

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Rose v. Canadian Natural Resources Ltd.*,  
2025 BCSC 1108

Date: 20250616  
Docket: S199460  
Registry: Vancouver

Between:

**Daniel Raymond Rose Jr., Marcel Raymond Rose, Nicole Suzanne Rose,  
Megan Elizabeth Lamb, and Candace Sarah Rainey**

Plaintiffs

And

**Canadian Natural Resources Limited**

Defendant

Before: The Honourable Justice Kirchner

## Reasons for Judgment

Counsel for the Plaintiffs:

J. Frame

Counsel for Defendants:

C.E. Chisholm  
A. Bilenkey, Articled Student

Place and Date of Hearing:

Vancouver, B.C.  
May 9, 2025

Place and Date of Judgment:

Vancouver, B.C.  
June 16, 2025

**Table of Contents**

**I. INTRODUCTION ..... 3**

**II. ISSUES ..... 3**

**III. DISCUSSION ..... 4**

    A. Is Mile 98 Road Part of the Plaintiff’s Property? ..... 4

    B. CNRL’s Road Use Permit..... 12

        1. The 2017 Permit ..... 12

        2. The 1991 Permit ..... 13

        3. Conclusion on Road Permits ..... 18

    C. The Plaintiffs’ Trespass and Nuisance Claims ..... 19

        1. Overview..... 19

        2. Suitability for Summary Trial..... 20

        3. Trespass..... 22

        4. Nuisance..... 25

        5. Damages ..... 26

**IV. CONCLUSION ..... 27**

**I. Introduction**

[1] The defendant, Canadian Natural Resources Limited (“CNRL”) applies under the summary trial rule (R. 9-7) to dismiss the plaintiffs’ claim. The plaintiffs have sued CNRL seeking damages for trespass and nuisance in respect of CNRL’s use of a road that passes through the plaintiffs’ property. The plaintiffs argue the matter is not suitable for summary trial.

[2] The road in issue is referred to as the Mile 98 Road which runs east from Mile 98 on the Alaska Highway. The plaintiffs concede CNRL and other members of the public are permitted to use the road but argue CNRL has exceeded this authorized use by constructing culverts on a portion that passes through the plaintiffs’ property, causing the property to flood. They also claim CNRL’s vehicles travel at excessive speeds on the road and kick up dust that settles on the plaintiffs’ property.

[3] CNRL argues Mile 98 Road is a public road and that the British Columbia Oil and Gas Commission (now the B.C. Energy Regulator) has authorized CNRL to use and maintain the road under a “Petroleum Resources Road” or “PRD” permit issued under *Oil and Gas Activities Act*, S.B.C. 2008, c. 36 (now called the *Energy Resource Activities Act*). CNRL maintains it has a right to place the culverts on the road under this permit and denies the culverts have caused water to enter the plaintiffs’ property. It also argues the plaintiffs have not proven causation for their nuisance claim or damages for either the trespass or nuisance claim.

**II. Issues**

[4] Broadly speaking, there are four issues on this summary trial application:

- a) What, if any, rights do the plaintiffs have in the Mile 98 Road that might give them standing to bring this claim?
- b) What, if any, rights does CNRL have to use the Mile 98 Road within the plaintiffs’ property? Specifically, what, if any, rights are conferred on CNRL by its road use permit?

- c) Have the plaintiffs established their claims in trespass and or nuisance?
- d) Is this matter suitable for summary trial disposition?

[5] In my view, the issue of suitability arises only in respect of the plaintiffs' claims in nuisance and trespass and I propose to address it in that context.

### **III. Discussion**

#### **A. Is Mile 98 Road Part of the Plaintiff's Property?**

[6] The plaintiffs are the registered owners of three properties in northeast British Columbia just east of Mile 98 on the Alaska Highway: District Lot (DL) 2207, DL 2208, and DL 2567. This case primarily concerns DL 2207 which the plaintiffs acquired in 2013.

[7] Mile 98 Road enters DL 2207 approximately five kilometres east of the Alaska Highway and a 0.72-kilometre stretch passes through DL 2207. The road then continues beyond the eastern boundary of DL 2207, including through DL 2567 which is another lot owned by the plaintiffs. However, unlike the portion through DL 2207, CNRL has a statutory easement for the portion that passes through DL 2567 and the plaintiffs receive annual payments for CNRL's use of that part of the road.

[8] The Crown grant for DL 2207 was issued on March 9, 1965, almost 50 years before the plaintiffs purchased it. It is clear from historical aerial photos of the area and surveys of neighbouring lots that Mile 98 Road pre-dated the original Crown grant for DL 2207 and traversed the area that would become that lot. In short, Mile 98 Road existed within DL 2207 before the Crown granted it to the plaintiffs' predecessors in title in 1965.

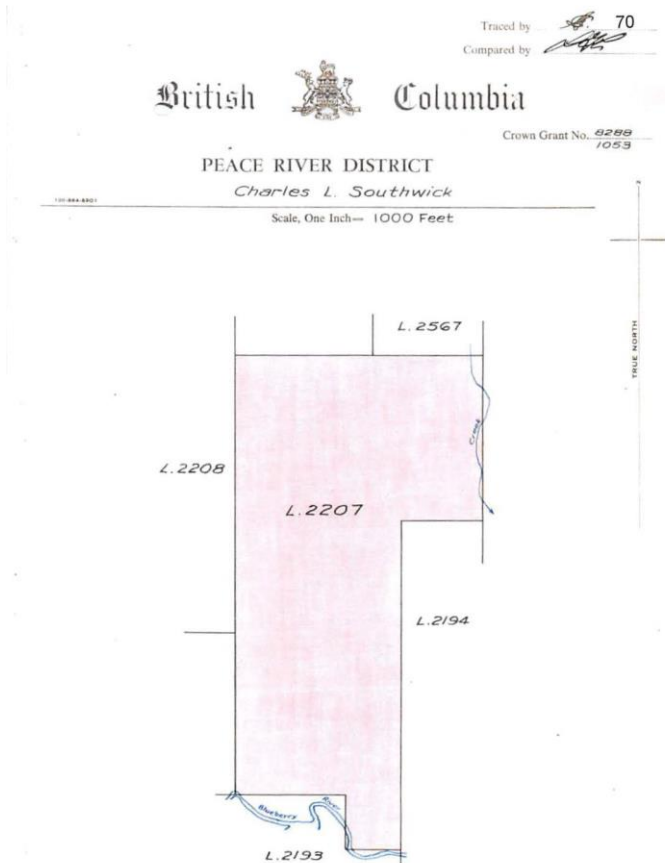
[9] Despite that, neither the wording of the Crown grant nor the plan attached to it refer to or exclude Mile 98 Road from the grant. DL 2207 is described in the grant as including the area over which the road passes. It reads:

All that Parcel or Lot of Land situate in Peace River District, and more particularly described on the Map or Plan hereunto annexed and coloured red, and number Lot Two thousand two hundred and seven (2207) on the

Official Plan or Survey of the said Parcel or Lot in the Province of British Columbia...

[Emphasis added]

[10] DL 2207 is coloured solid red on the plan annexed to the Crown grant, save for two watercourses. Mile 98 Road is not shown at all on the plan:



[11] However, the terms of the grant reserved a public right of use and passage over any existing road or trail that passed through the lot. That portion of the grant reads as follows:

PROVIDED also that this Grant is issued and accepted on the understanding that the Grantee, his heirs and assigns, shall not interfere with the free and unrestricted use of and passage by the public over any roads and trails existing through the said lands, and it is further provided that this condition shall remain in force for so long as may be deemed necessary by the Minister of Lands, Forests, and Water Resources for and in right of the Province of British Columbia.

[Emphasis added]

[12] CNRL argues these words exempt Mile 98 Road from the Crown grant of DL 2207 such that the road is and always has been a public highway that was unaffected by the Crown grant.

[13] I disagree for the following reasons.

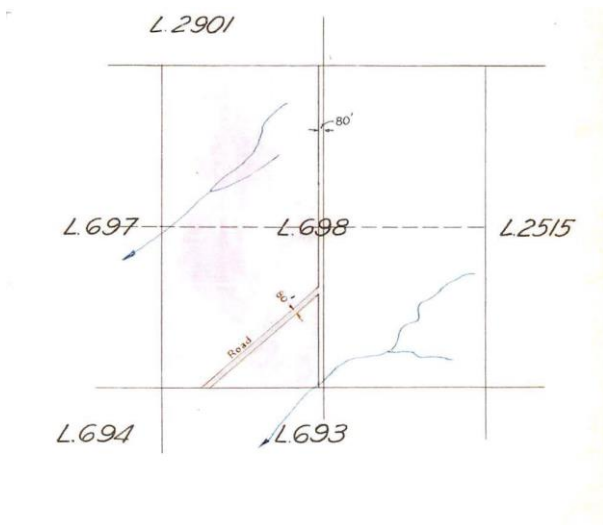
[14] First, on the face of the grant itself, all the land coloured red on the annexed plan was granted. As mentioned, the only portions that were not coloured red are the watercourses. Since the area over which Mile 98 Road passes is coloured red and the road is not demarcated on the plan, I find the road area was included in the grant.

[15] This conclusion is supported by the evidence of other Crown grants made for nearby properties around the same time. A 1971 grant of the west half of DL 68, a 1974 grant of DL 2553, and a 1977 grant of DL 2307 each contain the same language found in Crown grant for DL 2207, namely that the granted lands are “coloured red” on the attached plan. However, the wording about the roads in those three Crown grants is different to the Crown grant for DL 2207. Those grants read:

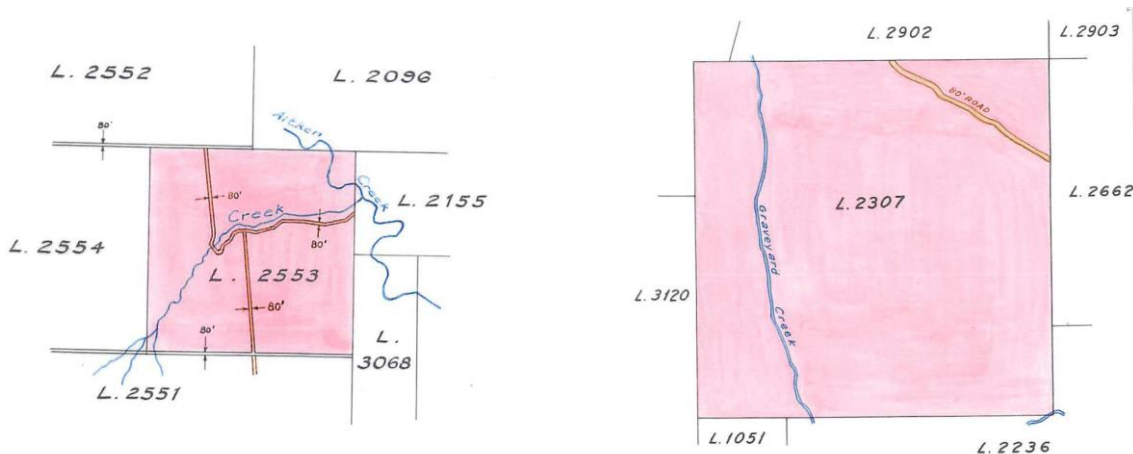
PROVIDED also that any road or roads to the width indicated on the map or plan hereunto annexed, shown coloured, outlined or otherwise designated thereon in a colour other than red are not included in this Grant.

[Emphasis added]

[16] The attached plan for DL 68 shows a road within the lot area. It is difficult to see whether the road is coloured something other than red but it does show a road width:



[17] The plans attached to the Crown grants for DL 2553 and DL 2307 are clearer in that the road in each is plainly a different colour:



[18] This evidence indicates that if the Crown intended to exclude a road from a Crown grant, its practice was to specify that in the grant itself, including on the attached plan. While these three examples come after the Crown grant for DL 2207, the grant of DL 67 was only six years later and there is nothing in the evidence to suggest the practice of specifying excluded roads in the plan developed after 1965.

