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May 2026

Featuring Counsel Comments from:

David Rosenberg, K.C.; Christopher Devlin and Kajia Whelan; Matthew Ghikas, Tariq Ahmed and Niall Rand; Duncan Magnus; Tanner Gervin; Kaelan Unrau and Nathan Surkan; and Gavin Cameron

Friendly Zebras, Okavango Delta

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Featured Cases:

The Nuchatlaht v British Columbia, 2026 BCCA 137

Areas of Law: Aboriginal Law; Aboriginal Title; Evidence; Historical Record

~Evidence of sufficient occupancy for the purposes of an Aboriginal title claim must be assessed in the context of the evidentiary difficulties inherent in adjudicating Aboriginal title claims; here, the trial judge applied an inappropriately narrow site-specific approach when assessing the claim~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned the evidence necessary to establish sufficiency of occupation for the purposes of a claim to Aboriginal title. The appellant Nuchatlaht claimed approximately 210 square kilometres of Nootka Island, seeking to show that they exercised effective control of the claimed land and regularly exploited resources within that territory as of 1846, the date of the assertion of British sovereignty over the island.

The evidence before the court below consisted largely of historic documentation, along with expert opinions on the ethnographic and historical record and the use and occupation of the claimed area. Dr. Philip Drucker's *The Northern and Central Nootkan Tribes*, based on field observations in 1935-1936, was a critical piece of historical documentation. A significant amount of evidence was led at trial about the presence of culturally modified trees on Nootka Island, with the Nuchatlaht taking the position that the presence of these trees in inland areas supported their claim to the inland territory. The trial judge, however, was concerned with the quality and sufficiency of this evidence, particularly the fact that, of those sites which had been dated, only a small portion of the inland trees pre-dated the assertion of sovereignty.

The trial judge dismissed the claim following an initial hearing, relying heavily on Dr. Drucker's view that the Nuu-chah-nulth people were unfamiliar with "remote inland areas" to find that there was no claim to the inland portion of the claimed territory. He also found there was insufficient evidence of occupation for the territory as a whole. Following further submissions, he allowed a modified claim to Aboriginal title over certain coastal areas of Nootka Island.

The Nuchatlaht v British Columbia, (cont.)

APPELLATE DECISION

The Court of Appeal allowed the appeal, agreeing with the Nuchatlaht that the trial judge misapplied the test for sufficient occupation and gave inadequate weight to the evidence of occupation. First, the court found that the trial judge erred by applying a narrow site-specific approach in assessing the claim as presented. He wrongly insisted that the Nuchatlaht fill "gaps" in the evidence of use of the coast and undervalued evidence presented with respect to the Nuchatlaht s use and occupation of the interior of the island. There was no evidentiary foundation for his conclusion that the entire interior of the claim area above 100 metres in elevation was a "remote inland area" as that term was used by Dr. Drucker.

The trial judge also erred in his treatment of the evidence with respect to the culturally modified trees. The repeated use required to form even one culturally modified tree could support the establishment of the regular use required for sufficient occupation. Further, the use of inland forest resources after 1846 should not have been discounted. Taken all together, the judge failed to afford appropriate weight to the limited pre-1846 evidence and significant post-1846 evidence in the context of the evidentiary difficulties inherent in adjudicating Aboriginal title claims.

The court rejected two additional arguments put forward by the Nuchatlaht, concluding that the trial judge did not take a "piecemeal" approach to the evidence and that *Canada v The Colony of Newfoundland*, [1927] UKPC 25 did not establish a legal principle that the occupation of a seacoast carried with it the right to the "whole territory drained by the rivers which empty their water into its line."

On remedy, the court found there was no need to return the matter to the court below. The evidence, taken all together, was sufficient to establish Aboriginal title to the entire area claimed in the pleadings.

COUNSEL COMMENTS

The Nuchatlaht v British Columbia, 2026 BCCA 137

Counsel Comments by David Rosenberg, K.C.,
Counsel for the Interveners, Cowichan Nation, Cowichan Tribes,
Penelakut Tribe, Halault and Stz'uminus First Nations

David Rosenberg, K.C.

"There have only been three trials in Canadian history that have resulted in declarations of aboriginal title.

In *Nuchatlaht,* the British Columbia Court of Appeal makes the first declaration of Aboriginal title ever granted by that court.

The other two cases in which aboriginal title have been declared are the *Tsilhqot'in* case and the *Cowichan* case.

In *Nuchatlaht*, rather than confirm the trial judge's site-specific, narrow approach in determining the area over which Aboriginal title exists, the Court of Appeal applied the *Tsilhqot'in* test to endorse a more expansive territorial approach.

That resulted in an approximately tenfold increase in the declared aboriginal title area over that found by the trial judge.

For the Cowichan Nation, who intervened on the appeal, the approach taken by the Court of Appeal is significant.

