

CANADA / JUDGMENT

Gokey v. Usher

2023 BCSC 1312

COURT

Supreme Court of British Columbia

DECIDED

28 July 2023

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2023 BCSC 1312 Gokey v. Usher

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gokey v. Usher,

2023 BCSC 1312

Date: 20230728

Docket: 10740

Registry: Prince Rupert

Between:

Edward C. Gokey and Diane B. Gokey

Plaintiffs

And:

Gordon F. Usher and Patricia Ann Parsons

Defendants

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Edward C. Gokey on his own behalf

and on behalf of Diane B. Gokey:

E.C. Gokey

Counsel for the Defendants:

J. Adams

Place and Date of Trial:

Prince Rupert, B.C.

February 14-18, 20-25, 28, 2022

March 1-4, March 7, May 16-17

October 11-14, 2022 and

February 10, 2023

Written Submissions (Volume 1) of
the Defendants:

September 10, 2022

Written Submissions of the Plaintiffs

September 14, 2022

Written Submissions (Volume 2) of
the Defendants:

September 16, 2022

Written Reply Submissions of the Defendants:

October 4, 2022

Written Reply Submissions of the Plaintiffs:

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Written Sur-Reply Submissions of the Defendants:

November 29, 2022

Written Sur-Reply Submissions of the Plaintiffs:

December 7, 2022

Place and Date of Judgment:

Prince Rupert, B.C.

July 28, 2023

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Introduction

- [1] The plaintiffs and defendants became neighbours in Sandspit, British Columbia on Haida Gwaii in July 1997. The plaintiffs, Edward C. and Diane Gokey, purchased the property at 495 Beach Road. It is the property immediately east of the defendants' property at 497 Beach Road. In June 1998, the plaintiffs also purchased the property to their east at 493 Beach Road. To the north across Beach Road is a public beach area on the Pacific Ocean. Properties to the south of the parties' properties are vacant.
- [2] Initially, the parties were neighbourly but after a few years that neighbourly relationship ended. Matters significantly deteriorated over the issue of a shared well for which the defendants agreed to grant an easement to the plaintiffs. The easement documents were never signed by the plaintiffs. Litigation ensued in Provincial Court. Matters then deteriorated further, leading to the present litigation.
- [3] In this action, the plaintiffs claim assault, invasion of privacy, harassment and/or infliction of mental suffering, intimidation, nuisance and trespass. The plaintiffs seek injunctive relief and damages.
- [4] The defendants by counterclaim seek a declaration that there is an easement and that the plaintiffs are subject to its terms and shall comply with all statutory and regulatory requirements relating to the well on the easement. The defendants also seek a permanent injunction restraining the plaintiffs from a number of uses of their property, restraining the plaintiffs from having any contact with the defendants except electronically or by Canada Post or a third-party courier and restraining the plaintiffs from entering the property of the defendants. They also seek an injunction preventing the plaintiffs from filing property tax appeals related to the defendants' property and from entering the municipal property lying between the north edge of their property and Beach Road, Sandspit, without their prior written permission.
- [5] In addition, they seek an order respecting removal of structures placed on the easement area, as well as general, punitive and aggravated damages against the plaintiffs for nuisance, trespass, assault and battery and costs.
- [6] While both Mr. and Mrs. Gokey are named as plaintiffs and are the defendants on the counter-claim, Mrs. Gokey did not testify and the allegations of the defendants against the plaintiffs arise from the conduct of Mr. Gokey, not Mrs. Gokey.
- [7] Mr. Gokey was the sole witness for the plaintiffs. The defendants were both witnesses. In addition, they called two other residents of Sandspit: Carol Wagner, the neighbour of the defendants on the other side of their property from Mr. and Mrs. Gokey, and Lori Wilson, who testified to a conversation she heard Mr. Gokey have at a local restaurant where she was a server.