[19] A second reason for finding that Mile 98 Road is not a public highway as it passes through DL 2207 is that it does not come within the definition of “highway” under the *Transportation Act*, S.B.C. 2004, c. 44:

"highway" means a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land or improvement that becomes or has become a highway by any of the following:

- (a) deposit of a subdivision, reference or explanatory plan in a land title office under section 107 of the *Land Title Act*;
- (b) a public expenditure to which section 42 applies;
- (c) a common law dedication made by the government or any other person;
- (d) declaration, by notice in the Gazette, made before December 24, 1987;
- (e) in the case of a road, colouring, outlining or designating the road on a record in such a way that section 13 or 57 of the *Land Act* applies to that road;
- (f) an order under section 56 (2) of this Act;
- (g) any other prescribed means;

[Emphasis added]

[20] In *Adam v. Insurance Corporation of British Columbia*, 2018 BCCA 482, the Court of Appeal held that this definition exhaustively lists the ways by which a highway can come into existence. At issue in that case was whether a gravel bar on the Fraser River that was frequently used by ATV riders was a "highway" such that I.C.B.C. was obligated to pay out the plaintiff's claim for a hit-and-run accident. The trial judge interpreted the definition of "highway" as automatically including any "public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, [or] ferry approach". He found that paragraphs (a) to (g) applied only to new highways that might come into existence by one of those means. Thus, he found, where there is an existing public street, road, trail etc., it did not require one of (a) through (g) to be recognized as a highway. The Court of Appeal found this interpretation "demonstrably wrong" and concluded a highway could only be recognized as such if it came into existence through one of the enumerated methods:

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

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

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

[Underling emphasis added by the BCCA. Bold emphasis is mine.]

[21] The court then considered the legislative history and jurisprudence of the *Transportation Act* and its forerunner, the *Highway Act* and concluded:

[55] I agree with the Attorney General the definition in the *Transportation Act* now establishes a complete code: the only means by which a highway can come into existence in British Columbia are set out in s. 1 of the *Transportation Act*.

[Emphasis added]

[22] CNRL relies on paragraph (e) of the definition of “highway” and s. 13(1) of the *Land Act* to argue that Mile 98 Road was withheld from DL 2207 in the original Crown grant. However, as I discussed earlier, the Crown grant for DL 2207 does not colour, outline, or designate Mile 98 Road in the grant or the annexed plan so I find para. (e) does not assist CNRL. Nor does any other paragraph in the definition. Thus, Mile 98 Road is not a “highway” within the *Transportation Act* definition.

[23] Thus, I agree with the plaintiffs that the wording in the Crown grant preserves a right of the public to use the Mile 98 Road as it passes through DL 2207 but it does not exclude the road area from the Crown grant. Essentially, DL 2207 was granted in full (other than the specified watercourses) to the plaintiffs’ predecessors in title, subject to a right for members of the public to traverse Mile 98 Road as it crosses

the property. That means the road is part of the plaintiffs' property but subject to a public right of use. This conclusion is consistent with other jurisprudence of this court and with the legal principles applicable to construing Crown grants.

[24] In *Shaman v. Meek*, 2019 BCSC 9, Justice Funt considered a Crown grant with the same language as the DL 2207 grant regarding the public right to use any road. He found that wording, which he called the "free passage provision", preserved a public right of passage but the road itself was private:

[104] ...the Crown viewed the oil road as a private road and not a public road. The free passage provision in the Crown grant contemplates that title to the property where the road is located passed to the grantee, subject to the public's free passage and use so long as the Minister may deem necessary. I note again that the free passage provision was typed specifically as part of the grant. The inference that I draw is that the parties, in particular, the Crown, gave contemporaneous thought to the existing oil road and purposely included the safe passage provision because the Crown viewed the road as a private road.

[Emphasis added]

[25] The "free passage provision" is also typed into the Crown grant for DL 2207 which brings this case squarely in line with *Shaman*. That said, I do not think the inference drawn from the typeface is necessary to conclude that the road area was included as part of the grant, subject to a public right of passage. In my view, that is evident on the face of the grant.

[26] Legal principles respecting the interpretation of Crown grants also favour the conclusion that the road area was included with the grant. Where a grantee gives valuable consideration, "the grant will be construed, where possible, in favour of the grantee": Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, loose-leaf (2019-Rel. 22), 3rd ed. (Toronto: Thomson Reuters, 2006) at §31:90:10, quoted with approval in *Bonavista Energy Corporation v. Fell*, 2020 BCCA 144 at para. 38. The grant states that the grantee, Charles L. Southwick, paid \$800 for the grant so the principle of construction applies. The grant is capable of an interpretation that includes the road area within grant but reserves the right of free public passage over the road. That interpretation must be preferred to favour the grantee.

[27] CNRL next relies on s. 4 of the *Highway Act*, R.S.B.C. 1960, c. 172 that was in force at the time of the Crown grant to suggest Mile 98 Road is a public highway. In that Act, “highway” was simply defined as follows:

“highway” includes all public streets, roads, ways, trails, lanes, bridges, trestles, ferry landings and approaches, and any other public way.

[28] Section 4 of that *Act* deems all roads, other than private roads, to be common and public highways and s. 5 stipulates that the “soil and freehold of every public highway is vested in Her Majesty, her heirs and successors.”

[29] CNRL argues that these provisions deem Mile 98 Road to be a public highway because there is no evidence to suggest it was a private road when the grant was made. Again, I disagree.

[30] First, as discussed earlier, the Crown grant itself is evidence that Mile 98 Road was made a private road, albeit subject to an easement for public passage. As a result of the grant, the “soil and freehold” was transferred from the Crown to the grantee. It ceased to be vested in Her Majesty.