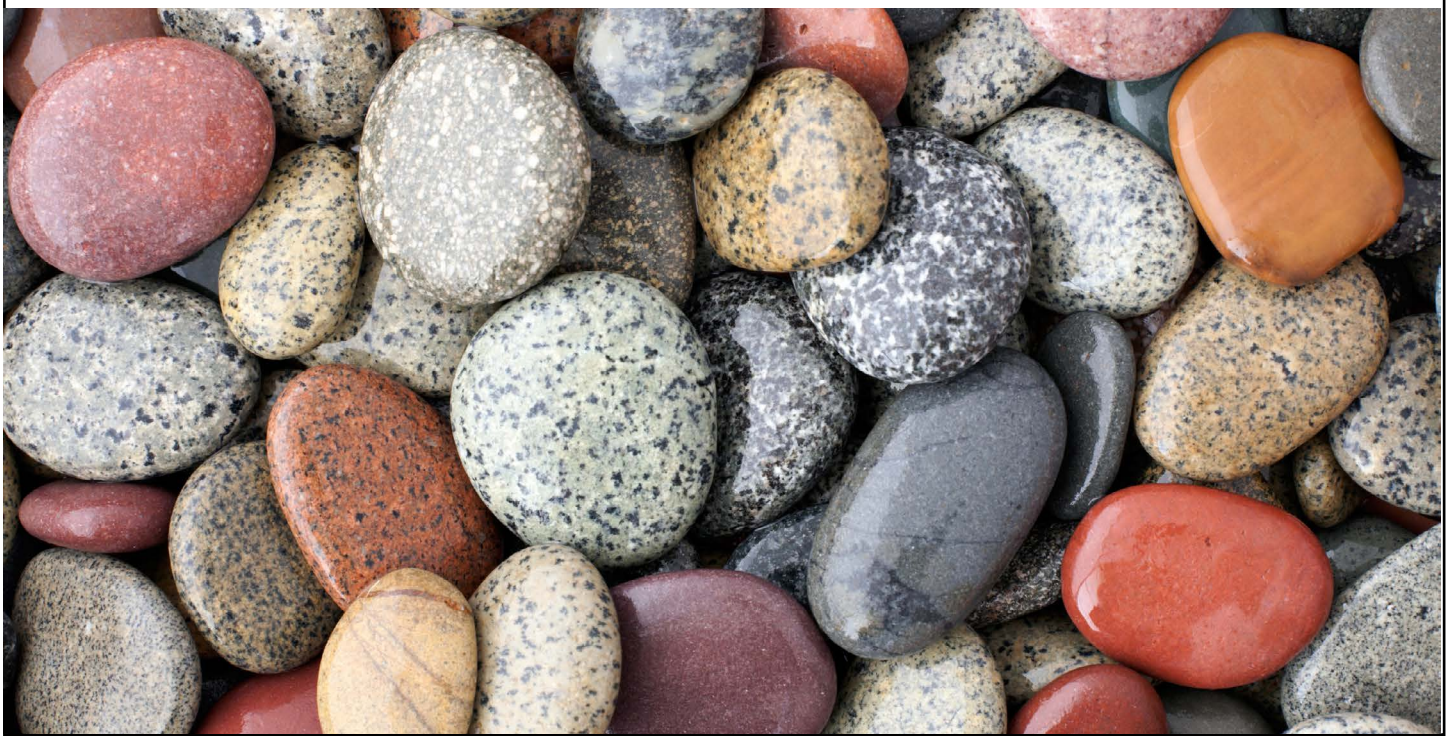
Having determined that the trial judge erred by defining the Aboriginal title area too narrowly, rather than remit the matter back to the trial court (as the Supreme Court of Canada did in *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010), the Court of Appeal made a declaration of Aboriginal title for the entire claim area (210 square kilometers). Given the length and complexity of aboriginal title trials, the Court of Appeal's willingness to make the declaration rather than remit the case back to the trial court makes the decision procedurally important over and above

COUNSEL COMMENTS

the more obvious substantive victory for the Nuchatlaht in the expansion of their declared aboriginal title area.

The Court of Appeal's declaration of Aboriginal title to the larger area in *Nuchatlaht* may have implications for the Cowichan Nation who have their own appeal pending before the Court of Appeal. The Cowichan Nation will argue that a more expansive finding of Aboriginal title is also called for in their case. In the *Cowichan* case, like in the *Nuchatlaht* case, the trial judge found Aboriginal title to only a portion of the claim area. In the *Cowichan* case, the trial judge declared Cowichan Aboriginal title to approximately 40% of the claimed Aboriginal title area. The Court of Appeal could allow the Cowichan's appeal and declare aboriginal title to the entire claim area based on the *Nuchatlaht* decision.

Given how few aboriginal title cases ever get to trial, never mind appeal, every decision by the Court of Appeal in this area of the law is noteworthy."



COUNSEL COMMENTS

The Nuchatlaht v British Columbia, 2026 BCCA 137

Counsel Comments by Christopher Devlin and Kajia Whelan,
Counsel for the Intervener, Tseshaht First Nation

Christopher Devlin

Kajia Whelan

"This decision came as a surprise to many.

The Nuchatlaht's legal strategy was intentionally time- and cost-conscious. The trial lasted only 54 days (over the course of four months), which is not long in the context of an Aboriginal title claim. By contrast, the *Tsilhqot'in* and *Cowichan Tribes* Aboriginal title litigation each spanned five years with over 300 and 500 days of trial respectively.[1]

No oral history witnesses were called. Nuchatlaht's evidence was elicited through two expert witnesses and focused primarily on ethnography and archaeology. This compared to dozens of elders and community witnesses and eight expert witnesses in *Cowichan Tribes* covering a dozen different academic fields.[2] Nuchatlaht's legal counsel appeared to gamble that a single territorial map, drawn up in the 1950s (over 100 years past the 'crystallization' date for Aboriginal title), would be sufficient to satisfy the test for Aboriginal title.

1 See *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (*'Tsilhqot'in'*) and *Cowichan Tribes v Canada (Attorney General)*, 2025 BCSC 1490 (*'Cowichan Tribes'*).
2 *Cowichan Tribes*, para 4.

COUNSEL COMMENTS

The result at trial did not end well for the Nuchatlaht's strategic approach to litigating its title. The trial judge granted a declaration of Aboriginal title to only 5% of the Nuchatlaht's claimed area, less than 11.4 square kilometers.

However, and unexpectedly to many observers, the Court of Appeal not only overturned the trial judge's decision but, instead of sending it back to trial as is the normal course, substituted its own declaration, establishing Nuchatlaht Aboriginal title over their entire claimed area of approximately 210 square kilometers.

The Court of Appeal's decision is a welcome result for First Nations after the discouraging results at trial. It provides a glimmer of hope that access to justice and resolution of outstanding title claims may be more within reach to Nations with fewer resources at their disposal than previously understood. This is significant at a time when the pendulum on addressing Indigenous issues in the Province is swinging away from reconciliation towards litigation again.

Caution is in order, however. The Nuchatlaht's claim area has several distinct advantages not likely available to most other First Nations. It is a relatively remote island consisting almost entirely of provincial Crown land. Fee simple and federal Crown interests were expressly excluded from the claim, keeping out the federal Crown and private landowner defendants, and no other First Nations assert overlapping interests to the area.

