancellation as provided in this Agreement, Robson-Raspberry improvement District and the Private Owners acknowledge that if the Private Owners perform their obligations under this Agreement, and if Robson Raspberry Improvement District has not canceled this easement pursuant to paragraph 3.4 and if the Private Owners wish to enter into further agreements, the parties hereto will meet with one another before March 1, 2019 to consider renegotiating the grant of easement by the Robson Raspberry Improvement District and the extension of the terms and conditions of this Agreement. [Emphasis added.]

[73] Clause 8.1 of the easement provided that subsequent owners would enter into agreements to take on the responsibilities of Private Owners:

8.1 The Private Owners will conduct all transactions and activities dealing with the Dominant Tenements herein so as to ensure that:

- a) subsequent owners of any lands which are a Dominant Tenement herein enter into a New Owners Agreement;
- b) owners of any lands accessed by way of the Bridge and Road enter into a New Owners Agreement with such changes as are required to ensure that such owners take on the responsibilities and enjoy the benefits of the Private Owners to the intent that all persons taking the benefit of the Bridge and Road share in proportions established by 7.1 the responsibility, liability and benefit in relation to the Bridge and Road with the other Private Owners.

[74] Other terms of the easement were:

- a) MRRUC would pay \$1,000 annually to RRID (cl. 3.4);
- b) RRID could cancel the easement on 6 months' notice if, for good and sufficient reason it determined cancellation would be beneficial to the water supply system (cl. 3.5(b));
- c) MRRUC would maintain and keep the road and bridge in good repair (cl. 4.1); and
- d) The parties would cooperate in requesting the Minister of Highways to assume permanent responsibility for the maintenance and repair of the road (cl. 7.2)

Negotiations to Renew Easement

[75] In 2019, the parties began negotiating a renewal of the easement. The chronology of the negotiations is primarily reflected in correspondence. That chronology is as follows:

- a) January 10, 2019 - RRID advises the current easement ends on March 1 and requests a renewal proposal from MRRUC.
- b) February 5, 2019 - MRRUC advises RRID that it is in contact with the District, the local MLA and associated Ministry liaisons to investigate purchasing lands from the District or obtaining a declaration of a statutory right of way. They advised they would be in touch with a more detailed proposal.
- c) March 26, 2019 - RRID advises the termination date of the easement has passed without a proposal from MRRUC. RRID proposes a ten-year renewal of the easement with a yearly access fee based on the number of properties requiring access. It further advises that if a response is not received within 30 days, it will restrict access. MRRUC responds that they are still pursuing the options they mentioned in February.

- d) April 6, 2019 - MRRUC advises that the easement does not present a threat to the water supply system and says there is no longer a need for a temporary easement. MRRUC proposes a permanent easement.
- e) April 18, 2019 - RRID proposes that the easement be renewed for a period of 20 years, with a fee of \$120 per property per year.
- f) April 22, 2019 - MRRUC responds advising \$120 per property per year amounts to a total of \$160,800 over the term of the easement. MRRUC proposes to subdivide the RRID lands and for it to purchase the subdivided land at fair market value.
- g) April 25, 2019 - RRID rejects the offer to subdivide and sell the easement lands, provides an explanation for the proposed fee of \$120 per property per year and referred back to its proposal made April 18, 2019. It also extended an extension to May 15, 2019 before it would restrict access.
- h) May 14, 2019 - MRRUC wrote to the office of the Inspector of Municipalities, seeking an order for the subdivision and sale of the easement lands or, alternatively, an order granting it a permanent easement.
- i) June 4, 2019 - RRID had a no trespassing sign installed.
- j) June 12, 2019 - The Inspector of Municipalities advised MRRUC it did not have jurisdiction to make the orders requested.
- k) July 7, 2019 - RRID requests that its no trespassing sign be returned by July 9 and that the parties return to the negotiating table so we may resolve this matter without further issues.
- l) July 9, 2019 - MRRUC reiterated its offer to either subdivide and purchase the RRID lands or for it to be given a permanent easement.
- m) July 24, 2019 - RRID advises the board had again discussed the issue and that it has no interest in selling land or granting a permanent easement. It renews its offer of a 20-year easement at the fee discussed.
- n) August 7, 2019 - MRRUC advises RRID there is no justified or legal reason to inflate the fees by \$8,000 and that the residents have no interest in a 20-year easement. It proposes a permanent easement for \$5,000. In the alternative, MRRUC proposes a permanent easement for each private landowner for \$120/year with RRID taking over the annual administrative burden of collecting the fee.
- o) August 20, 2019 - RRID reiterates that it will not sell any portion of the property or grant a permanent easement. It further advises MRRUC is now trespassing but says it is open to a meeting with the MRRUC.