Background

- [8] The defendants, Gordon Usher and Patricia Parsons, began living together in Terrace, B.C. in 1981. They married in 2008. Ms. Parsons is 73 and Mr. Usher is 74. In 1987 they moved to Haida Gwaii and in January 1988 they purchased 497 Beach Road, Sandspit, B.C. Sandspit is a small community of approximately 350 people.
- [9] Mr. Usher was a warehouseman for a number of years and then a fishery officer from 1987 to approximately 2008 when he retired for medical reasons. He later began doing seasonal road maintenance in the Sandspit area for O'Brien Road and Bridge Maintenance Ltd., the company responsible for the maintenance of provincial roads on Haida Gwaii. He continues to do that work.
- [10] Ms. Parsons worked in forestry tree planting contracts and then as a provincially-licensed log scaler until approximately 1985 when a work injury to her back ended her employability in that profession. She received a disability pension. She thereafter did seamstress work for several years until rheumatoid arthritis prevented her from continuing to do so.
- [11] The plaintiffs reside in Washington State. Mr. Gokey and other Gokey family members operate a general contractor house and septic field construction business there. Mr. Gokey is in Sandspit approximately six months per year, usually for two to several weeks each time. His visits paused between March 2020 and the late summer of 2021 because of the COVID-19 travel ban between Canada and the United States.
- [12] The plaintiffs' and defendants' properties are each approximately 30.5 metres wide (100') and 232 metres (760') deep. The properties at 495 and 497 Beach Road share the boundary down the east side of 497 Beach Road and the west side of 495 Beach Road. There are no properties across Beach Road as on the other side is the beach and the Pacific Ocean. The properties to the south of 495 and 497 Beach Road are not occupied.
- [13] Initially the parties were on friendly terms. They had dinners together on occasion and Mr. Gokey and Mr. Usher went fishing together. Mr. Usher sometimes borrowed tools from Mr. Gokey. The defendants visited the plaintiffs at their home in Washington State and they exchanged Christmas cards. As the property of the plaintiffs was a second home, they remained primarily resident in the United States.
- [14] In April 2004 the parties agreed to share a well and water system. They entered into a community water use agreement under which they were to share equally in the construction, connection, maintenance and operational costs of the well. It was intended to be shared 50/50 and could be used by the plaintiffs and the defendants for one residential dwelling each.

- [15] The shared well was constructed in or about May 2004. Approximately 1/3 of the head of the well bore was located on 495 Beach Road and approximately 2/3 on 497 Beach Road. A well house was also constructed immediately to the north of the well bore which as a result was not itself in the well house. The well house straddled the property line with approximately one-half of it being on either side of the property line with access doors from each side.
- [16] The roof of the house was peaked. The two sides of the roof sloped towards each of the parties' properties from the peak which was on the property line between 495 and 497 Beach Road. The controls for the well valves and the electricity supply for the well and the water system were constructed on the plaintiffs' side of the well house.
- [17] There was a dispute over the location of the well bore as the defendants stated it was to be located on 495 Beach Drive, not on their property. Allegations arose that the plaintiffs were not complying with the terms of the community water use agreement and were refusing the defendants' requests to remedy the issues. In 2009, Northern Health sent letters to Mr. Usher a number of times, copied to Mr. Gokey, advising that an operating permit was required under the Drinking Water Protection Regulation, B.C. Reg. 200/2003 for the well to be used to supply more than one single family residence; in this instance, the plaintiffs' and the defendants' homes. That permit was never obtained as Mr. Gokey continues to assert sole ownership of the well and fee simple to the land on which the well is located. In his trial submissions Mr. Gokey still claims he and his wife intended to buy the defendants' one-half of the well and the easement area to be used for two residences, one on each of the plaintiffs' lots. They seek resolution of the two-residence issue in this proceeding as they wish to have the well service the property at 493 Beach Road that they now own on the other side of 495 Beach Road.
- [18] In August 2004, the defendants allege the power to the water pump was turned off by Mr. Gokey, resulting in their water supply being cut off. Over the years there were continued issues with the defendants' water supply being either cut off or their water pressure being reduced.
- [19] Mr. Gokey alleges the defendants have interfered with his use of his property and access to the well by building a fence on his land at 495 Beach Road between their property and the well bore.
- [20] In April 2009, Mr. Gokey installed a plywood wall down the centre of the well house despite the defendants asking that he not do so. The wall denied the defendants access to the well controls. They were left without water. Ms. Parsons used an electric chain saw to cut the plywood to give her access to the controls. She did not think Mr. Gokey was present when she did so. Once she was aware he was behind the plywood, she stopped cutting.
- [21] The defendants complained many times to Mr. Gokey about the shortage of water and the lack of water pressure.