The absence of overlapping Aboriginal title claims greatly assisted the Court of Appeal in assuming the culturally modified trees found in the claim area were likely made by the Nuchatlaht rather than by some other group. This played a critical role in the Court of Appeal's decision to overturn the trial judge.

Further, the Province may appeal the decision to the Supreme Court of Canada. If the Supreme Court of Canada decides to weigh in, it may have difficulty with the Court of Appeal's decision. The reasons for judgment are not particularly robust in terms of law and legal principles or doctrine. Most of the legal discussion focuses on the law respecting finding palpable and overriding error to enable the Court of Appeal to substitute its assessment of the evidence for that of the trial judge.

COUNSEL COMMENTS

What most appeared to vex the justices on the Court of Appeal panel was how some of the findings at trial seemed arbitrary and inconsistent with the evidentiary record. In terms of a further appeal to the Supreme Court of Canada, the Province may argue there is a minimum threshold of evidence required to prove Aboriginal title, and this case did not meet that threshold.

On the other hand, the Province's focus may be sufficiently consumed by the Cowichan Tribes appeal and its controversial efforts to reform the *Declaration on the Rights of Indigenous Peoples Act*. It may determine the unique circumstances attaching to the Nuchatlaht's claim area sufficiently limit the potential precedential impacts.

Time will tell if further surprises are in store."

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Richmond (City) v British Columbia (Utilities Commission), 2026 BCCA 139

Areas of Law: Public Utilities; Statutory Interpretation; Administrative Law; Procedural Fairness

~The British Columbia Utilities Commission correctly interpreted the term "public utility" in the Utilities Commission Act *to include wholly owned and wholly operated local government corporations~*

CLICK HERE TO ACCESS THE JUDGMENT

This appeal, direct from an inquiry conducted by the British Columbia Utilities Commission (the "Commission"), concerned the proper interpretation of the term "public utility" in the *Utilities Commission Act*, RSBC 1996, c 473 (the "UCA"). By excluding services provided by a municipality or regional district within its own boundaries from the definition of public utility, the UCA exempts those bodies from the Commission s regulatory supervision and oversight. The appellants argued that, properly interpreted, a wholly owned and wholly operated local government corporation ("LGC") also fell within that exclusion.

Following its inquiry, the Commission issued a report finding that LGCs are not excluded from the definition of public utility and are therefore subject to regulation by the Commission. However, the Commission decided that LGCs should nonetheless be eligible for an exemption from the application of the UCA, subject to certain annual reporting requirements. On appeal the appellants both challenged the Commission s interpretation of "public utility" and alleged procedural unfairness in the conduct of the inquiry.

APPELLATE DECISION

The Court of Appeal dismissed the appeals, finding that the Commission's interpretation was correct and that the inquiry was procedurally fair. The court began by noting that while the UCA does not define "municipality," the *Interpretation Act*, RSBC 1996, c 238 does, as "the corporation into which the residents of an area are incorporated as a municipality under the *Local*

Richmond (City) v British Columbia (Utilities Commission), (cont.)

Government Act." A broad interpretation of municipality for the purposes of the UCA would conflict with this definition. Further, the exclusion in the UCA makes no express allowance for a corporate entity other than the incorporated municipality, no matter the degree of its attachment. The appellants' interpretation would also depart from the established principle that parent companies and subsidiary companies have distinct legal personalities; even where wholly owned and operated, LGCs are distinct corporate entities and separate from the local government.

The court also found that the Commission's interpretation did not result in an absurdity, particularly as the UCA allows for case-by-case or class exemptions to its regulatory scheme. Although the Commission's definition of public utility would make a distinction between local government services provided directly by a municipality and those provided on behalf of a municipality by an LGC, the scheme was sufficiently flexible to address any concerns arising as a result.

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Richmond (City) v British Columbia (Utilities Commission), *(cont.)*

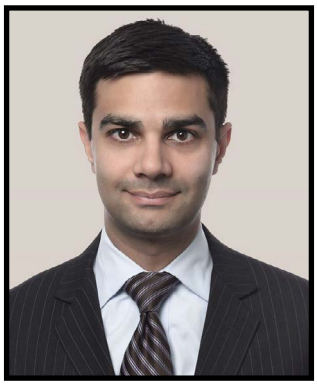
With respect to procedural fairness, the appellants complained the Commission failed to give them an opportunity to provide submissions on the exemption criteria. The court disagreed, holding there was no requirement for the Commission to offer an opportunity to comment on the draft report, and that in any event the appellants did not respond to a timetable the Commission issued in February 2022 which would have allowed them to give input on the exemption criteria.

COUNSEL COMMENTS

Richmond (City) v British Columbia (Utilities Commission), 2026 BCCA 139

Counsel Comments by Matthew Ghikas, Tariq Ahmed and Niall Rand,
Counsel for the Respondents (CA50129 AND CA50130),
FortisBC Energy Inc., FortisBC Inc., and FortisBC Alternative Energy Services Inc.

Matthew Ghikas



Tariq Ahmed

Niall Rand

"This decision is the second of two recent Court of Appeal decisions (the other being *Powell River Energy Inc. v. British Columbia (Utilities Commission)*, 2026 BCCA 93) in which the Court rejected attempts to narrow the meaning of 'public utility' so as to place the entity in question outside the ambit of the *Utilities Commission Act* (the 'UCA').

The definition of 'public utility' in section 1(1) of the UCA is a central feature of the statutory scheme because it determines which entities fall within the British Columbia Utilities Commission's regulatory jurisdiction.

In this case, the Court of Appeal upheld the Commission's determination, arising from its inquiry into the regulation of municipal energy utilities, that a corporation wholly owned and operated by a municipality is a 'public utility' within the meaning of the UCA. That conclusion matters because municipalities and regional districts are excluded from the definition of 'public utility' in respect of services they provide within their own boundaries and, to that extent, are not subject to Commission regulation. (Other statutory exclusions exist, including for landlords providing service to their tenants and for those engaged in the petroleum industry.)