- p) October 11, 2019 - MRRUC appears to again propose a permanent easement. It advises RRID "it is not unheard of for parties to negotiate a one-time lump sum payment for the development of a permanent easement agreement". Also, on the same date. Mr. Gelber, legal counsel for RRID, advises MRRUC that the easement has expired and they are trespassing but renews the offer made on April 18, 2019.

- q) October 22, 2019 - MRRUC wrote a lengthy letter to Mr. Gelber. It concludes as follows:

If the RRID continues to refuse to negotiate a permanent settlement of the issue and block our access on November 15, 2019 or any other date, the MRRUC will apply for an injunction from a judge to stop the work. After which point both parties will be obligated to pending litigation [sic]. MRRUC will put in an application to a Judge for permanent easement under the multitude of regulations protecting people in our situation and have the Judge decide what is fair and just. We will also be seeking special costs against your client.

[76] There were no further negotiations after October 22, 2019.

[77] It is undisputed that, notwithstanding the expiration of the easement and the inability of the parties to come to agreement on an extension of the easement, MRRUC members continue to access their properties via the Pass Creek bridge and road over RRID lands.

Summary of Findings

[78] I summarize my more relevant findings of fact as follows:

- a) The MRRUC lands were originally part of a crown grant to the BC Railway and Navigation Company on February 9, 1893, and part of a Crown grant to John August Erickson on September 5, 1906;
- b) In September 1907, subdivision plan NEP 795 was registered which created various lots including the lots belonging to MRRUC members. The subdivision included a road allowance which did not connect to any other road. At its eastern end it terminated at what became District Lot 8092;
- c) District Lot 8092, was created and conveyed by crown grant to Allison Gibson on October 15, 1907. The drawing attached to the grant does not show a road connecting to the road allowance in subdivision plan NEP795;
- d) District Lot 8092 was subdivided into two lots in 1954;
- e) In 1955, RRID acquired lot 2 of District Lot 8092;
- f) In 1965, Alex Ziben acquired 28 lots of the MRRUC lands, including lots 1, 2 and 3 of District Lot 7457 and Lots 99, 100 and 101 of District Lot 301A, all of which border on Lot 2 of District Lot 8092, owned by RRID;

- g) In 1966, Alex Ziben subdivided lots 100, 101 and 102 of District Lot 301A creating Lot A of District Lot 301A. Lot A was then sold to RID without any representations, qualifications, reservations or conditions. More particularly, there was no agreement that Alex Ziben could construct a bridge and road over the lands conveyed;
- h) From sometime before the 1950s until 1988, the MRRUC lands were accessed via a gravel road that ran from the intersection of what is now Marshall Road and Daye Road and followed the course of a trail marked on the 1907 subdivision plan, NEP 795;
- i) The gravel access road did not traverse any part of the RRID lands which were pristine forest and creek bank;
- j) In 1988, a gate was installed by an unknown person at approximately the intersection of what is now Marshall Road and Daye Road;
- k) Following the installation of the gate at the intersection of Marshall Road and Daye Road, the MRRUC lands were accessed for a brief period of time via the Rialto Service Road and an ATV trail;
- l) In or about 1989, without notifying RRID and without the permission of RRID or the Ministry of Transportation and Highways, Alex Ziben constructed a road and bridge over Pass Creek to access the MRRUC lands. The road and bridge were constructed, in part, on RRID lands;
- m) Prior to the completion of the construction of the road and bridge in 1989, the MRRUC lands had never been accessed by a path or road over the RRID lands;
- n) RRID only became aware of the road and bridge after the completion of construction. RRID immediately objected and made several unsuccessful attempts to stop the use of the road and bridge;
- o) In 1999, the RRID and MRRUC entered into a time-limited easement with an expiry date of March 1, 2019;
- p) The easement expired on March 1, 2019;
- q) Throughout 2019, the parties discussed an extension of the easement agreement but could not come to terms; and
- r) Notwithstanding the expiry of the easement and the inability of the parties to come to agreement on an extension, MRRUC has continued to use the road and bridge to access the MRRUC lands, over the objections of RRID.

