COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *LeBourdais v. British Columbia (Public Guardian and Trustee),* 2025 BCCA 319

Date: 20250912
Docket: CA50352

Between:

Corine LeBourdais

Appellant
(Plaintiff)

And

The Public Guardian and Trustee, Administrator of the Estate of Carlo Rupert Eugene Asquini, otherwise known as Carlo Asquini

Respondent
(Defendant)

Before: The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher
The Honourable Justice Iyer

On appeal from: An order of the Supreme Court of British Columbia, dated December 27, 2024 (*Lebourdais v. British Columbia (Public Guardian and Trustee)*, 2024 BCSC 2369, Kamloops Docket 55068).

The Appellant, appearing in person: C. LeBourdais

Counsel for the Respondent: S.A. Besanger

Place and Date of Hearing: Kamloops, British Columbia
June 17, 2025

Place and Date of Judgment: Vancouver, British Columbia
September 12, 2025

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Justice Iyer

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Summary:

The appellant's claim in negligence and nuisance against the Public Guardian in its capacity as the owner of real property was dismissed following a summary trial. The appellant alleged the respondent had negligently constructed a culvert under a roadway crossing Cherry Creek, contrary to the provisions of the Water Act and the Water Act Regulation, or failed to maintain the culvert and thereby caused or contributed to flooding of the appellant's neighbouring property. In the alternative the appellant alleged that the flood damage was caused by the respondent's creation of a nuisance, the obstruction and diversion of the creek. The summary trial judge held the appellant had not established the culvert was negligently designed, constructed or maintained. He further held the flood damage occurred due to historic flooding that over topped the roadway crossing, rather than failure or obstruction of the culvert and that the appellant had failed to establish that interference with her property was caused by a nuisance created by the respondent. Held: appeal allowed and the claim remitted for trial. The summary trial judge erred in relying upon an inaccurate expression of the opinion of an expert and thereby misapprehended the evidence. The error is palpable and overriding and undermines the judge's conclusion that the crossing was "over topped" by record flooding and failed as a result. It is not possible to say that the judge would have rejected the inference that the crossing failed due to a build up of debris, poor maintenance or inadequate inspection as the appellant contended, if he had not misinterpreted the opinion evidence.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] This is an appeal from an order dismissing the appellant's civil claim in negligence and nuisance against the Public Guardian and Trustee (the "Public Guardian") in its capacity as the owner of real property on Cherry Creek, above Kamloops Lake, west of Kamloops (the "Asquini Property").

[2] The appellant owns property adjacent to and downstream from the Asquini Property, through which Cherry Creek also flows. She alleges that in 2012, the Public Guardian replaced a culvert at a road crossing over the creek which had washed out in 2011. She says on May 4, 2017, the culvert washed out again and was displaced downstream to a location where it obstructed Cherry Creek and diverted the path of the creek.

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[3] She claims that on May 5, 2017, numerous trees came down off a hillside, toward which one branch of the creek had been diverted and began to dam the creek. Over the course of the next few days, the water continued in its diverted path, forcing debris onto her property, eroding the ground, leaving a large trench and undermining structures on her property.

[4] She alleges that erosion and degradation of the banks of the creek upstream from her property, and along the banks of the creek on her property, has continued to progress since May 2017.

[5] She commenced a civil action in nuisance and negligence against the Thompson Nicola Regional District, the Province of British Columbia and the Public Guardian. The action against the Regional District was dismissed by the Court. The action against the Province was dismissed by consent. The action against the Public Guardian was dismissed, for reasons indexed at 2024 BCSC 2369, following a five-day summary trial on liability in August 2024, which entailed cross-examination on affidavit evidence before the trial judge. It is the order dismissing the claim against the Public Guardian that is before us.

[6] The allegations of nuisance and the allegations of negligence against the Public Guardian overlap. They relate to interference with the flow of Cherry Creek and consequent flooding of the appellant’s property. Particulars of the nuisance and/or negligence alleged in the pleadings include:

a) altering the flow and course of Cherry Creek, to the detriment of the appellant and her downstream property;

b) constructing the crossing and installing the culvert without proper permits or governmental approvals and without proper guidance from a qualified engineer;

c) installing the culvert in a location and manner that was susceptible to damage by flooding of the creek;

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d) failing to properly maintain, inspect and repair the culvert and failing to maintain and clear debris; and

e) failing to respond in a timely manner when the Public Guardian knew the culvert was diverting Cherry Creek and that damage to the appellant's property was imminent.