COUNSEL COMMENTS

A key practical implication of the Court of Appeal's decision is that municipalities that choose to provide utility service through a separate corporate vehicle, rather than through a conventional municipal department, should expect that entity to be regulated under the UCA. That creates a meaningful structural trade-off. A separate corporation may offer benefits associated with the corporate form, including a measure of legal and financial separation from elected council. But those benefits come with regulatory oversight. In effect, the decision confirms that a municipality cannot obtain the advantages of a distinct corporate structure while also relying on the statutory exclusion that applies to services delivered by the municipality itself.

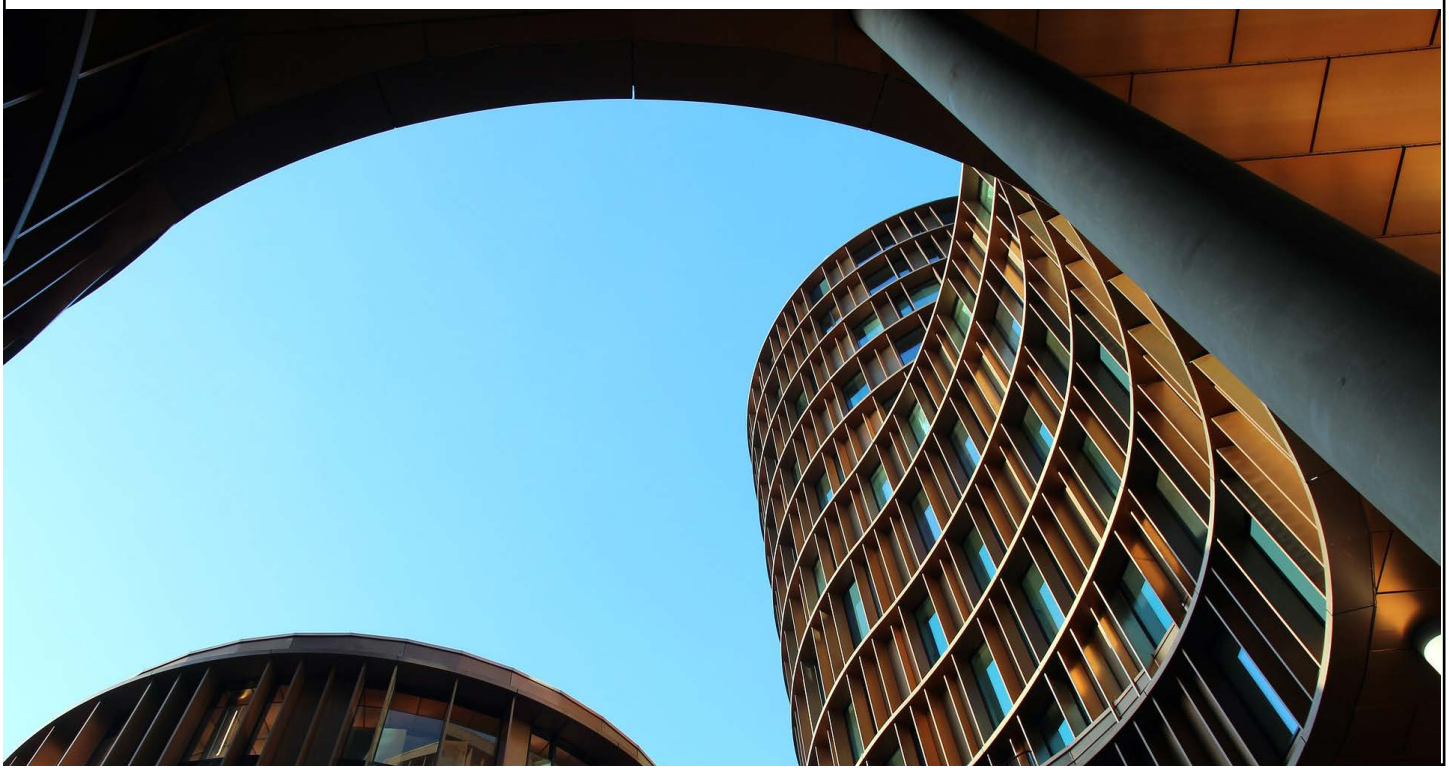
The Commission nevertheless retains flexibility under the UCA to tailor regulation to the circumstances, including through forbearance or other light-handed forms of oversight. For lawyers advising municipalities, local government corporations, or energy providers, that is an important point: the decision confirms the scope of potential jurisdiction, but it does not necessarily mean that every municipally owned utility will be subject to the full weight of conventional public utility regulation. This is consistent with the UCA framework, which both seeks to ensure that energy consumers have meaningful recourse in the face of unjust rates or substandard service and permits the Commission to avoid unnecessary, redundant or excessive oversight.

Indeed, the Commission adopted that approach in its final order in the inquiry prior to the appeals, largely exempting local government corporations that are wholly owned and operated by a municipality and that provide services exclusively within the municipality's boundaries from the UCA, provided they comply with annual reporting requirements. That outcome underscores the practical reality that where the Commission has jurisdiction, that jurisdiction may be exercised in a calibrated way.

More broadly, the decision is another example of the Court of Appeal resisting recent efforts by municipalities to narrow the Commission's jurisdiction. In these appeals, the Court held that the appellants' proposed interpretation would be 'inconsistent with the Commission's mandate by reducing the extent of its regulatory reach and diminishing its capacity to ensure that energy consumers in British Columbia have accessible recourse in the face of unjust rates or substandard service'. The Court's reasoning is consistent with recent appellate authority

COUNSEL COMMENTS

recognizing the Commission's 'broadly drawn powers', including *Coquitlam (City) v. British Columbia (Utilities Commission)*, 2021 BCCA 336, where the municipality unsuccessfully challenged the Commission's jurisdiction to permit a decommissioned gas pipeline to be abandoned in place under a municipal highway, and *City of Richmond v. British Columbia Utilities Commission*, 2024 BCCA 16, where the municipality argued unsuccessfully that the Commission had exceeded its jurisdiction by imposing a limitation of liability provision in an order requiring a utility to alter its gas distribution piping. For practitioners, the broader lesson is that courts are likely to continue interpreting the Commission's jurisdiction purposively, in light of the role identified by the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4: fixing just and reasonable rates and protecting the integrity and dependability of the supply system."