Positions of the Parties

- [79] The position of MRRUC has changed as this matter has progressed. In its petition it pleaded: (1) that it was entitled to an easement of necessity over the RRID lands; (2) that cl. 3.3 of the 1999 easement agreement either gave it a right of renewal or obliged the RRID to negotiate a renewal in good faith, which it did not do; (3) that the representations made by RID in 1966 gave rise to a right of proprietary estoppel; and (4) that Mountain Ridge Road, including the part crossing RRID lands, is a public highway.
- [80] During the course of the proceeding, MRRUC determined that the public highway argument was not tenable, which led to the dismissal of the proceedings against the Attorney General. At the hearing before me, MRRUC abandoned the claim that Mountain Ridge Road is a public highway.
- [81] In summary, MRRUC now submits that it is entitled to an easement over the RRID property on three independent grounds: first, it says it is entitled to an easement of necessity arising in 1907 due to an error in the Crown grant which provided no road allowance over the RRID lands; second, it says it is entitled to an easement of necessity or, alternatively, proprietary estoppel arising from the 1966 subdivision; and, third it says the 1999 easement was subject to three implied terms that were breached by RRID, namely, (1) that RRID must negotiate the renewal of the easement in good faith, (2) that the renewal of the easement was not to be unreasonably withheld, and (3) that, if the road was not declared a public highway, the easement would be made permanent or would continue until such time as there was alternative legal access to the MRRUC lands.
- [82] RRID submits that MRRUC has not met the legal requirements for an easement of necessity (or a Wheeldon v Burrows easement), whether arising in 1907 or 1966. More specifically, it says MRRUC has not established that:
- a) the easement is absolutely necessary to access the properties since there is alternate access either via the Rialto Forest Service road or via the Marshall road trail;
 - b) there was never unity of title between Lot 2, over which the bridge and part of the roads runs and the MRRUC lands at any time; and
 - c) the easement it now seeks was not in use at any time before 1989.
- [83] RRID further submits that MRRUC has not met the requirements of proprietary estoppel because there is an express grant of easement, albeit a temporary easement, and because the evidence falls far short of establishing words or conduct on the part of RRID conveying that a permanent easement would be granted.
- [84] RRID also submits that MRRUC does not come to court with clean hands and is therefore not entitled to equitable relief. It relies on the fact that Andy Ziben built the road and bridge without permission or over the objections of RRID.

[85] Finally, RRID submits that there are no implied terms to the 1989 easement as suggested by MRRUC. RRID accepts that the parties had a duty to negotiate a renewal in good faith but submits that it did so. It says MRRUC unreasonably failed to refuse to consider any option but a permanent easement which RRID had no obligation to provide. It says the easement is now extinguished and must be cancelled.

Issues

[86] Issues are:

- a) Is MRRUC entitled to an easement of necessity over the RRID lands?
- b) Is MRRUC entitled to an easement over the RRID lands based on proprietary estoppel?
- c) Is MRRUC entitled to a permanent easement over the RRID lands based on the express or implied terms of the 1989 easement agreement?
- d) Did RRID fail to negotiate the renewal in good faith?

Analysis

Is MRRUC entitled to an Easement of Necessity or a Wheeldon v Burrows Easement over the RRID Lands?

[87] The first issue is whether MRRUC is entitled to an easement of necessity or a Wheeldon v Burrows easement over the RRID lands.

[88] Wheeldon v Borrowers easements are described in *Hart v. McMullen*, 1900 CanLII 81 (SCC), 30 SCR 245, at p.254:

In the case of *Suffield v. Brown*, Lord Westbury's observations are to the effect that on a grant by an owner of an entire heritage, of part of that heritage as it is then used and enjoyed, there will pass to the grantee all those continuous and apparent easements which have been and are at the time of the grant used by the owner of the entirety for the benefit of the parcel granted. In the well known case of *Wheeldon v. Burrows*, Thesiger L. J. says that on the grant by the owner of a tenement, of part of that tenement as it is then used and enjoyed there will pass to the grantee all those apparent and continuous easements, or, in other words, all those easements which are necessary to the reasonable enjoyment of the property granted, and which have been and are at the time of the grant used by the owner of the entirety for the benefit of the part granted.

[Emphasis added.] [Footnotes omitted.]

[89] The different types of implied easements were addressed by Justice D. Smith in *Roop v. Hofmeyr*, 2016 BCCA 310 [Roop]. At para. 31, she identified the four characteristics of implied easements. At para. 32, she identified that the relevant time period for determining whether an implied easement exists is the date of the grant of land from the servient tenement to the dominant tenement.