- [22] Mr. Gokey complains the defendants cut off the power to the water pump. The defendants admit they did so when, despite their protests, Mr. Gokey injected chlorine into the system. Another time they sealed off the well house to keep the water tank from freezing and to prevent damage to the electrical panel, which was being exposed to rain after Mr. Gokey removed the 495 Beach Road half of the roof.
- [23] As for Mr. Gokey's complaints about lacking power in the well house, the defendants state that in order for them to comply with the plaintiffs' purchase of the well under a settlement agreement resulting from proceedings in Provincial Court, they switched the electrical supply and controls to Mr. Gokey's side of the well house, giving him sole control of the electricity supply. Mr. Gokey complained about not being able to get what was now his pump to work and kept hooking his hoses into the system being supplied by the defendants' new well. The pump breaker for the electrical system was solely accessible by the plaintiffs. Despite the defendants informing Mr. Gokey that he was failing to switch the breaker on he continued to blame them. They eventually hired an electrician who tested the system and confirmed in a letter dated July 9, 2014 that the only problem with the system was that the pump breaker, which the plaintiffs by then had sole access to, was turned off. Despite this, Mr. Gokey made complaints to the RCMP that the defendants were cutting his power to the well. At trial Mr. Gokey testified that he did not take issue with the July 9, 2014 letter. He offered no explanation for his conduct given he had control of the breaker.
- [24] Ms. Parsons' evidence at trial was that the defendants suffered from numerous water shortages when Mr. Gokey was present in Sandspit. The defendants believe this resulted from Mr. Gokey's habit of running too many hoses from the water system and then leaving them spilling water onto the ground even when he wasn't using the water, from his using the system to supply water to the 493 Beach Road property and from Mr. Gokey's installation of a "super pump" in 2010. The defendants deny they were the reason for any water shortages complained of by Mr. Gokey during the time the use of the well was shared.
- [25] The evidence at trial did not support the allegations of Mr. Gokey that the defendants had engaged in any deliberate cutting off of any parts of the well or well system to interfere with the plaintiffs' supply of water. As for Mr. Gokey's allegation that they had taken his pump I accept the evidence of the defendants that the original pump Mr. Gokey had provided for the well had stopped working and the defendants had replaced it at their own cost with a new pump that worked.
- [26] Regarding Mr. Gokey's complaint about the fence between his property and the well house, the defendants agree they did build a fence between the well and 495 Beach Road. The fence, however, did not interfere with the Mr. Gokey's access to the well as he could still access the well itself by walking through the well house. The fence was built because the defendants wanted to create a barrier between soil that Mr. Gokey was building up on 495 Beach Road along the fence line next to the well and the well bore. A wire fence the defendants temporarily put up had not prevented soil from coming through. This was an issue because the grade of the slope down to the well casing was posing a risk of

contamination of the well, which was noted by Northern Health as a "high hazard condition" and contrary to the Groundwater Protection Regulation, B.C. Reg. 39/2016 in a February 12, 2010 letter to Mr. Usher, copied to Mr. Gokey. This point had also been raised in an April 24, 2009 Northern Health letter to Mr. Usher, copied to Mr. Gokey. The same issue was reiterated in a November 2, 2010 Northern Health letter to Mr. Usher and Mr. Gokey.