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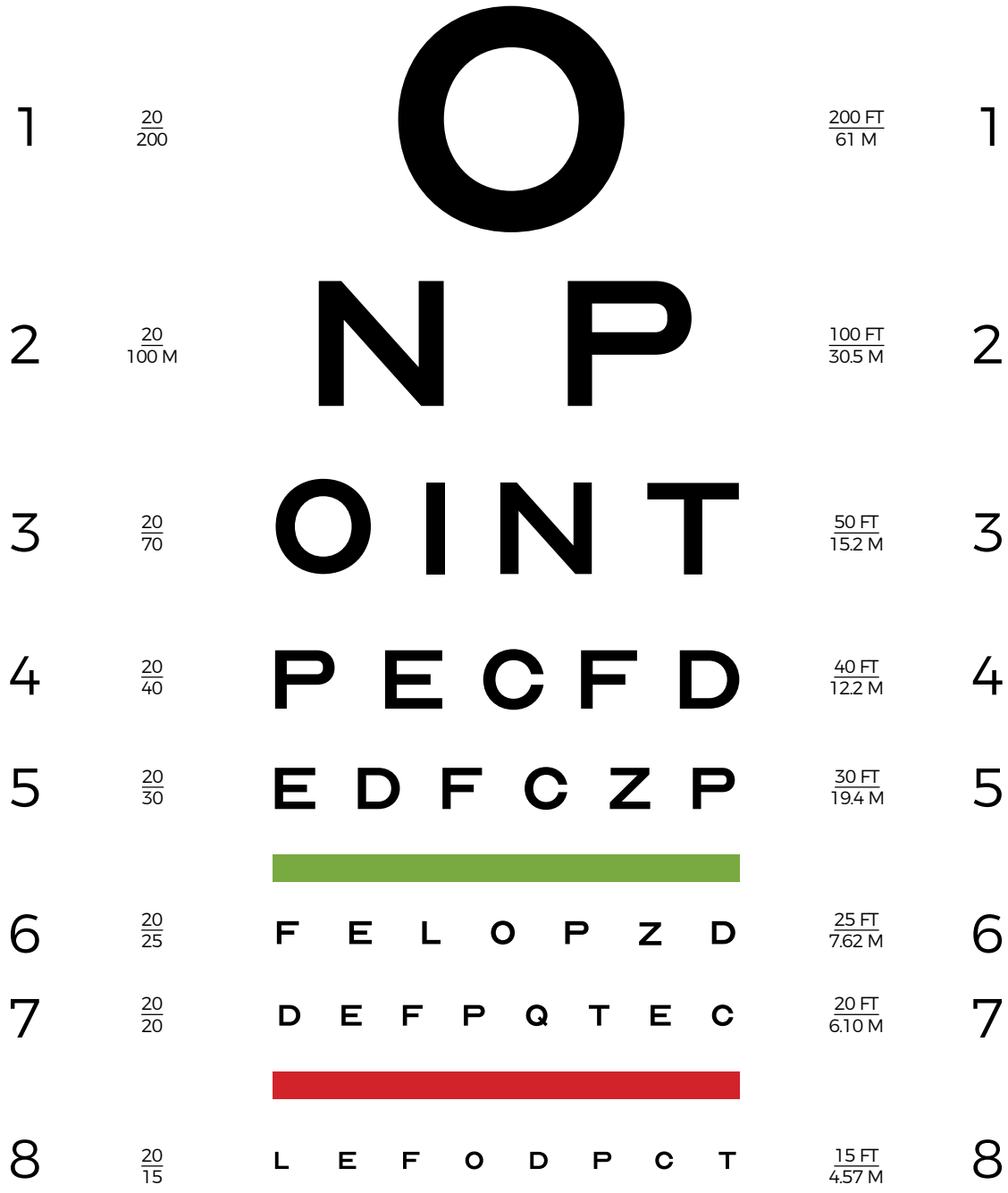

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Yurkiw Estate v Yurkiw, 2026 BCCA 149

Areas of Law: Wills and Estates; Trusts; Discovery of Documents; Estate Administration

~When determining the extent of a trustee's obligation to disclose trust documents to beneficiaries, the court must determine which of the available analytical frameworks is best adapted to the trust at issue~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned a trustee's obligation to disclose trust documents to beneficiaries. The testator died in 2020, with the named beneficiaries in his will being his adult children. A professional trustee, Heritage, was appointed by the court to administer the will. In April 2024, Heritage filed a notice of application to pass its accounts, estimating that approximately $396,000 would be available for distribution to the two beneficiaries. By that point Heritage had invoiced the estate for approximately $113,000. One of the beneficiaries, Benjamin Yurkiw, opposed the application to pass accounts and brought a cross-application for an order that Heritage produce its file. While Heritage succeeded on both applications before an associate judge, a chambers judge on appeal found the associate judge had overlooked the principle that a beneficiary has a right to the documents created by the administrator in the administration of the estate, with only limited exceptions. He therefore ordered Heritage to produce its file to the beneficiaries.

Yurkiw Estate v Yurkiw, *(cont.)*

While Heritage produced some documents, Mr. Yurkiw took the position that production fell short of what the order required. The chambers judge made a further order addressing the extent of Heritage's obligation to produce documents, expressly stating that Heritage was to produce the "totality of trust documents," with trust document defined as a document in possession of the trustee containing information about the trust, not subject to some rule permitting withholding. The chambers judge identified an exception for transitory records the trustee had set out in advance that it would not retain, either because the information was duplicative or unimportant.

Heritage appealed, arguing that the judge should not have made a blanket order for production but instead directed Mr. Yurkiw to identify classes or categories of documents sought, plus his reasons for seeking them.