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[7] In dismissing the appellant's claim the summary trial judge concluded that if the Public Guardian had altered the natural flow of the water in Cherry Creek, it owed a duty of care to the appellant to do so without interfering with her property. Section 21 of the *Water Act*, R.S.B.C. 1996, c. 483 or, subsequent to 2014, s. 29 of the *Water Sustainability Act*, S.B.C. 2014, c. 15, imposes a duty to exercise reasonable care upon a person who makes changes in and about a stream. He was of the view the appellant had failed to prove that the Public Guardian had breached the standard of care with respect to the installation of the culvert. In particular, she had not proven that the Public Guardian failed to meet the standard of care that might be said to be established by s. 44 of the *Water Act Regulation*, B.C. Reg. 204/88 (the "*Regulation*") which has since been repealed but provided, in part, that culverts with at least a minimum equivalent diameter of 600 mm and less than two metres in diameter could be installed in streams for the purposes of a road, provided they were designed to prevent the entrance of debris into the culvert, the installation did not destabilize the stream channel, and the culvert capacity was equivalent to the hydraulic capacity of the stream channel or was capable of passing the 1 in 200 year maximum daily flow without the water level at the culvert inlet exceeding the top of the culvert. The judge found:

a) the appellant had not established the hydraulic capacity of the Cherry Creek channel, and without knowing that capacity it was not possible to determine whether the culvert met the minimum standards imposed by the *Regulation*;

b) the size of the culvert exceeded the minimum diameter of 600 mm established by the *Regulation*;

c) the *Regulation* requires an engineer to design a culvert crossing where the culvert has a diameter of two metres or more, or the culvert is designed to pass a flow of more than six cubic metres per second. The diameter of the culvert was less than two metres, and the appellant had not established the actual or required design capacity of the culvert; and

d) the appellant had not tendered any evidence that the culvert was installed in a manner that did not permit the removal of obstructions and debris.

[8] The judge noted the appellant had presented no evidence that the condition of the crossing was in such a state that it needed maintenance prior to the flooding of May 2017. The judge was unable to infer that flooding was a result of poor maintenance or accumulated debris without some evidence that the crossing required maintenance.

[9] In the result he concluded the appellant had not established that the Public Guardian, having made changes in and about a stream, had failed to exercise the duty imposed by the *Regulation* to exercise reasonable care to avoid damaging the property of others.

[10] The trial judge considered the appellant's claim that the *Water Act* and *Regulation* established the standard of care in negligence:

> [58] The plaintiff claims that the PGT was negligent in the construction and maintenance of the Crossing on the PGT Property. In particular, the plaintiff alleges that the PGT installed the Culvert in 2012 contrary to the provisions of the *Water Act*, R.S.B.C. 1996, c. 483 and the *Water Act Regulation,* B.C. Reg. 204/88 (the "*Regulation*").
>
> [59] Further, the plaintiff alleges that the PGT was negligent in its maintenance of the Crossing.
>
> [60] The onus is on the plaintiff to prove each of the elements of negligence on a balance of probabilities. There is no burden on the PGT to prove that it was not negligent.

[11] He did not engage in a distinct analysis of the statutory claim for damages arising out of alterations in the course of a waterway described by this Court in *Waterway Houseboats Ltd. v. British Columbia*, 2020 BCCA 378. Having concluded

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negligence was not established he was of the view he was not required to address the question of causation of damages in negligence. However, he went on to consider whether the washout of the crossing and the displacement of the culvert caused damage to the appellant's property. He accepted the expert opinion of Dr. Millar, a hydrotechnical engineer retained by the Public Guardian, that the flooding, washout and blockage of the culvert on May 4, 2017, occurred during climate conditions that produced widespread flood damage and the highest flows in several decades across the region. He also accepted Dr. Millar's conclusion that the washout of the crossing would not have affected the flow of Cherry Creek and the opinion that whether the culvert remained intact or washed out was immaterial to the flows on the appellant's property. He was of the view that Dr. Millar's conclusions were "supported by the failure of numerous other crossings along Cherry Creek during this flood event": at para. 93.