- [31] In the absence of express words of creation and depending on the circumstances, three types of easement may be implied: (1) easements of necessity; (2) easements giving effect to intended use (not pleaded in the petition or raised in submissions); and (3) easements that fall within the rule in *Wheeldon v. Burrows* (Megarry and Wade at 1246-1249). All three forms of implied easement include four characteristics (as noted in *Shaw Cablesystems Limited v. Concord Pacific Group Inc.*, 2008 BCCA 234 at para. 27): (1) there must be a dominant and servient tenement; (2) an easement must accommodate the dominant tenement; (3) dominant and servient owners must be different persons; and (4) a right over land cannot amount to an easement unless it is capable of forming the subject-matter of a grant.
- [32] The relevant period of time for determining if an implied easement was established is when the original grant of land by the servient tenement was made to the dominant tenement. See Anger & Honsberger, "Law of Real Property, Third Edition" (Toronto: Thomson Reuters Canada Limited, 2014) at 17-9. [Emphasis added.]
- [90] At para. 33 of *Roop, D. Smith J.* set out the tests for establishing an implied easement:
- [33] The test for establishing an implied grant of easement was summarized in Anger & Honsberger at 17-9 to 17-10:

When land owned by one person is divided and part of the land conveyed to another, even if there are no words in the instrument expressly creating an easement, a court will imply that the new owner was granted easements of necessity and any continuous and apparent easements which existed as quasi-easements during unity of ownership. Thus the implied grant will render the retained lands servient and the newly acquired portion dominant. [Emphasis added.]

The test for necessity is fairly stringent. In order to make a successful claim for an easement of necessity, it would have to be shown that it would be impossible to enjoy the dominant land otherwise. A common example is a right-of-way which would provide the only possible access to a piece of land.

In order for a quasi-easement which was exercised during unity of ownership to become an easement by implication of law, the right claimed must meet certain criteria:

- a) it must be necessary to the reasonable enjoyment of the part granted;
- b) it must have been used by the owner of the entirety for the benefit of the part granted up to and at the time of the grant; and
- c) it must have been apparent at the time the land for which the easement is claimed was acquired.

For an easement to be apparent, its previous use must have been indicated by some visible, audible or other apparent evidence on either the quasi-dominant or the quasi-servient tenement which could be seen, heard or smelled by a reasonable inspection.

[Footnotes omitted.]

[91] At paras. 35-41 of *Roop, D. Smith J.* addressed *Wheeldon v Burrows* easements. At para. 39 she set out the three requirements of such an easement

[39] In short, the three elements from *Wheeldon v. Burrows* that must be proved on a balance of probabilities include: (1) continuous and apparent use of the grantor's land for the benefit of the grantee's land; (2) that was necessary for the reasonable enjoyment of the grantee's land; and (3) that was exercised by the grantor at the time of the original derogation of land to the grantee.

[92] In *Allen v. 0990199 B.C. Ltd.*, 2018 BCSC 1465, Justice Crossin set out the general principles applicable for easements of necessity as follows:

[86] Anger and Honsberger define an implied easement as follows:

A right of way may be created by implication of law where the dominant and servient tenements have been commonly owned and the owner sells and conveys one for an absolute estate therein. There is an implied grant of all easements necessary for the reasonable enjoyment of the tenement conveyed and an implied reservation of an easement of necessity without which there could be no enjoyment of the tenement conveyed.

Anger and Honsberger, *Real Property*, 2nd ed. (Toronto: Canada Law Book, 1985) at 949.

[90] An implied easement of necessity arises when there is no access to the grantee's property (i.e. it is land-locked) and necessity requires an implied easement for any enjoyment of the property. By contrast, a *Wheeldon v. Burrows* easement arises when there is a derogation of a parcel of land (by a grantor) to another party (a grantee) and reasonable enjoyment of the derogated land requires an implied easement (*Roop*, at para. 38, citing from *Halsbury's Laws of England*, vol. 14, 4th ed. (London, UK: Butterworths, 1980) at 31, para. 61).

[92] The test for necessity is stringent. The leading authorities are clear. An easement of necessity will only be available where there is no alternative way of accessing the dominant tenement's property.

[93] The distinctions between easements of necessity and *Wheeldon v Burrows* easements were nicely summarized in *Zelinski v. Zelinski*, 2021 SKCA 165:

[33] Easements may arise by operation of law in several ways, each of which have different requirements. Easements of necessity, for example, were described by Rouleau J.A. in *McClatchie v Rideau Lakes (Township)*, 2015 ONCA 233, 333 OAC 381:

[48] Easements of necessity are easements presumed to have been granted when the land that is sold is inaccessible except by passing over adjoining land retained by the grantor. The concept arises from the premise that the easement is an implied grant allowing the purchaser to access the purchased lot. See *Nelson v. 1153696 Alberta Ltd.*, 2011 ABCA 203, 46 Alta. L.R. (5th) 113, at paras. 40-43, leave to appeal to S.C.C. refused, [2011] S.C.C.A. No. 423;

and *Dobson v. Tulloch* (1994), 1994 CanLII 7239 (ON SC), 17 O.R. (3d) 533 (C.J. (Gen. Div.)), *aff'd* (1997), 1997 CanLII 14542 (ON CA), 33 O.R. (3d) 800 (C.A.).