APPELLATE DECISION

The Court of Appeal generally approved of the order below, allowing the appeal only to the extent of making a minor variation in one term of the order. In doing so, the court went into some depth on the proper legal approach to determining what documents beneficiaries are entitled to obtain from the trustee. The court noted that determining the extent of a trustee's obligation to provide documents to a beneficiary has vexed the courts, given that trusts can be established in a wide range of contexts and vary widely in number of beneficiaries, time span, and trustee powers. The courts in British Columbia have applied three separate analytical frameworks in addressing the issue: the proprietary right theory (in which the beneficiary, as owner of the trust estate, also owns trust documents in the trustee's possession); the joint or common interest theory (focusing on the joint interest of beneficiaries, rather than their proprietary rights); and the modern or balancing theory (where the obligation to disclose is dependent on the exercise of judicial discretion, having regard to a balancing of competing interests).

Yurkiw Estate v Yurkiw, *(cont.)*

The court concluded that each of the analytical frameworks had its uses; the task in any given case is therefore to choose the analytical framework best adapted to the specific trust at issue. In this case, which involved an uncomplicated estate with two vested beneficiaries, the proprietary rights framework best fit the facts. There was no evidence of any factors that would weigh against the beneficiaries' claim to the documents. The judge therefore did not err in ordering Heritage to disclose all trust documents in its possession.

However, the court found that the term of the order creating an exception for transitory records which the trustee set out in advance that it would not retain should be varied to remove the requirement for Heritage to identify the records in advance. Such a term was never requested and there was no reason to make Heritage produce duplicative, deleted or inaccessible records.

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COUNSEL COMMENTS

Yurkiw Estate v Yurkiw, 2026 BCCA 149

Counsel Comments by Duncan Magnus,
Counsel for the Respondent, Benjamin Yurkiw

Duncan Magnus

"This decision provides useful guidance to address the difficult question of what documents a trust beneficiary is entitled to access outside of an adversarial process, simply because they wish to see the documents. As Justice Gomery stated 'It is a question that has vexed the courts. The question has proved difficult because of the range of circumstances in which it may arise, and legal, practical and policy considerations that may be brought to bear.' In my own practice, I find this question arises in a variety of circumstances, ranging from estates, commercial matters, real estate disputes, and family matters.

Historically, Courts approached the issue from three different perspectives: (1) the 'proprietary right' theory, (2) the 'joint interest' (or 'common interest') theory, and (3) the 'modern' theory, or balancing theory. The Court confirmed that the joint interest theory and the balancing theories do not replace proprietary interests and that the 'task in every case is to choose the analytical framework best adapted to the trust and circumstances at hand. The diversity and complexity of trust law is such that no single analytic framework has been devised that will be perfectly suited to every circumstance.'

From a practical point of view, this case highlights a few points worth noting in relation to disclosure of trust documents:

a) The trustee typically knows what their file encompasses (whereas the beneficiaries often only have a limited understanding). If a trustee wishes to ask the Court to engage in balancing interests, they should be tendering evidence as to the nature of the file/documents, what documents could be produced, and the costs associated with producing those documents.

COUNSEL COMMENTS

b) If a party is unclear about the terms of the order, it is advisable to proactively seek clarification from the Court;

c) A trustee cannot expect that it will be indemnified for legal fees or it will avoid a costs sanction where it takes an adversarial approach (i.e. favouring personal interests over that of the trust.)"

Heywood v Songhees Nation, 2026 BCCA 150

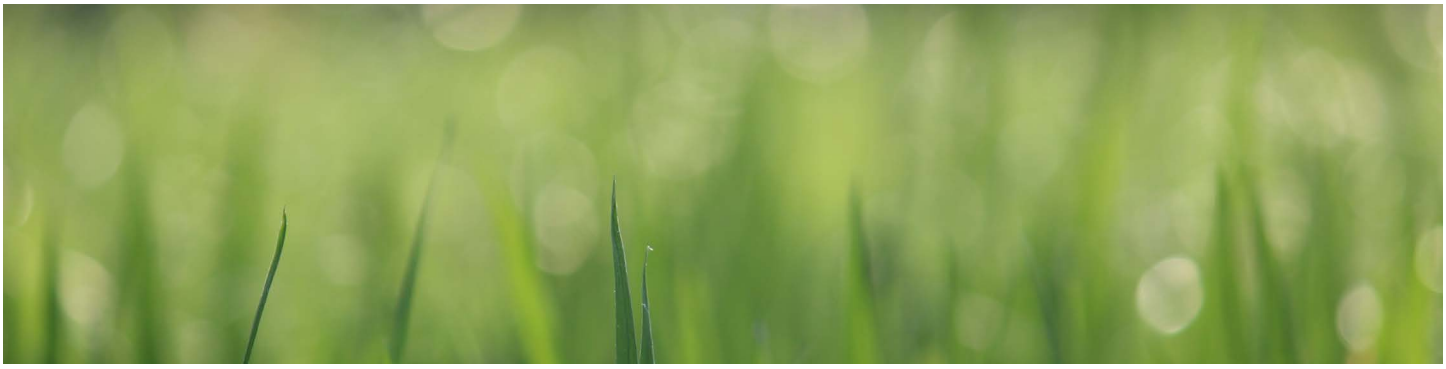
Areas of Law: Real Property; Personal Property; Fixtures; Unjust Enrichment

~Neither the location of a manufactured home park on reserve land nor the Songhees Nation's lack of consent to permanent affixation of the manufactured homes was relevant to determining whether the homes were fixtures or chattels~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal addressed the question of whether manufactured homes in a manufactured home park on the respondent Songhees Nation's reserve were fixtures or chattels. The appellants, although not members of the Songhees Nation, were residents in the manufactured home park. The Songhees Nation decided it wished to use the land in the park to fulfill its members' housing needs and accordingly gave the appellants three years' notice of the end of their tenancies. When the appellants brought a claim seeking a right to continued occupation of their residences, the Songhees Nation brought a summary trial application seeking dismissal of the claim. The chambers judge granted the application, dismissed the claim, and ordered the appellants to remove their homes from the lands by the end of September 2025.