[12] Turning to the claim in nuisance, he held:

a) The culvert became dislodged during the "flood event in May 2017" and did not become dislodged as a result of any "positive steps" (at para. 103) taken by the Public Guardian to cause a change in the direction, volume or velocity of the flow of water on Cherry Creek.

b) The appellant had failed to prove that an act or omission of the Public Guardian caused the culvert to become dislodged.

c) Further, the appellant had not proven that the culvert became embedded in such a manner as to divert the flow of water, causing an avulsion and the creation of a secondary channel which unreasonably interfered with the appellant's property.

[13] Accordingly, the judge found the appellant had failed to establish that any interference with her property was caused by a nuisance created by the Public Guardian.

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Grounds of Appeal

[14] The appellant, appearing on her own behalf, identified a number of issues in her factum but emphasised two errors on appeal: (1) the judge's failure to properly consider the Public Guardian's strict liability under the *Water Act*; and (2) the judge's treatment of the events of May 4–8, 2017 as one "flood event", without addressing the evidence that the crossing failed and the culvert was displaced before significant flooding. She says that error was a result of a misapprehension of the evidence of Dr. Millar. She contends that error undermines the judge's assessment of the causation element in the negligence analysis and the claim in nuisance.

Evidence

[15] It was the evidence of Ms. LeBourdais that the crossing failed, and the culvert was displaced on May 4. She was advised of the displacement on that date by her partner, Mark Hanson, and returned home. She observed the culvert lodged in the creek causing water to back up behind it.

[16] Her evidence with respect to events on the following day was, in part:

> On May 5, 2017, at approximately 6:00 am, the water had backed up and pooled at the east end of the property and was running down the driveway past the house. The west end of my property was underwater. The creek had rerouted around the culvert and was forcing the water straight into the mountain forcing dirt, rocks, and vegetation to be eroded into the creek (Avulsion B). Debris had built up on the east side of the property fence line between my property and 5080 Lazy Acres Road [Asquini Property] as the water built up behind the culvert that was still lodged across the creek. This further forced the water into the new channel down my driveway (Avulsion A).
> …

[17] She described in detail the efforts to protect structures on the property in the days that followed and appended photographs of the diverging channels that developed on her property during the flooding. She described the resulting damage as follows:

> My property suffered catastrophic damage from Avulsion A and the debris that was forced into the lower channel of Avulsion A from Avulsion B after the natural barrier of the creek was destroyed by the erosion of Avulsion A. …

[18] Mark Hanson swore an affidavit in which he deposed that he was present on the appellant’s property on May 4 when the crossing failed. He went to the fence line at the boundary between the appellant’s property and the Asquini Property and saw that the culvert had been displaced, moved downstream and was completely obstructing the flow of Cherry Creek, diverting it from its natural pathway.

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[19] He contacted the Public Guardian’s property manager to alert them of the seriousness of the obstruction and the importance of removing it. He was advised a contractor would be asked to go to the site to assess the issue. Appended to Mr. Hanson’s affidavit was a copy of the correspondence between Mr. Hanson and the property manager in an email chain. On May 4, the property manager relayed Mr. Hanson’s concerns to the contractor in the following terms:

> Further to my messages. Our client’s bridge fell and a piece of it, the culvert, is stuck down creek in front of neighbour’s property. Water is backing up behind this stuck piece and the neighbour is concerned about his property flooding. He thinks it needs a crane truck to lift it out.

[20] Mr. Hanson received a copy of an email from the property manager to the Public Guardian dated May 5, that reads as follows:

> The neighbour reported that Mr. Asquinl’s [sic] bridge came down. A large part of it, the ‘culvert’, is down creek and stuck in the water up against the neighbour’s property, flooding his property. I’m arranging for a general contractor or an excavator.

[21] Mr. Hanson’s evidence was that the flow of water in the creek was “normal for that time of the year” on May 4, and that there was no noticeable amount of debris in the creek and no flooding on the appellant’s property when the culvert was first displaced.