[31] Second, the Court of Appeal in *Adam* was alive to the equivalent of s. 4 when it held that the definition of highway exhausts all means by which a highway can be established. The court reviewed the legislative and jurisprudential history of the *Transportation Act* and, its predecessor, the *Highway Act*. It found the definition of highway in the *Transportation Act* “existed in a combination of ss. 2, 4 and 5(1) of the *Highway Act*.” In other words, to the extent the deeming provision in s. 4 serves to establish a public highway, it is now encapsulated by one of the paragraphs in the definition of “highway” in the *Transportation Act*. The court said that definition “gathered the requirements for a ‘highway’ into one definition section”. Thus, the Court of Appeal did not consider the deeming provision to do anything for the establishment of a highway that is not now found in the definition of “highway” in s. 1 of the *Transportation Act*. As I have found earlier, none of those provisions apply to Mile 98 Road as it traverses DL 2207.

[32] I therefore conclude that Mile 98 Road was included in the original Crown grant for DL 2207 such that it became a private road, albeit subject to a public right of passage.

**B. CNRL’s Road Use Permit**

**1. The 2017 Permit**

[33] Even if Mile 98 Road is part of the plaintiffs’ land, CNRL claims it was authorized to maintain the road, including by placing culverts on it, under a “Petroleum Development Road” or “PDR” permit issued to it by the Oil and Gas Commission on December 13, 2017. The PDR permit authorizes CNRL to “construct and maintain an oil and gas road” pursuant to s. 25(1) of what is now the *Energy Resource Activities Act* and to “enter, occupy and use any unoccupied Crown land located within the operating area to carry out the oil and gas activities authorized” by the permit.

[34] Section 25(4) of the *Energy Resource Activities Act* provides that if the Commission issues a permit under subsection (1), it “must provide notice, in accordance with subsection (5), to the owner of the land on which an operating area is located.” That form of notice must:

- a) advise the land owner of the issuance of the permit and of the location of the proposed site of an oil and gas activity on the land owner’s land; and
- b) state that the land owner may appeal under section 72 the decision to issue the permit, and include an address to which an appeal may be sent.

[35] There is no evidence that the Commission or CNRL complied with s. 25(4) when the permit was sought or issued. Marcel Rose, one of the plaintiffs, deposes that the plaintiffs “have never been notified by the defendant of its intention to enter DL 2207 under the *Energy Resource Activities Act*”. That evidence is not refuted.

[36] I agree with the plaintiffs that it is not open to CNRL to rely on the permit as against the plaintiffs when it did not comply with the notice provisions under the *Act*.

While CNRL emphasizes that the plaintiffs have never challenged the permit, it has neither argued nor pleaded that the plaintiffs' claim is a collateral attack on the permit. (In view of the apparent non-compliance with the notice requirements, it is not clear that CNRL could claim it is a collateral attack in any event.) Thus, I find the 2017 permit does not assist the defendants.

**2. The 1991 Permit**

[37] CNRL argues that it was not required to satisfy the notice requirements under the *Energy Resource Activities Act* because the 2017 PDR permit was simply a transition of an existing PDR permit to its modern equivalent under the *Energy Resources Activities Act*. However, even if the transition could have allowed CNRL to avoid the notification requirements (and I am not persuaded that it could), the evidence respecting the pre-existing permit falls well short of establishing any authorization that applies to that portion of Mile 98 Road that passes through DL 2207. In fact, I am not persuaded the pre-existing permit that CNRL relies on is a PDR permit at all.

[38] The pre-existing permit on was issued on July 16, 1991 but has its origins in an October 6, 1981 application by Czar Resources Ltd for a Petroleum Development Road "at approximately Mile 98 of the Alaska Highway". Czar's agent made the application to the Petroleum Resources Branch of the Ministry of Energy, Mines and Petroleum Resources seeking "a Reserve of Crown Land for the purposes of a Petroleum Development Road" on specified lands. It states that Czar was making the application because it carries out "all maintenance on this road."

[39] Also on October 6, 1981, Czar's agent sent a sketch plan showing the approximate location of the road. The cover sheet stated that DL 2207 and three other specified lots "may be affected by this application."

[40] On November 24, 1981, the Commissioner, Petroleum Titles Branch wrote to the Ministry of Lands in Fort St. John seeking its concurrence for the application. The Ministry responded more than a year later on February 8, 1983 advising that the location of the road was not correctly identified in the application. It provided a

sketch plan purporting to show the correct location of the road and stated that it had “no objections to the existing road becoming a petroleum development road” as long as the “standard clause protecting public use” is a condition in the permit. It also noted that “Peace Wook [*sic*] Products has an interest in the road, having constructed a portion of it” but it made no observation about DL 2207.

[41] On February 25, 1983, the Commissioner, Petroleum Titles Branch wrote to the Ministry of Lands in Fort St. John stating:

We have now received word that the plat forwarded with this application was not correct. We are enclosing a new plat on which the proposed road has been properly outlined.

[42] According to the evidence on this application, the matter then remained dormant until February 6, 1989 when the Petroleum Titles Branch wrote to Czar’s agent asking if Czar still wished to proceed with the application. Czar’s agent confirmed on March 7, 1989 that it still wished to proceed.

[43] Again, the record is silent on any progress until April 26, 1991 when the Petroleum Titles Branch advised Czar’s agent that:

...we are proceeding with this application and require an access permit for the portion of PDR 82 [Mile 98 Road] which connects with Mile 98 of the Alaska Highway.

[Emphasis added]

As I read this passage, the contemplated access permit appears to be distinct from the PDR permit. The letter suggest that the access permit was needed before a PDR permit could be issued.

[44] On July 16, 1991, the Ministry of Transportation and Highways granted Czar Resources a permit to “Construct, Use and Maintain Access to a Provincial Highway”. CNRL claims this is the PDR permit for the Mile 98 Road but to me it appears to be the highway access permit that was described in the April 26, 1991 letter as being a prerequisite to obtaining a PDR permit. It is not the PDR permit itself. I say this because it was issued by the Ministry of Transportation and Highways rather than the Ministry of Energy, Mines, and Petroleum Resources; it

expressly refers to accessing the Alaska Highway both in its title (“Permission to Construct, Use, and Maintain Access to a Provincial Highway”) and in its text; and it states that it applies only to the “use of a public highway” or “other matter within the jurisdiction of the Minister of Highways.” It reads in part:

The works comprising of the use of one existing Petroleum Development Road accessing the Alaska Highway 97 at approximately Mile 98, adjacent to District Lot 1667 are hereby approved insofar as they relate to the use of a highway right of way, interference with public works, or other matter under the jurisdiction of the Minister of Transportation and Highways, and permission to construct, use, maintain and operate the said works is hereby granted to Czar Resources Ltd....