The appellants did not appeal from the order to vacate the lands, but instead from the order relating to their interests in the manufactured homes. They argued that the judge erred in finding that the homes were chattels and therefore erred in ordering them to remove the manufactured homes from the lands. Additionally, they challenged the judge s dismissal of the claim in unjust enrichment for the value of the homes.



Heywood v Songhees Nation, *(cont.)*

APPELLATE DECISION

The Court of Appeal allowed the appeal in part, finding that the manufactured homes were fixtures and that the appellants were not required to move them. While the chambers judge properly cited the test from *Stack v T Eaton Co* for whether an object on land is a fixture, she misapplied the test by relying on three observations: first, that the homes could be removed without damaging either the homes or the sites; second, that the homes were on reserve land; and third, that the Songhees Nation had not consented to the homes being affixed as permanent fixtures. The movability of an object may assist in determining the degree and object for which an item is annexed to land, but in this case doing so substantiated the position that the homes were affixed. Moving the homes would be costly and require considerable effort and planning. With respect to the location of the manufactured home park on reserve land, it was no more than a neutral fact in the analysis. As for the Songhees Nation's lack of consent, the subjective intention of the parties is not relevant under the *Stack* test.

On the claim for unjust enrichment, the court agreed with the chambers judge that there was a juristic reason for any enrichment: because the appellants were free to remove the homes from the land, any homes left behind would be considered abandoned. The court also found that retention of the manufactured homes would not confer a benefit on the Songhees Nation, as it had been clear it did not wish to retain them.

The court varied the order below so that the plaintiffs were ordered to vacate the lands and remove their personal property, but not to remove their manufactured homes.

COUNSEL COMMENTS

Heywood v Songhees Nation, 2026 BCCA 150

Counsel Comments by Tanner Gervin,
Counsel for the Appellants

Tanner Gervin

"*Heywood* turned on factors that have guided the common law for nearly a century those from *Stack v. T. Eaton Co* (1902), 4 O.L.R. 335 (the '**Stack Test**'). Although the Stack Test is not new, the result in *Heywood* was. The Court of Appeal's finding in *Heywood* is significant because it was the first time a mass eviction of tenants living on reserve land was challenged in court on a park-wide basis involving dozens of litigants.

Off-reserve manufactured home communities are governed by provincial statutes such as the *Manufactured Home Act*, [SBC 2003] c.75 (the '**MHA**') and the *Manufactured Home Park Tenancy Act* [SBC 2002] c.77 (the '**MHPTA**').

Section 23(2) of the MHA deems a manufactured home to be a chattel unless the parties agree in writing otherwise. However, provincial legislation such as the MHA and MHPTA, including the deeming provisions in Section 23(2) of the MHA, do not apply on reserve land. In the absence of legislation created by the Songhees Nation, the common law Stack Test applied. Under the common law, and as explained in *Heywood*, these homes were fixtures, meaning there was no requirement to remove them.

Although it may not seem like a victory for the appellants to have their homes treated as fixtures, it was. Before the appeal, the respondent sought special costs on the basis that the appellants had not removed their homes and had also threatened contempt proceedings. The appellants could not afford to demolish or remove their homes. Had the litigation continued, the appellants likely would have faced claims for the cost of disposing of the homes.

COUNSEL COMMENTS

For self-governing nations, *Heywood* is a double-edged sword. It confirms that the MHPTA's tenant-protection legislation does not apply to tenant-owned homes on reserve. This allows for manufactured home tenants to be evicted for redevelopment purposes without paying the assessed value of the homes, as an off-reserve landlord would be required to pay. On the other hand, as shown by the result in *Heywood*, a nation may be left responsible for disposing of homes it does not want to keep.

Tenants should know that they have no protection under the MHPTA on reserve land unless the local First Nation agrees to adopt a law giving them protection. For self-governing nations, *Heywood* shows that failing to adopt tenant-protection rules like the MHPTA or to enact their own tenancy laws could lead to years of litigation and the risk of being required to dispose of unwanted fixtures."

COUNSEL COMMENTS

Heywood v Songhees Nation, 2026 BCCA 150

Counsel Comments by Kaelan Unrau and Nathan Surkan, Counsel for the Respondent

Kaelan Unrau

Nathan Surkan

"This case will be of interest to landlords and tenants of on-reserve manufactured home parks. In the off-reserve context, the closure of manufactured home parks is governed by the *Manufactured Home Park Tenancy Act*. The Court of Appeal has confirmed elsewhere, however, that the Act does not apply to on-reserve tenancies (see *Sechelt Indian Band v. British Columbia (Manufactured Home Park Tenancy Act, Dispute Resolution Officer)*, 2013 BCCA 262 at para. 50; *McCaleb v. Rose*, 2017 BCCA 318 at para. 14). That includes provisions in the Act relating to the payment of compensation.

The plaintiffs in this case sought comparable remedies under the common law doctrine of unjust enrichment, saying that the manufactured homes had become *de facto* fixtures that could not practically be moved, and that the Nation would be unjustly enriched by any homes left behind. On appeal, the Court accepted that the homes were fixtures, but rejected the argument that this gave rise to any right to compensation.

The decision contains two key points of appellate clarification.

First, the decision provides guidance on how manufactured homes should be treated under the common law doctrine of fixtures. Manufactured homes exist on a continuum of movability – from highly mobile units with the wheels still attached to structures effectively converted into bungalow-style homes. It is unsurprising, then, that lower courts have varied in their treatment of this type of property, finding them to be chattels in some cases and fixtures in others.

COUNSEL COMMENTS

The homes in this case fell somewhere in the middle. The units' wheels had been removed, but they lacked extensive improvements and sat on concrete or wooden supports. The evidence also clearly established that the units were all movable without risk of damage to themselves or to the lands. Such factors have supported findings of chattels in past cases. The Court confirmed, however, that movability is not dispositive (applying the *Stack* test) and that the factors overall supported the conclusion that the units had become fixtures.