[22] He deposed that water began to flow around the culvert and outside its normal channel, down the appellant’s driveway in one channel and toward an embankment on the other side in a second channel, at about 9:00 am on May 5. A contractor arrived at about 11:00 am but was unable to remove the culvert because there was too much water flowing across the property to permit access.

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[23] Mr. Hanson described the accumulation of debris in the new channels, some of which was a result of water eroding the embankment, and the flooding and erosion that followed on May 6–8.

[24] He deposed that after concrete barriers were erected to re-direct the creek into its natural pathway on May 8, it was easy to contain the flow of water in the creek with sandbags.

[25] The appellant's daughter, Shay LeBourdais, deposed that she was on the property on May 5 at about 4:30 pm. At that time the creek had divided into two channels and was not running in its usual course. She could see the culvert creating an obstruction, backing up water and accumulating debris. The new channel that ran into the embankment appeared to be bringing down trees and other large vegetation into the creek.

[26] The evidence that the culvert was displaced and was perceived by witnesses to be obstructing the creek on May 4 was uncontroverted by direct evidence.

[27] Dr. Millar prepared a report setting out his expert opinion on January 17, 2022. He attempted to estimate the water flows on Cherry Creek (which does not have an operating hydrometric gauge) by using measurements taken on creeks in adjacent areas, particularly Guichon Creek (22 km from the appellant's property) over the period from May 4–7, 2017. That data recorded relatively low flows on May 4, increasing on May 5 and very high flows on May 6–13, particularly on May 7, 2017.

[28] In his written report he concluded:

> … Based on the recorded maximum flow of 4.2 m^3/s on *Guichon Creek* … on May 07, 2017, my best estimate of the maximum flow on Cherry Creek on or about May 04, 2017 using the high flow trendline is 6.3 m^3/s [cubic meters per second]. …
>
> The estimated maximum flow on Cherry Creek corresponds to the former location of the *Cherry Creek below Pendleton Creek* … gauge, which is approximately 600 m below the Subject Properties, and includes runoff from the Pendleton Creek tributary. I have adjusted the estimated maximum flow for selected locations along Cherry Creek based on the catchment areas

> (Table 2). My best estimate of the maximum flow at the PGT and Plaintiff's Properties on or about May 04, 2017 is 5.9 m³/s.
>
> [Emphasis added.]

[29] He continued:

> The annual maximum daily flow of 4.2 m³/s recorded on May 07, 2017 at *WSC Gauge Guichon Creek* … is the highest recorded flow at this gauge over the period 1968 – 2021, a period of 54 years.
>
> [Emphasis in original.]

[30] He concluded:

> Based on my review of the background documents and my personal experience, there was widespread flooding and damage to culvert crossings during early May 2017 on Cherry Creek and other watercourses in the region. In my opinion, this flooding was primarily a result of the above average snowpack that persisted into May, and warm to hot temperatures. Rainfall may have also contributed to some flooding. Selected culvert flooding, blockages and washouts included:
>
> - Blockage and washout of the culvert on the PGT property on or about May 04, 2017, which is part of the Plaintiff's civil claim.
>
> …
>
> In my opinion these examples indicate that the flooding, washout, and blockage of the PGT culvert crossing on May 04, 2017 occurred during climatic conditions that produced widespread flood damage and the highest flows in several decades across the region.
>
> …
>
> In my opinion the photographs and observations by Mr. Costerton, P.Eng. [a hydrotechnical engineer who attended at Cherry Creek for the Thompson Nicola Regional District on May 18 and 19, 2017] provide strong evidence that development of an avulsion channel and flooding of the Plaintiff's property on or about May 04, 2017 was initiated by formation of two log jams. The effect of the log jams would be to reduce the flow capacity of the main channel and to promote sediment deposition in the main channel. The combined effect "forces" the flow out of the main channel onto the adjacent floodplain, which then erodes a new channel. This process is referred to as "avulsion".
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> …
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> As stated in my Opinion 3 (Section 4.3), flooding on the Plaintiff's property on or about May 04, 2017 was a consequence of two principal factors:
>
> 1. High flood flows due to rapid snowmelt of above-average snowpack due to high temperatures.