- [49] Necessity is assessed at the time of the original grant: *Nelson*, at para. 42; *Dobson*, at p. 541.
- [35] Easements may also arise pursuant to the rule in *Wheeldon v Burrows* (1879), 12 Ch D 31 (CA), which is sometimes referred to as an easement by way of an implied grant or an easement of apparent accommodation. In 3021386 *Nova Scotia Ltd. v Barrington* (Municipality), 2015 NSCA 30, 357 NSR (2d) 289, the Nova Scotia Court of Appeal, and in *Roop v Hofmeyr*, 2016 BCCA 310, [2016] 12 WWR 83 [Roop], the British Columbia Court of Appeal adopted the summary of this rule provided in *Anger & Honsberger Law of Real Property* at §17:12:
- [94] Although I have been referred to many additional authorities by the parties, I need not consider them.
- [95] To establish either an easement of necessity or a *Wheeldon v Burrows* easement, MRRUC must establish, on a balance of probabilities, that:
- 1) land owned by one person (the grantor) was divided and part of the land was conveyed to another (the grantee);
 - 2) at the time of the grant, the easement sought was used by the grantor to access the part granted; and
 - 3) without the easement, there is no other access to the grantee's land (it is landlocked).
- [96] Importantly, the relevant period of time is when the original grant of land by the servient tenement was made to the dominant tenement.
- [97] MRRUC submits that these conditions were met in 1907 when District Lot 8092 was created and conveyed by crown grant or in 1966 when Andy Ziben subdivided and sold Lot A to RRID. I will address first the 1907 grant and then the 1966 subdivision and conveyance.
- [98] There are multiple difficulties with the MRRUC's submissions that it is entitled to an implied easement arising from the 1907 crown grant of District Lot 8092.
- [99] First, MRRUC has failed to show unity of ownership and subdivision in 1907. Put differently, it has failed to show that land owned by the grantor was divided and part was conveyed to the grantee. The 1907 crown grant was a conveyance of District Lot 8092 to Allison Gibson. At the time of that conveyance, the MRRUC lands were not owned by the crown but were owned by Kootenay Columbia Fruit Lands Ltd. Thus, the requirement for unity of ownership before the conveyance of part of the land has not been established.
- [100] MRRUC attempts to overcome this difficulty by arguing that the Crown retained title to the road allowance depicted on NEP795 and that this is sufficient for unity of ownership. However, I have been provided with no authority for such a proposition and I do not accept it. Easements of necessity are an exception to the normal rule of indefeasibility of title and

courts must be cautious in recognizing them or extending the circumstances under which such easements can arise. The need for caution was expressed by Justice McDonald in *Nelson v. 1153696 Alberta Ltd.*, 2011 ABCA 203:

- [67] Under the Torrens system, an unregistered easement of necessity is somewhat analogous to a hidden landmine on a piece of property. It is essentially impossible to detect until it is too late. I agree with the comments of Mr. Justice Kerans in *Petro-Canada Inc v Shaganappi Village Shopping Centre Ltd*, 1990 ABCA 261, [1991] 1 WWR 169, wherein he stated, at para 5: "We should be slow to accept any unnecessary disruption of the anchor principle of the Torrens system, indefeasibility." Accordingly, in my view, since an easement of necessity represents an exception to the principle of indefeasibility, a court must be very careful in its review and analysis of the evidence before it concludes that a proper case for an easement of necessity has been established.
- [101] Second, MRRUC has failed to establish that the implied easement was apparent at the time of the 1907 grant, in the sense that the previous use could be seen, heard or smelled by a reasonable inspection. There is simply no evidence before me that any part of the RRID lands were ever used to access the MRRUC lands prior to 1989. To the contrary, the evidence is that the RRID lands were pristine until Mr. Ziben constructed the road and bridge in 1989.
- [102] A final difficulty that MRRUC cannot overcome is that the MRRUC lands were not landlocked by the 1907 grant. The evidence is that the lands were accessed until 1988 via the gravel road extending from the intersection of Marshall Road and Deye Road. Although MRRUC says there is no legal access to that road, I am far from satisfied that is the case. No steps were taken in 1988 by Andy Ziben to challenge the installation of the gate by some unknown person.
- [103] MRRUC further submits that the 1966 subdivision of lots 100, 101 and 102 and the conveyance of Lot A to RRID created an easement of necessity. I again disagree.
- [104] Although unity of ownership existed in respect of the 1966 subdivision and conveyance, it is not the grantee, RRID, that seeks the easement but the grantor, Andy Ziben, and his successors in title. This is the exact opposite of what is required for an easement of necessity. An easement of necessity protects the grantee not the grantor.
- [105] Additionally, the arising of an easement of necessity in 1966 also fails for the reasons expressed above in relation the 1907 grant. There was, in fact, no previous use of Lot A for access to the MRRUC lands and the MRRUC lands were not landlocked by the 1966 subdivision and conveyance. The MRRUC lands continued to be accessed from 1966 to 1988 by the gravel road extending from Marshall Road.
- [106] Accordingly, MRRUC has failed to establish an easement of necessity over the RRID lands.