Second, the Court reaffirmed the principle of freedom of choice under the doctrine of unjust enrichment. The summary trial judge had held that if any homes were left behind after the move-out deadline (a possibility she found need not happen in light of the homes' movability), then they would constitute an 'incontrovertible benefit' to the Nation, even though it had consistently stated it had no use for the homes. But there would be a juristic reason for any enrichment – either abandonment or the doctrine of fixtures – such that the Nation would not be liable in damages.

The Court of Appeal reasoned that this analysis overlooked the Nation's freedom of choice. The Nation had made clear that it did not want the homes, and had given the plaintiffs ample opportunity – more than four years – to remove them. The result was that the claims for compensation failed on two grounds. Even if the abandonment of the homes constituted a deprivation, the homes held no value for the Nation and so there would be no corresponding benefit. There would also be a juristic reason for the deprivation, as ownership had passed to the Nation under the doctrine of fixtures.

Ultimately, the decision helps clarify the legal landscape for on-reserve tenancies. Provincial tenancy legislation does not apply, and courts will not automatically import comparable procedures through the common law. The case also underscores the importance of understanding the specific terms of any on-reserve tenancy, including those relating to termination, given the lack of generally applicable statutory requirements and procedures.

Returning to the specific circumstances of this case, the decision allows Songhees Nation – an urban First Nation with an extremely limited land base – to move ahead with the process of establishing community housing for its members on its own lands. That process had been put on hold as this case worked its way through the courts."

Murphy v Morgan, 2026 BCCA 152

Areas of Law: Personal Injury; Future Earnings; Contingencies; Damages; Evidence

~The trial judge erred in applying deductions for negative contingencies in a motor vehicle case where there was no evidence capable of supporting the conclusion that the occurrence of the contingencies was a real and substantial possibility~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned deductions for negative contingencies in the assessment of the appellant s damages arising from a motor vehicle accident. Prior to the accident, while the appellant suffered from Type II diabetes, sleep apnea, and low back pain, he was generally healthy and active. In 2016, he was rear-ended by a vehicle driven by one of the respondents, causing a minor traumatic brain injury, headaches, chronic pain, tinnitus, and sleep disturbances. After the accident he reduced his working hours as a result of his symptoms.

In the years that followed, the appellant suffered from several health issues unrelated to the accident, including diagnosis with a treatable and asymptomatic form of leukemia, a traumatic incident at work which resulted in psychological symptoms and required ten months of leave, a groin injury, a serious bout of COVID-19, and cardiac bypass surgery. By the time of trial, he was off work and receiving disability benefits.

As liability for the accident was admitted, the focus of the trial was on damages. The trial judge applied deductions for negative contingencies to three elements of the damages award in order to account for the impact of the appellant s post-accident injuries and health issues: 30% to the award for non-pecuniary damages; 30, 50 and 60% to each of three time periods in the award for past loss of earning capacity; and 70% to loss of future earning capacity.

Murphy v Morgan, *(cont.)*

APPELLATE DECISION

The Court of Appeal allowed the appeal and varied the damage award by setting aside most of the deductions for negative contingencies. The court emphasized that specific contingencies must be established by evidence capable of supporting the conclusion that the occurrence of that contingency is a real and substantial possibility, not speculation. Applying a specific negative contingency absent any supporting evidence is an error in principle.

The court found the trial judge erred in applying deductions to all three categories of award, as the deductions were not grounded in the evidence or based on the application of proper principles. The judge failed to compare the appellant s original and injured positions and did not identify the possible detrimental impacts of his subsequent injuries and health issues on his life irrespective of the accident. Further, there was no medical or other evidence capable of grounding the finding that there was a measurable risk that the post-accident health issues would have affected his life adversely beyond their proven past impacts.

Murphy v Morgan, *(cont.)*

On past loss of earning capacity, the proven periods of unrelated work incapacity were past facts, not contingencies, and beyond accounting for those—which the judge correctly did—there was no evidence to support a measurable risk that the subsequent injuries and health issues would otherwise have prevented the appellant from working full-time, regardless of his accident-related injuries. The same reasoning applied with respect to the deduction applied to the loss of future earning capacity.

The court therefore varied the damages award, reinstating the full amount of the award for non-pecuniary damages and past loss of earning capacity. On future loss of earning capacity, the court reduced the deduction to just over 20% to account for the possibility that the appellant might at some point return to work part-time.

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COUNSEL COMMENTS

Murphy v Morgan, 2026 BCCA 152

Counsel Comments by by Gavin Cameron,
Counsel for the Appellant

Gavin Cameron

"*Murphy v. Morgan* is another appeal arising out of a recent trend in personal injury litigation – defence allegations of pre-existing conditions or injuries, which in the defence contention, would have caused the plaintiff to suffer the damages they sue for in any event. But these issues are framed not as a 'crumbling' or 'thin' skull situation. Rather, it is said they should be considered a question of contingencies – damages should be reduced by substantial percentages because of the risk the harm would have occurred regardless of the negligence of the defendant(s). In this case, the deductions to various heads of damages ranged as high as 70% from the award that was otherwise accepted to be proven and assessed by the trial judge.

The legal framework governing this question was settled in *Dornan v. Silva*, 2021 BCCA 228, but its application in the trial court has led to appellate intervention in several cases since, including *Sharma v. Sagoo*, 2024 BCCA 319, *Murphy v. Snippa*, 2024 BCCA 30, as well as this decision.

The key issue arising in these cases is the lack of a firm evidentiary foundation to measure a measurable risk – as the Court of Appeal noted at paragraph 18, 'The respondents did not adduce any evidence at the trial.' Yet radical reductions to the damages awarded were sought, and acceded to, by the trial judge, without expert evidence to moor those deductions.

The Court of Appeal made clear that evidence is necessary; a percentage guess as to whether something pre (or in many instances in *Murphy v. Morgan*, post) accident would have led to the same damages arising in any event is not sufficient. There must be a 'a measurable and measured risk' to justify a contingency deduction (at para. 101)."

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