[Emphasis added]

[45] Paragraph 7 of the authorization states:

7. That the permission herein granted to use and maintain the said works is only granted for such time as the land on which the said work is constructed is under the jurisdiction of the Minister of Transportation and Highways.

[Emphasis added]

[46] Whether this authorization relates only to the intersection with the Alaska Highway or whether it applies to the Mile 98 Road more generally, it is clear that it does not apply to that part of Mile 98 Road that passes through DL 2207 because that portion of the road is not a public highway and is not within the jurisdiction of the Minister of Transportation and Highways. Thus, whatever the scope of this authorization, it did not give Czar Resources or its successors any interest in DL 2207.

[47] On July 24, 1991, Czar Resources’ agent forwarded this July 16, 1991 authorization to the Ministry of Energy, Mines and Petroleum Resources and asked if “permanent PDR status will be given for this Road”. I find this further supports the conclusion that the July 16, 1991 authorization was the prerequisite authorization for the connection with the Alaska Highway needed to obtain a PDR permit for Mile 98 Road and not the PDR permit itself.

[48] On August 21, 1991, the manager, Petroleum Titles Branch wrote to the Ministry of Lands about the road asking it to “proceed with the establishment of a notation of interest as per the attached application form”. On September 16, 1991, the Ministry of Lands responded advising that a preliminary status indicates a number of possible conflicts which must be resolved before the application can be accepted. One of the stated conflicts is that the road “crosses District Lot 2207 which is private”.

[49] On November 12, 1991, the Petroleum Titles Branch advised Czar Resources’ agent of this conflict and stated “Permission to cross the land must be obtained from the owner.” Thus, at this stage it appears that no PDR permit had been issued and one would not be issued until the conflict over District Lot 2207 was resolved by way of agreement with the owner of that lot.

[50] On June 17, 1992, the Tenure Administrator in the Petroleum Titles Branch wrote to Czar Resources’ agent as follows:

Does Czar still require Petroleum Development Road status for PDR 82? If so, we require a brief summary outlining status and maintenance information for our records.

A reply to our letter, dated November 12, 1992, requesting resolution of conflicts as advised by the Ministry of Environment, Lands & Parks has not been received. Your cooperation in providing this information would be appreciated.

Thus, the conflict with DL 2207 had not been resolved by June 1992.

[51] On July 17, 1992, Czar Resources confirmed that it “would like to keep Petroleum Development Road Status on the above mentioned roads”, noting that Czar provides maintenance on a regular basis. However, the documents just reviewed suggest that PDR status had not yet been granted (or permanently granted) due to the conflict with DL 2207. Czar’s July 17, 1992 letter did not address that conflict.

[52] On July 30, 1992, the Petroleum Titles Branch responded to Czar Resources advising that “temporary approval” was granted for the road on November 24, 1981

but the Branch had never received the survey plans or photo mosaics needed under the Petroleum Development Road Regulations to “retain PDR status.” It asked Czar Resources to forward those.

[53] A year later, it seems nothing had been done. On June 21, 1993, the Petroleum Titles Branch wrote to Czar Resources as follows:

We are currently conducting a review of our Petroleum Development Road files.

Does Czar still require Petroleum Development Road status for PDR 82? If so, we require a brief summary outlining status and maintenance information for our records.

A reply to our letter dated July 30, 1992 requesting the same information has not been received. Your cooperation in providing the information, this year, would be appreciated.

[54] Czar Resources responded as follows on July 21, 1993:

Czar Resources maintains this road on a regular basis. In June we spent approximately \$100,000 to repair the damage the heavy rains had caused. In July \$60,000.00 was spent to shale this road.

There are no survey plans or photo mosaics available for this PDR.

[55] On March 1, 1994, Czar Resources’ agent wrote to the Petroleum Titles Branch advising that the “center-line survey of the above mentioned road has been completed and a survey plan will be submitted by March 15, 1994.” This was followed by a letter dated March 15, 1994 attaching “two prints of the plan of the above Petroleum Development Road.”

[56] On April 12, 1994, the Petroleum Titles Branch sent a fax to Czar Resources stating in the cover sheet that the “Possible conflicts still not resolved as per attached letter concerning PDR 82.” No letter is attached to the copy of the cover sheet in evidence but it would seem logical that it was the September 16, 1991 letter identifying the conflict with DL 2207.

[57] On September 14, 1994, the Petroleum Titles Branch wrote to Czar Resources about six petroleum development roads, including Mile 98 Road. Once again, the Branch stated:

We are currently conducting a review of our Petroleum Development Road files.

Does Czar still require Petroleum Development Road status for the referenced petroleum development roads? If so, we require a brief summary outlining status and maintenance information for our records.

Your cooperation in providing this information would be appreciated.

[58] Once again, Czar Resources responded as follows on September 20, 1994:

Czar Resources Ltd. would like to keep Petroleum Development Road Status on the above mentioned roads.

Czar Resources maintains these roads on a regular basis.

[59] There was an identical exchange of correspondence in 1995 and similar correspondence in subsequent years with Czar Resources' successor, Ranger Oil Limited and eventually CNRL. The subject of resolving the conflict with DL 2207 seems to have dropped from discussion but there is no evidence that it was ever resolved.

[60] On October 20, 2017, CNRL applied to the Oil and Gas Commission to transition "PDR status to Road Permit only" for Mile 98 Road. Then on December 13, 2017, the 2017 permit was issued under the *Oil and Gas Activities Act*. However, there is no evidence that a permanent PDR permit was ever issued prior to October 20, 2017 and no evidence that the conflict with DL 2207 was ever resolved.