Proprietary Estoppel

- [107] MRRUC further submits it is entitled to an easement on the basis of proprietary estoppel.

- [108] Proprietary estoppel arises where there is a representation made to the claimant, the claimant reasonably relies on the representation, and the claimant suffers a detriment as a result of the reasonable reliance. These requirements are set out in *Cowper-Smith v. Morgan*, 2017 SCC 61, at para. 15:
- [23] As we have seen, to establish proprietary estoppel one must first establish an equity of the kind that proprietary estoppel protects. This requires three things: a representation or assurance on the basis of which the claimant expects to enjoy a right or benefit over property, reasonable reliance on that expectation, and detriment as a result of the reliance. When the owner of an interest in the property over which the claimant expects to enjoy a right or benefit is responsible for the representation or assurance, then the equity established by the claimant's reasonable reliance may be given effect by proprietary estoppel.
- [109] MRRUC submits that the requirements of proprietary estoppel are met in this matter because, at the time of the subdivision and conveyance of Lot A, the RRID assured Alex Ziben that he would continue to have full use of Lot A and that he could build a bridge and road over Lot A.
- [110] My findings of fact dispose of this submission. I have found that Andy Ziben's evidence of the alleged representations and assurances by RRID is inadmissible hearsay and that the conveyance of Lot A to RRID was made without any representations, qualifications, reservations or conditions.
- [111] Accordingly, there can be no easement by proprietary estoppel.

Express or Implied Easement

- [112] MRRUC submits that the 1999 easement agreement either expressly or impliedly granted a permanent easement of the RRID lands.
- [113] I reject out of hand the submission that the 1999 easement agreement expressly gave a permanent easement. The terms of the easement agreement are perfectly clear. An easement was granted for a defined period of time, until March 1, 2019. There is no ambiguity as to the term of the easement and absolutely no basis for suggesting a permanent easement was granted.
- [114] MRRUC submits that three terms should be implied into the easement agreement as follows:
- a) RRID must renegotiate the renewal/extension of the easement in good faith;
 - b) The extension of the easement must not be unreasonably withheld; and
 - c) If, on expiry of the easement term, the road is not a public highway across Lot A and Lot 2, then the easement be made permanent, or alternatively, that the easement continue until such a time as legal and actual access is obtained elsewhere.

- [115] I will address the first two alleged implied terms in the next section. Here I address whether there was an implied term that, if the road was not declared a public highway, then the easement would be permanent or continue.
- [116] The circumstances in which terms will be implied into a contract were addressed in *Moulton Contracting Ltd. v. British Columbia*, 2015 BCCA 89, at paras. 53-55:
- [53] In *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619 at para. 27, cited by the trial judge in support of the implied terms, Justice Iacobucci for the Supreme Court summarized the three circumstances (identified in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711 at 774-776) where terms may be implied in a contract:
- (1) based on custom or usage; (2) as the legal incidents of a particular class or kind of contract; or (3) based on the presumed intention of the parties where the implied term must be necessary "to give business efficacy to a contract or as otherwise meeting the 'officious bystander' test as a term which the parties would say, if questioned, that they had obviously assumed" [citation omitted].
- [54] Justice Iacobucci noted that while it was not clear from *Canadian Pacific Hotels Ltd.* whether the "business efficacy" and "officious bystander" tests were two separate tests, what was "important in both formulations is a focus on the intentions of the actual parties", and not "the intentions of reasonable parties" (at para. 29 [emphasis in original]):

This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis.

- [55] The key element is that the implied term is more than just reasonable; it is necessary to make the contract as the parties intended. That is, without the term, the contract, as intended by the parties, would not be effective.
- [117] MRRUC has not suggested that a term could be implied based on custom or usage or based on the legal incidents of a particular class of contracts. Rather, it relies on a third type of implied term based on the presumed intention of the parties.
- [118] MRRUC relies on clauses 3.3 and 7.2 of the easement agreement as supporting an implied term. Those clauses provide:

3.3 While the parties acknowledge that the easements herein granted by the Robson-Raspberry Improvement District are of a temporary nature and are subject to cancellation as provided in this Agreement, Robson-Raspberry improvement District and the Private Owners acknowledge that if the Private Owners perform their obligations under this Agreement, and if Robson Raspberry Improvement District has not canceled this easement pursuant to paragraph 3.4 and if the Private Owners wish to enter into further agreements, the parties hereto will meet with one another before March 1, 2079 to consider renegotiating the grant of easement by the Robson

Raspberry Improvement District and the extension of the terms and conditions of this Agreement.