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> 2. Accumulation of woody debris (log jams) and sediment in the Cherry Creek main channel.
>
> In my opinion, washout of the PGT culvert crossing would not have affected the flow on Cherry Creek. The flow immediately upstream and downstream of the PGT culvert appears to have largely remained within the main Cherry Creek channel. The presence or absence of the PGT culvert crossing, or whether the culvert remained intact or washed out, was immaterial with respect to the flood flows on the Plaintiff's property.

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[31] In cross-examination, Dr. Millar was asked about the sequence of flooding over the period of May 4–8. He agreed that a reasonably accurate assessment of the temperature at the property on May 4 would be 26˚C and the rainfall could be reasonably estimated as 0.4 millimetres. The peak flows on the creeks he considered to be comparable to Cherry Creek were fairly consistent from April 23 to May 4. The flow of water increased throughout the day on May 5 and dramatically on May 6 and 7. The culvert failed on May 4, before the peak event which occurred a couple of days later.

[32] He elaborated on the tables and Figure 2 in his report [which illustrated peak flows in graphic form] as follows:

> A I think it provides a good estimate of the … magnitude of the peak, and it indicates that the snowmelt event began on or -- on May 4th and peaked a couple of days later. I haven't looked at specific days and whether the -- May 4th or May 5th, I haven't calculated those, and I would be less confident in trying to assign particular flows on particular days during that event. My focus has been on the peak of that event.
>
> Q Okay. So, then you would agree the peak of the flow on Cherry Creek was May the 7th if we're –
>
> A Well, the peak on Guichon Creek was May the 7th. I didn't -- I don't know exactly when the peak of the flow was. My impression was on Cherry Creek it was -- it was the 7th or 8th, but I -- I ... I think in that original report I was -- I don't think -- I think I was purposely -- purposely did not specify when the -- when the peak occurred.
>
> Q So, you would agree then you really don't have any data to determine what the flows were on May the 4th, 5th, 6th, 7th and 8th on Cherry Creek accurately?
>
> A There's no flow data on Cherry Creek for those dates. I believe that. The best we can do is utilize data from nearby gauges … and make an estimate, and I have … made estimates with … that information …

> to come up with the best estimate … that I could make given the available information.

[33] In an affidavit filed in reply, Ms. LeBourdais observed that Dr. Millar estimates the maximum daily flow in Cherry Creek on May 7, but he does not estimate the flow on May 4, when the culvert failed, or May 5 when the new channels developed.

[34] She deposed that there was no rainfall on her property during the days prior to May 4, 2017, and for several days following the culvert failure. It was her position there was no reason to expect that peak flows on Cherry Creek did not occur on May 7 or May 8, as on Guichon Creek.

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<u>Discussion and Analysis</u>

[35] For the following reasons, I have concluded that the trial judge made two errors that warrant appellate intervention.

1. *Water Act* Liability

[36] The appellant submits the trial judge erred in law by failing to address the claim founded upon the strict liability regime imposed on landowners who alter the natural flow of water in streams imposed by operation of s. 21(1) of the *Water Act* and s. 29 of the *Water Sustainability Act*.

[37] The *Water Act* was in force when the Public Guardian installed the culvert in 2012, but the *Water Sustainability Act* was in force at the time of the flooding event in 2017. As the trial judge observed, the substantive effect of the relevant provisions is the same. As the judge referred to the provisions of the *Water Act*, I will do the same for ease of reference.

[38] Section 21(1) of the *Water Act* provided that a person who “makes changes in and about a stream or diverts or uses water” must “exercise reasonable care to avoid damaging land, works, trees or other property, and must make full compensation to the owners for damage or loss resulting from construction, maintenance, use, operation or failure of the works”.

[39] In *Waterway Houseboats*, this Court held that s. 21 of the *Water Act* created a civil cause of action that does not attract the defence of due diligence: at para. 186. It also held that the *Water Act* and its subsequent amendments provided “a broad statutory liability regime for failures resulting from changes in and about a stream”: at para. 196.

[40] At trial, the appellant alleged the Public Guardian could not establish its culvert complied with the provisions in s. 44(1) of the *Water Regulation* that describe the conditions in which a culvert may be installed without approval or licence. The appellant says the judge erred in imposing the burden of proof on her to prove the Public Guardian had failed to comply with those statutory requirements.