[61] Ultimately, I am not persuaded that the 2017 permit was a transition of a pre-existing permit because there is no pre-existing permit in evidence. It seems from the history I have just relayed that it never was issued, perhaps in part because the conflict with DL 2207 was never resolved. Regardless, whatever authorization CNRL or its predecessor had to use and maintain the Mile 98 Road did not give it any authority to use that part of the road that passes through DL 2207 beyond the general public use contemplated by the Crown grant for DL 2207.

### **3. Conclusion on Road Permits**

[62] For these reasons, I conclude that neither the 2017 nor the 1991 permits assist CNRL in resisting the plaintiffs' trespass and nuisance claims.

**C. The Plaintiffs' Trespass and Nuisance Claims**

**1. Overview**

[63] That leads me to the substance of the plaintiffs' trespass and nuisance claims. The plaintiffs argue that the evidence clearly makes out a trespass claim that should go to trial and a good case for a nuisance claim that should also be tried. They point largely to CNRL's installation of culverts on Mile 98 Road as it passes through DL 2207, flooding of their property which they say has resulted from these culverts, and dust that falls on their property from the vehicle traffic using Mile 98 Road. The plaintiffs argue the factual and legal nuances of these claims make the matter unsuitable for a summary trial.

[64] CNRL argues that even if that part of Mile 98 Road that runs through DL 2207 is private and the permits do not authorize CNRL to maintain that part of the road, the plaintiffs' claims should still be dismissed because they have not proven them on the evidence. CNRL argues it was incumbent on plaintiffs to marshal the evidence needed to prove their claims in response to CNRL's summary trial application and without having attempted to lead the necessary evidence, they cannot simply assert that the matter is unsuitable for summary trial.

[65] I largely agree with CNRL on this point. By way of summary, I find the evidence on this application supports a finding that CNRL's placement of the culverts on or adjacent to that part of Mile 98 Road that passes through DL 2207 constitutes a trespass. I also accept that the culverts cause the plaintiffs' land to flood from time to time and this too constitutes a trespass as well as a nuisance. I find the evidence does not establish a nuisance as it relates to CNRL's trucks kicking up dust as they traverse DL 2207 for the simple reason that the plaintiffs have not led evidence that it is CNRL's vehicles that are responsible for this. I also find the plaintiff have not proven any damages that flow from the trespass or nuisance. I find the plaintiffs have not tendered evidence necessary to prove these aspects of their claim as they are required to do in response to a summary trial

application, even if they maintain the case is unsuitable for summary disposition. As a result, I find that the plaintiffs claims must be dismissed.

## **2. Suitability for Summary Trial**

[66] Rule 9-7(2)(a) of the *Supreme Court Civil Rules* provides that a party may apply for judgment by way of a summary trial, either on an issue or generally, in an action in which a response to civil claim has been filed. On hearing a summary trial application, the court may grant judgment unless: (i) the court is unable, on the whole of the evidence before it, to find the facts necessary to decide the issues of fact or law; or (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

[67] The plaintiffs argue the case is not suitable for summary trial because their claims cannot be summarily dismissed. They argue trespass is clearly made out on the evidence of the culverts and diverted water and thus should proceed to trial. They submit that an arguable case has been raised on the nuisance question but it is “factually nuanced as the court must consider whether the interference with the plaintiffs’ use and enjoyment is substantial and unreasonable”. They submit this requires “a more fulsome investigation and analysis of the alleged nuisance.” They say they have provided “some examples of the nuisance caused by dust” and suggest these examples “without a doubt prevents dismissal of the nuisance claim by way of summary judgment.”

[68] The plaintiffs’ position appears to conflate a summary trial application under Rule 9-7 with a summary judgment application under Rule 9-6, but the two are materially distinct. A summary *judgment* application, when brought by a defendant, is premised on the notion that the plaintiff’s claim discloses no genuine issue for trial. If a genuine issue is found to exist, the application is dismissed and the matter may proceed to trial. By contrast, a summary *trial* application is *a trial of the action itself* and the plaintiff bears the onus of proving its claims, *even if it is not the applicant*, unless the court finds the matter is unsuitable for summary determination: *Gichuru v.*

*Pallai*, 2013 BCCA 60 at para. 35; *Placer Development Ltd. v. Skyline Explorations Ltd.*, 1985 CanLII 147, 67 B.C.L.R. 366 (C.A.).

[69] It is no answer to a summary trial application to say the claims have merit but their nuances demand a conventional trial. The question of suitability turns on whether the court can find the facts needed to decide the issues and whether it would be unjust to decide the case on a summary basis.

[70] Once a summary trial application is brought, the responding party is required to put itself in the best position possible to prove or defend the claim, even if its primary position is that the matter is not suitable for summary trial disposition: *Gichuru*, paras. 32-33; *Everest Canadian Properties Ltd. v. Mallmann*, 2008 BCCA 275. As stated in *Anglo Canadian Shipping Co. v. Pulp, Paper and Woodworkers of Canada, Local 8* (1988), 27 B.C.L.R. (2d) 378 (C.A.):

...if adequate notice is given to an opposing party that a summary trial application is going to be brought on, there then falls on that party an obligation to take every reasonable step to complete as much of the pre-trial procedures as is necessary to put him in the best mastery of the facts that is reasonably possible before the summary trial proceedings are heard.

[71] As discussed in *Placer Development Ltd. v. Skyline Explorations Ltd.*, 1985 CanLII 147, 67 B.C.L.R. 366 (C.A.), a party responding to a summary trial application has three options: (1) agree the case is suitable for summary trial and seek judgment in its favour; (2) take the position the case is not suitable for summary trial and oppose the application on that basis; or (3) maintain it is not suitable for summary trial but nevertheless tender evidence needed to prove the party's case, should the court find the matter suitable for summary trial. In *Brown v. Douglas*, 2011 BCCA 521, Justice Newbury observed that a party who proceeds on the second option "runs a risk" that the court will not agree the case is inappropriate for summary trial and give judgment against that party. In my view, that is largely what has happened here.