7.2 The parties will cooperate in requesting the Minister of Highways to assume permanently the responsibility for maintenance and repair of the Road. If the Minister of Highways agrees to assume permanent responsibility for maintenance and repair of the Road, the parties will cooperate in releasing the Private Owners' obligations to maintain the Road and the Drainage Facilities.

[119] MRRUC makes the following submission:

172. As the Ministry would only assume responsibility for the road if it were dedicated as a public road, para. 7.2 contemplates dedication as a permanent, public road. In that event, the easement would obviously cease to exist.
173. Ergo, the renewal clause would only apply if the Ministry did not assume responsibility for the road within the twenty-year term. In that event, a continuation of the easement would be the only means for the petitioners to have access to their properties and for RRID to have its covenants vis-à-vis maintenance and repair.

[120] I reject these submissions.

[121] Clause 7.3 of the agreement merely provides that the parties will cooperate in having the Minister of Highways take over the responsibility for the road and, if it did so, they would further cooperate in releasing the contractual obligations of the landowners to maintain the road. This clause is silent on what would happen if the Minister refused to take over the road.

[122] The implied term urged upon me by MRRUC is not necessary to give business efficacy to the contract. In fact, in my view, it is completely inconsistent with the express terms of the easement agreement and the expressed intentions of the parties. First, the easement agreement is replete with references to the temporary nature of the easement and of a right on the part of RRID to cancel the easement if certain conditions are met. There is simply nothing in the agreement that suggests in any way the parties intended the easement would become permanent.

[123] Second, the easement agreement has two purposes: to grant MRRUC access to MRRUC land and to improve the water supply by improving the road system. This second purpose is reflected in the preambles as follows:

AND WHEREAS the intake for the water supply system for the community of Robson is located on Norns Creek downstream from Lot A, Lot 2, and the Private Owners' Lots as defined below;

AND WHEREAS the Robson-Raspberry Improvement District has concerns that the bridge and existing road system over Lot A and Lot 2 and over the Private Owners' Lots presently produces sediment into Norns Creek which the Robson-Raspberry improvement District believes negatively affects the water supply system;

AND WHEREAS the parties wish to cooperate with one another in:

- a) improving the existing road system and providing for runoff control and amelioration of conditions causing the production of sediment into the Robson water supply system; and
- b) granting easements over Lot 100, Lot 101, Lot 102, Lot A and Lot 2 as defined below to benefit the properties of certain of the other parties on the terms and subject to the conditions hereinafter described;

[124] The second purpose of the easement agreement, the amelioration of sediment in Pass Creek is achieved by the specific clauses in the agreement requiring the road and bridge to be kept in good repair by MRRUC. These clauses are enforced by the RRID's ability to cancel the agreement or to decline to renew the agreement upon its expiry. A permanent easement would be inconsistent with RRID's intent to improve the water quality of Pass Creek.

[125] Accordingly, there is no implied term that the easement would become permanent if the Minister of Highways refused to assume responsibility for the road. Such a term is inconsistent with the express terms of the agreement and with the intentions of the parties.

Breach of Duty of Good Faith

[126] The parties agree that the renewal clause of the easement agreement is subject to a duty of good faith. More specifically, they agree that RRID was required to negotiate a renewal/extension of the easement in good faith and that a renewal or extension was not to be unreasonably withheld by RRID.

[127] The parties disagree on whether RRID failed to act in good faith and unreasonably withheld its consent to a renewal or extension of the 1999 easement agreement.

[128] I have set out above the chronology of the communications, discussions and negotiations for the renewal of the easement. In summary, RRID commenced the negotiation process in January 2019 by requesting a renewal proposal from MRRUC. No proposal was made by MRRUC, which resulted in the expiry of the easement on the termination date, March 1, 2019. Despite not receiving a proposal from MRRUC and despite the expiry of the easement, on March 26, 2019, RRID proposed a 10-year renewal of the easement with a yearly access fee. On April 6, MRRUC proposed the conversion of the temporary easement to a permanent easement. RRID replied on April 18, 2019 with a proposal for a 20-year easement and a fee of \$120 per property per year. MRRUC replied on April 22, 2019 proposing the RRID lands be subdivided with it purchasing the subdivided land. Three days later, RRID rejected this proposal, renewed its offer for a 20-year easement and gave

MRRUC until May 15, 2019 to respond before it blocked access. On July 9, 2019, after a failed attempt to have the office of the Inspector of Municipalities order subdivision and sale of the RRID lands, MRRUC repeated its proposal for a subdivision or a permanent easement. RRID again rejected this proposal on July 24, 2019, but renewed its offer of 20-year easement. On August 7, 2019, MRRUC again rejected the RRID offer and again requested a permanent easement. On August 20, 2019, RRID advised MRRUC it was now trespassing but also offered to meet with them.