[41] It is my view that the judge failed to properly assess the appellant’s claim under s. 21 the *Water Act* or s. 29 of the *Water Sustainability Act*. The Public Guardian had a duty to exercise reasonable care to avoid damaging the appellant’s “land, works, trees or other property” and to compensate her for damage or loss resulting from the failure of the culvert. In *Waterway Houseboats*, there was no question that the defendant owner failed to exercise reasonable care in the construction of a bridge. Therefore, the Court did not resolve the question of whether the exercise of reasonable care “to avoid damaging land, works, trees or other property” in accordance with s. 21(1)(a) of the *Water Act* could provide a defence to an approval holder against a claim by an owner seeking compensation for damage and loss under s. 21(1)(b): see para. 174. However, assuming there is a defence, it follows that the party asserting that defence would have the burden of proving it exercised reasonable care. In fact, counsel for the Public Guardian conceded that it bore the burden of establishing compliance with the statutory duties.

[42] In my respectful view, the judge’s conclusion that the appellant had failed to discharge an evidentiary onus cannot be sustained.

2. Misapprehension of the Evidence

[43] The appellant’s argument that the judgment is founded upon a misapprehension of the evidence calls for us to adopt a deferential standard of

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review. That standard is helpfully discussed in *Benhaim v. St-Germain*, 2016 SCC 48, where Justice Wagner (as he was) writing for the majority said:

> [36] The standard of review is correctness for questions of law, and palpable and overriding error for findings of fact and inferences of fact: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 8, 10 and 19; *St-Jean*, at paras. 33-36. Causation is a question of fact, and so the trial judge's finding on causation is owed deference on appeal: *St-Jean*, at paras. 104-5; *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8; *Ediger v. Johnston*, 2013 SCC 18, [2013] 2 S.C.R. 98, at para. 29.
>
> [37] It may be useful to recall the many reasons why appellate courts defer to trial courts' findings of fact, which were described at length in *Housen*, at paras. 15-18. Deference to factual findings limits the number, length and cost of appeals, which in turn promotes the autonomy and integrity of trial proceedings. Moreover, the law presumes that trial judges and appellate judges are equally capable of justly resolving disputes. Allowing appellate courts free rein to overturn trial courts' factual findings would duplicate judicial proceedings at great expense, without any concomitant guarantee of more just results. Finally, according deference to a trial judge's findings of fact reinforces the notion that they are in the best position to make those findings. Trial judges are immersed in the evidence, they hear *viva voce* testimony, and they are familiar with the case as a whole. Their expertise in weighing large quantities of evidence and making factual findings ought to be respected. These considerations are particularly important in the present case because it involves a large quantity of complex evidence.
>
> [38] It is equally useful to recall what is meant by "palpable and overriding error". Stratas J.A. described the deferential standard as follows in *South Yukon Forest Corp. v. R.*, 2012 FCA 165, 4 B.L.R. (5th) 31, at para. 46:
>
>> Palpable and overriding error is a highly deferential standard of review …. "Palpable" means an error that is obvious. "Overriding" means an error that goes to the very core of the outcome of the case. When arguing palpable and overriding error, it is not enough to pull at leaves and branches and leave the tree standing. The entire tree must fall.
>
> [39] Or, as Morissette J.A. put it in *J.G. v. Nadeau*, 2016 QCCA 167, at para. 77 (CanLII), [TRANSLATION] "a palpable and overriding error is in the nature not of a needle in a haystack, but of a beam in the eye. And it is impossible to confuse these last two notions."

[44] The appellant says the judge erred in relying upon what was clearly an error in Dr. Millar's report. In the passages from the written report cited above, Dr. Millar estimated peak flows on Cherry Creek at the appellant's property at 5.9 m^3/s. That figure was arrived at using the measured peak flow on Guichon Creek, 4.2 m^3/s, the highest recorded flow in 54 years. However, that peak flow was experienced on May 7. In cross-examination, Dr. Millar corrected the impression left by his report

that he had estimated peak flows on any particular date. He acknowledged that peak flows on Cherry Creek probably occurred on May 6 or May 7. Further, he acknowledged that some of the factors contributing to heavy runoff were not yet present on May 4 in that the culvert failed before the peak event.

