



Posted on: June 24, 2021

## BRITISH COLUMBIA COURT OF APPEAL CLARIFIES LIMITS ON RIGHT OF SUBROGATION

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Often times, before an injured plaintiff settles a claim with a defendant, or receives a court award, they receive “collateral benefits” from third parties to help cover medical expenses, missed time from work, or other losses sustained due to their injuries. Since the law only requires defendants to put a plaintiff back in the position they would have been in if they were never injured, questions about when a defendant can deduct a collateral benefit paid to a plaintiff frequently arise.

The general rule is that defendants can deduct collateral benefits from what they may owe the plaintiff. However, there are a number of exceptions to this. If the collateral benefit was a voluntary payment or gift or if it falls within the “private insurance” exception, defendants cannot deduct the benefit.

The most common exception is when the party that provided the collateral benefit has a right of subrogation, since allowing defendants to deduct the collateral benefit would deprive the third party of their right to recover what they paid to the plaintiff to the unjust benefit of the defendant.

The recent BC Court of Appeal decision *Provost v. Dueck Downtown Chevrolet Buick GMC Limited et al* 2021 BCCA 164 provides guidance on what third parties need to do to ensure they have a right to subrogation and clarity on when deductions are available for defendants.

Prior to **Provost**, a line of cases in BC allowed a third party to assert a right of subrogation so long as they indemnified the injured plaintiff, even if there was no contract of indemnity between them. **Provost** has overturned these cases, finding that a third party only has a right of subrogation if it has an indemnity contract with the plaintiff.

### Background

**Provost** concerned personal injuries an RCMP officer sustained while involved in a police chase (the “Accident”). At trial, the court awarded \$461,142.29 in damages.

\$36,995.00 of the damages award was for wage loss and other benefits the plaintiff received from the RCMP following the Accident (the “RCMP Payments”). The RCMP Payments were not made pursuant to a legally





binding obligation, but rather were part of the RCMP's long standing practice to pay full wages to officers injured in the line of duty.

At trial, the judge found the Attorney General of Canada ("AG Canada"), on behalf of the RCMP, had an equitable right of subrogation since the RCMP had fully indemnified the plaintiff and that this equitable right of subrogation existed even without a contract between the plaintiff and the RCMP.

The issue on appeal was whether the trial judge erred by including the RCMP Payments as part of the damages award. Specifically, the appellants argued the judge erred by finding AG Canada had right of subrogation despite it not having a contract of indemnity with the plaintiff.

A secondary issue was whether the RCMP Payments qualified under the voluntary payments exception because, if they did, the trial judge's order could stand.

### **The Ruling**

The appellants argued the trial judge erred in finding that a simple payment to the plaintiff granted AG Canada subrogation rights. The appellants relied on two BC Court of Appeal decisions that were not brought to the trial judge's attention, both of which endorsed the position that a contract must exist between parties for a right of subrogation to exist.

AG Canada argued that an equitable right of subrogation can exist absent a contract if: 1) it is necessary to prevent unjust enrichment; 2) the third party benefactor fully indemnified the plaintiff; and 3) the third party has not waived its right of subrogation.

In the end, the Court determined that for a right of subrogation to exist, the payment by a third party to the plaintiff must be made pursuant to a contract of indemnity. Without that contract, any payments made by a third party do not, on their own, give rise to a right of subrogation.

The Court also determined that equitable subrogation only applies if a contract of indemnity exists between parties but it does not include an express *contractual term* outlining the right of the subrogation. In that situation, equitable subrogation can be used by a third party to assert a right of subrogation where they made a payment to the plaintiff under the contract. However, this does not allow a third party to assert a right of subrogation if it made a payment to the plaintiff but does not have an underlying indemnity contract with the plaintiff.

As for whether the RCMP Payments fell under the voluntary payment exception, the Court found it could not rule on the issue: the evidentiary basis was lacking because AG Canada did not argue the RCMP Payments





were voluntary payments at trial, and the appellants would be unduly prejudiced if AG Canada was allowed to adopt the position for the first time at the appeal.

As such, the Court deducted the RCMP Payments from the damages award.

### **Practical Considerations**

Ultimately, **Provost** clarified that in order for a third party to assert a right of subrogation it must have made a payment to the plaintiff pursuant to a contract of indemnity. Absent such a contract, a third party cannot rely on equitable subrogation to assert a right of subrogation.

For parties providing collateral benefits, **Provost** demonstrates that in order to recover the benefits pursuant to a right of subrogation, you need to ensure a formal contract of indemnity is in place. At the very least, you should have a contract with the plaintiff where the plaintiff agrees to repay you from any judgment or settlement they receive. The corollary to this is that without a contract of indemnity a party should be wary of providing collateral benefits since they may not be able to recover them.

**Provost** could also be a useful tool for defending certain claims as it allows defendants to claim deductions when no indemnity contract exists between a third party and an injured plaintiff. However, the fact that the voluntary payment issue was not addressed means **Provost** may be of limited use. The Court of Appeal indicated in **Provost** that if AG Canada had handled the case differently, the voluntary payment exception might apply. As such, if a plaintiff can show a payment they received was a voluntary payment the defendant cannot claim a deduction.

Should you have any questions about this article, contact Insurance Lawyer, Sabdeep Sidhu here.