- [129] MRRUC submits that RRID acted in bad faith and unreasonably by refusing to make any concessions and by giving no consideration to the granting of a permanent easement or the option to subdivide and sell part of the RRID lands. I disagree. First, RRID did make concessions during the negotiations. It initially proposed a ten-year easement and later increased it to a 20-year easement. Second, RRID had no obligation whatsoever to consider the MRRUC proposal for a permanent easement or subdivision and sale. The duty imposed on it was to negotiate an extension of the time-limited easement in good faith. It had no duty to negotiate a permanent easement or a subdivision and sale of its lands. These are fundamentally different from a time-limited easement. Moreover, I disagree that RRID failed to consider the MRRUC proposal. The evidence before me is that RRID considered but rejected the proposal. For example, on July 24, 2019, RRID advised MRRUC that the board had again discussed its proposal. Additionally, I observe that if either party was intransigent, MRRUC was more so. MRRUC failed to consider any option except a permanent easement or subdivision and sale of the RRID lands.
- [130] MRRUC submits that RRID somehow acted unreasonably or in bad faith by threatening to shut off access during the negotiations. I do not agree. In my view, RRID's actions were measured and reasonable. It attempted to have the renewal resolved well in advance of the expiry of the easement. The delay in the negotiations was largely due to the actions and inactions of MRRUC. I accept that RRID imposed deadlines during the negotiations but those deadlines were not unreasonable and were extended by RRID on several occasions. It was only on August 20, 2019, long after the easement had expired, that RRID declared MRRUC to be trespassing. Moreover, and significantly, even as of August 20, RRID was still willing to meet with MRRUC to resolve the issue.
- [131] MRRUC further submits that RRID acted unreasonably or in bad faith by increasing the access fee. It says the access fee requested by RRID is arbitrary and unjustified. I again disagree. The fee requested by RRID was \$120 per property per year. By any measure, this is a reasonable fee for the right to an easement over lands belonging to another.
- [132] MRRUC also suggests that there was an inequality of bargaining power between the parties and that RRID used its bargaining strength in an unfair manner. I do not agree that there was inequality of bargaining power or that RRID exercised its powers in bad faith or unreasonably.

[133] In my opinion, the chronology of the negotiations does not illustrate any bad faith on the part of RRID. It attempted to commence the negotiations in a timely manner and made a bona fide first offer of a ten-year renewal of the easement. When its first offer was rejected, RRID made a second offer of a 20-year renewal, which offer it renewed on two occasions. If either party failed to negotiate with good faith, it was MRRUC, not RRID. MRRUC delayed in responding to RRID's request for a renewal proposal until after the easement had expired. MRRUC attempted to subvert the negotiations by making an application to the office of the Inspector of Municipalities. Most significantly, the chronology and the correspondence show that MRRUC was not prepared to negotiate a renewal of the time-limited easement. It came to the negotiations with a singular objective, to obtain a permanent right of access over the RRID lands and was not prepared to negotiate anything else.

[134] Accordingly, RRID did not negotiate in bad faith and did not unreasonably withhold consent.

Conclusion and Orders

[135] Accordingly, MRRUC has failed to establish that it is entitled to an easement of necessity over the RRID lands, has failed to establish a proprietary estoppel, has failed to establish that there was an express or implied term in the easement agreement that it would be entitled to a permanent easement, and has failed to establish that RRID acted in bad faith during the renewal negotiations. Moreover, the time-limited easement to which MRRUC was entitled under the easement agreement expired on March 1, 2019 and has not been renewed. It follows that action #31577 commenced by MRRUC is dismissed and that RRID is entitled to the orders it seeks in action #14741, namely, a declaration that easement KN8541 is expired, an order cancelling the easement and to an order that the road and bridge be deactivated and removed.

[136] However, MRRUC will require some time to either secure an alternative means of access to the MRRUC lands or to re-commence negotiations with RRID for the renewal of the easement, assuming RRID is so inclined. Therefore, my judgment is suspended for a period of 60 days or such other period of time as the parties may agree.

[137] The parties have leave to speak to me regarding costs, if necessary.

"Giaschi J."

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