[72] As I have said, the plaintiffs appear to treat this as a summary judgment application. They say their claims have merit and therefore cannot be dismissed.

However that misapprehends what they must do in response to a summary trial application. If, in fact, their claim in trespass is “established by the evidence” as they suggest, it is incumbent on them to lead evidence to prove the losses that flow from that. What loss or damage have the plaintiffs suffered as a result of that trespass? What amount of damages should be awarded to compensate the plaintiff for any such loss or damage? The plaintiffs have not led evidence to address these points.

[73] With respect to nuisance, there is nothing uniquely complicated about that tort that makes it inherently unsuitable for a summary trial. As counsel for CNRL points out, there are examples of successful summary trial applications for nuisance claims: *Milward v. Cache Creek (Village)*, 2024 BCSC 352. I do not agree with the plaintiffs’ submission that a trial is needed for a “more fulsome investigation and analysis” of that claim. Apart from the “examples” of the dust, the plaintiffs have not persuaded me that a deeper investigation or analysis could not have been done through the pre-trial procedures that are available to be utilized in advance of a summary trial application.

[74] Thus, in responding to the defendant’s summary trial application, it is not sufficient for the plaintiffs to assert that the evidence shows they have a meritorious claim that should proceed to trial. If there is a meritorious claim, it is incumbent on the plaintiffs to lead the evidence to prove that claim or risk having it dismissed. If there are conflicts in the evidence that cannot be resolved in a summary proceeding, then the matter would proceed to trial. However, that possibility does not relieve a plaintiff from responding substantively to a summary trial application.

[75] With those principles and findings in mind, I turn to the evidence that has been led in support of the plaintiffs’ claims.

### **3. Trespass**

[76] The plaintiffs argue there are two trespasses: one is the placing of culverts under the Mile 98 Road within DL 2207 and the other is the resulting diversion of water onto their land. They say the placement of culverts exceeds the permitted

public use of the road under the free passage provision in the grant and is therefore a trespass.

[77] The evidence of the placement of culverts is not in dispute. On behalf of the plaintiffs, Marcel Rose deposes that CNRL placed the culverts in 2016 and 2017. CNRL does not dispute that evidence. I agree with the plaintiffs that this exceeds the authorized use of the road as it passes through DL 2207.

[78] The scope of the permitted use is set out in the Crown grant for Lot 2207. It reserves for public a right of “free and unrestricted use of and passage” over the road. It does not allow the public to occupy the road or place culverts under or adjacent to it.

[79] Using the road for a purpose beyond the permitted use constitutes a trespass. In *Granfield v. Cowichan Valley Regional District*, 1996 CanLII 356 at para. 37 the Court of Appeal stated:

The grantee of an easement has the right granted to him and no more. Thus, if on the servient tenement he does an act beyond his grant, he becomes, to the extent of that act, commonly called "excessive user", a trespasser.

[80] In *Lafontaine v. University of British Columbia*, 2018 BCCA 307 at para. 49, Justice Saunders, for the majority, observed that “excessive user” simply means a “use that is not encompassed by the easement.”

[81] Marcel Rose also deposes that the culverts have diverted water onto parts of DL 2207, causing portions of it to flood. A video exhibited to his affidavit shows water exiting one of the culverts and flooding a portion of DL 2207. He deposes that before CNRL modified or installed that culvert, this portion of the lot did not flood. Now, he says, it floods almost every year and in a typical spring the water covers approximately two acres. CNRL has led no evidence refuting this.

[82] A second video shows water discharging from another culvert on to DL 2207. Again, Marcel Rose deposes this did not happen before CNRL installed or modified

the culvert and now it floods almost every year covering an estimated five acres on DL 2207. Again, CNRL has led no evidence refuting this.

[83] A third video shows water being discharged from a third culvert. Marcel Rose deposes this water floods an area between seven to 10 acres. Again, he says this did not happen before CNRL installed or modified the culverts and CNRL has led no evidence refuting this.

[84] Marcel Rose also deposes that before the culverts were installed, water flowed along rudimentary ditches on either side of Mile 98 Road and into Blueberry River.

[85] To the extent the culverts divert water onto the plaintiffs' property when that water would otherwise flow by or through the property, I find that constitutes a trespass: *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124 at paras. 126 and 141, leave to appeal to SCC refused, 2017 CanLII 38591 (SCC); *Kerlenmar Holdings Ltd. v. Matsqui (District)*, 1991 CanLII 367, 56 B.C.L.R. (2d) 377 (C.A.); *Medomist Farms Ltd. v. Surrey (District)*, 1991 CanLII 325, 62 B.C.L.R. (2d) 168 (C.A.).

[86] I agree with CNRL that there is a potential limitation issue. Marcel Rose deposes that CNRL placed the culverts in 2016 or 2017. The notice of civil claim was filed on August 26, 2019. The *Limitation Act*, S.B.C. 2012, c. 13, s. 6 places a two-year limitation on actions for trespass. Thus, any trespass that was before August 26, 2017 would be excluded by the *Act*. However, since the culverts remain on the property and, to the extent water diverted onto the property remains there, these constitute continuing trespasses with a fresh cause of action that arises each day: *Mowachaht Band v. British Columbia Hydro and Power Authority*, 1981 CanLII 641, 27 B.C.L.R. 50 (S.C.) at para. 21; *Peter Ballantyne Cree Nation* at paras. 128-148. If there are new instances of flooding that occur within the limitation period, those are also actionable.

[87] I therefore find that the plaintiffs have proven a trespass.

#### 4. Nuisance

[88] I also accept that the diversion of water onto the plaintiffs' land constitutes a nuisance. A nuisance occurs where the defendant has interfered with the plaintiffs' use or enjoyment of land and that interference is both substantial and unreasonable: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para. 19. A substantial interference is one that is non-trivial: *Antrim*, para. 19. Whether an interference is reasonable is a contextual analysis that looks at factors such as the nature, severity, and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff's use, and the utility of the activity: *St. Lawrence Cement Inc. v. Barette*, 2008 SCC 64 at para. 77. The fundamental question is whether it would be unreasonable in all of the circumstances to require the claimant to suffer the nuisance without compensation: *Antrim*, para. 25. This is assessed by balancing the gravity of the harm suffered against the utility of the defendant's conduct in all of the circumstances: *Antrim*, para. 26.