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[45] The appellant says that, as reflected in the following passage from the reasons for judgment, the trial judge erred in accepting at face value the opinion in Dr. Millar's report without accounting for his admissions in cross-examination:

> [43] Dr. Millar observes that during May 2017, the interior of British Columbia experienced widespread flooding due to high temperatures and above average snowpack. According to Dr. Millar, the maximum flow of water in Cherry Creek at the PGT Property and the Plaintiff's Property on May 4, 2017, was 5.9 cubic metres per second. Dr. Millar estimates that the return period for the flooding on Cherry Creek on May 4, 2017, to be approximately 1 in 75 years.
>
> [Emphasis added.]

[46] I agree with the appellant's submission that the judge apparently relied on the inaccurate expression of the opinion in Dr. Millar's report and thereby misapprehended the evidence. In my view, the error is palpable.

[47] For the following reasons, I am also of the view the error is overriding. Rather than assessing the claim on the basis of the uncontradicted evidence that the crossing failed and the culvert was displaced before significant flooding, the judge assessed the claim on the basis that the crossing was "over topped" by record flooding and failed as a result: at para. 47.

[48] It is not possible to say that the judge would have rejected the inference that the crossing failed due to a build up of debris, poor maintenance or inadequate inspection as the appellant contended, if he had not misinterpreted the opinion evidence of Dr. Millar. The misapprehension undermines the following conclusions:

a) The acceptance (at para. 91) of Dr. Millar's conclusion that "the flooding, washout and blockage of the PGT Culvert and Crossing on May 4, 2017

occurred during climate conditions that produced widespread flood damage and the highest flows in several decades across the region”;

b) The acceptance (at para. 92) of Dr. Millar’s conclusion that “the washout of the Crossing would not have affected the flow on Cherry Creek … [and] the presence or absence of the PGT Crossing, and whether the Culvert remained intact or washed out, was immaterial with respect to the flood flows on the Plaintiff’s Property”;

c) The view expressed (at para. 93) that Dr. Millar’s conclusions were supported by the failure and overtopping of other culverts “during this flood event”;

d) The rejection of the report of the appellant’s expert, Mr. Stirling, because he did not account for those other failures (criticism found at para. 95);

e) The view expressed (at para. 103) that the culvert “did not become dislodged as a result of any ‘positive steps’ taken by the PGT to cause a change in the direction, volume or velocity of the flow of water on Cherry Creek”; and

f) The conclusion (at para. 104) that the appellant had “failed to prove that the PGT’s conduct caused the Culvert on the PGT Property to become dislodged”.

[49] While the trial judge addressed the evidence of the expert witnesses in detail, he did not address the evidence of Ms. LeBourdais, Mr. Hanson or Shay LeBourdais. Implicitly, he discounted their evidence that the creek was not flooding when the culvert was displaced. That evidence was inconsistent with the assumption that water flows in Cherry Creek were at record levels on May 4, the assumption now impugned by the appellant.

[50] Nor did the judge address the evidence of Ms. LeBourdais, Mr. Hanson and Shay LeBourdais that on May 4–5 the culvert was diverting the creek out of its usual

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channel—evidence supported by the contemporaneous record of concerns expressed to the Public Guardian's property manager. In resolving the conflicting evidence with respect to whether the displaced culvert caused obstruction and a diversion, the judge weighed only the competing views of the experts, Mr. Stirling and Dr. Millar, based upon photographs of the creek during and after the flooding: at paras. 106–112. The judge's analysis suggests the evidence of the lay witnesses was given little, if any, weight. Although no explanation was given for discounting that evidence, it stands to reason it was discounted because it was inconsistent with what the judge considered to be objective, scientific evidence that the flooding was at its peak on May 4. If that was not the case, the evidence of the appellant and her family members would take on a different weight.

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<u>Conclusion and Disposition</u>

[51] For these reasons, I am of the view the appeal should be allowed and the order dismissing the appellant's claim set aside. Given the absence of findings with respect to the credibility of the lay witnesses and the inferences that might be drawn from the evidence of those witnesses, I am of the view that it is not appropriate for us to give judgment to either party. For that reason, I am of the view the matter should be remitted to the trial court.

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice Fisher"

I AGREE:

"The Honourable Justice Iyer"