[89] I accept that flooding some 15 acres of the plaintiffs' property is neither a trivial interference nor one that the plaintiffs should reasonably be expected to tolerate. I therefore accept that the flooding is a nuisance as well as a trespass.

[90] However, I am not persuaded the plaintiffs have proven a nuisance with respect to dust falling on their property for the simple reason that the evidence does not show this was caused by CNRL. On behalf of the plaintiffs, Daniel Rose Jr. deposes that vehicles travelling on Mile 98 Road kick up dust that falls on their property. He states:

5. That part of Mile 98 Road that crosses DL 2207 is used quite extensively. I estimate that there are in the range from 20 to 30 vehicle trips along it per day and upwards of 200 vehicle trips per day depending on the usage. The majority of these vehicles are travelling at or above 70 kph and during dry summer conditions, they kick up dust similar to what is shown in the photographs attached as Exhibit A. When I travel Mile 98 Road, I travel at a lower speed to reduce the amount of dust I kick up. My observations have been that my family members and my guests do the same.

6. As a result of the dust, I and my spouse, Candace am constantly having to wash, dust, and clean the exterior and interior of our home. The dirt also gets all over any item left outside, such as patio furniture and vehicles.

[91] Arguably, this could be a non-trivial and unreasonable interference, depending on the balancing exercise of the impact on the plaintiffs' use of their land against the utility of the defendants' conduct. However, there is nothing in these paragraphs stating that it is CNRL vehicles that are kicking up the dust. All members of the public are entitled to use Mile 98 Road so it is not just CNRL's vehicles that use, or may use, the road. Despite this, the plaintiffs have not led evidence to the effect that they have observed CNRL vehicles in particular kicking up dust that settled on their property. It strikes me that would be fairly simple to prove by spending some time watching the road and tracking which vehicles caused excessive dust. There is no reason why that kind of evidence could not be given in an affidavit and I see no reason why a conventional trial would be necessary or even preferable to elicit that kind of evidence.

[92] Marcel Rose then deposes that he has never seen anyone applying water or other dust-suppression measures such as calcium to Mile 98 Road as it crosses DL 2207. However, the plaintiffs have pointed to no authority that would compel CNRL to implement dust control measures on the road. In fact, the plaintiffs' position is that CNRL's rights are limited to passing through DL 2207 and nothing more.

[93] Apart from failing to prove causation, the plaintiffs have not attempted on this application to prove the manner in which the road is being used is unreasonable. They cite the dust as an "example" but go on to say the nuances of whether it is a substantial or unreasonable interference requires a full trial. I am not so persuaded. Again, it is incumbent on the plaintiffs to lead the kind of detailed evidence to prove their nuisance claim on this application, even if their primary position is there should be a conventional trial. I am not persuaded by that primary position and I find the defendants have not established a nuisance other than the diversion of water onto their land.

## **5. Damages**

[94] Nor have the plaintiffs tendered evidence to quantify any loss or damage they have suffered as a result of the established trespasses or nuisance. I accept that the

flooding limits the plaintiffs' ability to use their land but they have not led evidence of any particular use they would have made of the land were it not for the flooding. Nor have they attempted to quantify that loss. While trespass is actionable *per se* and does not require proof of actual damage to render a wrong actionable, the plaintiffs have led no evidence as to what the appropriate remedy is for this wrong. Nor have they made submissions as to some nominal amount of damages that would be appropriate even if an actual loss cannot be quantified.

[95] Conceivably, the plaintiffs might have asked for a mandatory injunction to compel CNRL to remove the culverts potentially any water that remains on DL 2207, but they have not sought that relief in this application or, for that matter, in their notice of civil claim where the relief sought is limited to damages. A lack of evidence as to damages is not a basis for finding a summary trial unsuitable: *Brown*, paras. 29-30.

[96] In short, while the trespasses and some element of nuisance are made out, the plaintiffs have not proven a quantifiable loss or suggested some nominal amount that would result in the damages they seek in their notice of civil claim. For that reason, they have not established a right to the relief sought in the notice of civil claim and the action must be dismissed.

#### **IV. Summary and Conclusion**

[97] This is a summary trial application in which the defendant seeks judgment dismissing the plaintiffs' claim. I find the matter is suitable for summary trial in that the court can find the necessary facts on the application to give judgment and it is not unjust to do so on a summary basis. I find that Mile 98 Road as it passes through DL 2207 is a private road but subject to a right of the public to traverse it. That public right does not permit CNRL to place culverts on that portion of the road within DL 2207 and it committed a trespass by doing so in excess of the limits of the right of public use. I also find CNRL's road use permit is ineffective on that part of Mile 98 Road within DL 2207.

[98] I find the plaintiffs have established a trespass and nuisance with respect to the placement of culverts on Mile 98 Road and the resulting diversion of water onto the plaintiffs' property. However, the plaintiffs have not established any other nuisance and they have not led evidence to support the damages sought in the notice of civil claim. Nor have they made submissions on any nominal damages that might flow from the trespass which is actionable *per se*. I find it was incumbent on them to lead the necessary evidence to prove their claim in full in response to the defendants' summary trial application, even if their primary position is that a summary trial is unsuitable. It is not sufficient for the plaintiffs to show their claim has merit and maintain it should proceed to a conventional trial.

[99] For those reasons, the plaintiffs' action is dismissed. While the plaintiffs were successful establishing their interest in Mile 98 Road within DL 2207 and in proving a trespass and some element of nuisance, CNRL was ultimately successful in having the action dismissed. On that basis, I am inclined to award costs to CNRL but if either party wishes to address that issue, they may do so in written submissions not exceeding three pages and filed through Supreme Court Scheduling within 60 days of this judgment.

"Kirchner J."