- [27] Mr. Gokey did not appear to accept at the time, or in his evidence at trial, that this risk of contamination was valid, despite the inclusion of a November 10, 2010 drinking water report which contained a boil water advisory. This is despite him claiming in the Small Claims action \$600 for bottled water over six years because of the contamination of the well. Mr. Gokey appeared to be of the view there was no contamination but if there was it was due to the presence of the defendants' dogs in the well area. This was at the same time he was attracting the dogs to the well area by feeding them scraps.
- [28] The issue of Mr. Gokey feeding the defendants' dogs despite their request that he not do so remains. Mr. Gokey denied feeding the dogs, stating that he was "training them" with rewards of treats, not to bark. Ms. Parsons testified that Mr. Gokey has continued feeding the dogs. Fish and food scraps were continuing to appear on the ground on 497 Beach Road near the easement area in January 2022. I accept this to be the case and Mr. Gokey's explanation for what he was doing is an example of his mischaracterizing of matters, thereby undermining the reliability of his evidence.
- [29] After the plaintiffs purchased 493 Beach Road, Mr. Gokey moved some outbuildings from that property to 495 Beach Road, placing them along the property line between the plaintiffs and the defendants. Those outbuildings start behind his home but not far from the defendants' home as their house has a greater setback from Beach Road. The structures then continue down the property line between the parties' properties. From the Beach Road frontage of the properties, they consist of what is described as a Sauna Smoke Shed, Brake Drum Fire Pit, Offal Container, Joey Shack, Tank, and Commercial Burner. The use of such by Mr. Gokey and the creation of odours and smoke became a major point of contention between the parties and are the basis for the defendants' counterclaim in nuisance.
- [30] In 2009, the defendants were licenced to grow marijuana for medicinal purposes leading to further disagreements between the parties. The plaintiffs advance allegations of illegality, commercial sales and complaints relating to the noise from fans and the smell of growing marijuana. The plaintiffs also advance claims of invasion of privacy by the defendants' photographing and video recording of Mr. Gokey's activities on his property.

Litigation History

- [31] I will summarize the litigation history in some detail, as that history is relevant to the orders and declarations being sought in this litigation and the appropriate limitation period that applies to the claims of the plaintiffs and the defendants.

Provincial Court Action No. 1841

- [32] On September 1, 2011, Mr. Usher and Ms. Parsons (as claimants) commenced Action No. 1841 in the Provincial Court of British Columbia, Masset Registry ("Action 1841"), claiming \$6,000 in damages against the Gokeys, alleging the Gokeys had partially demolished the well house structure, failed to share the costs of the utility bills, failed to share in repairs of the system, exceeded the number of residences that were supposed to be connected to the well, used a booster pump with the result that the defendants had been left without water and failed to follow provincial health regulations concerning the use of the system.
- [33] On January 10, 2012, the plaintiffs filed a reply and counterclaim, the latter seeking \$22,990 in damages for costs alleged to be incurred respecting work on the well and compensation for the alleged poisoning of trees and smoke damage to their mobile home. On January 24, 2012, Mr. Usher and Ms. Parsons filed a reply to the counterclaim.
- [34] On May 8, 2012, a settlement conference took place before Judge Crabtree (as he then was) but had to be adjourned. On April 9, 2014, a settlement conference was held before Judge Steinberg. During that settlement conference he provided the parties with a draft of a proposed settlement agreement and sent them home to consider its terms. They returned on the morning of the next day and that afternoon its terms were finalized. It resulted in a settlement agreement signed by all four parties:
1. Arrangements shall be made by the Claimants to have an easement drawn up in favour of Defendants granting the Defendants permanent access [to] the borehole, the radius of the easement shall be 3 ½ feet centered on the borehole.
 2. The Defendants will erect over the property line an interior wall to the current well house ensuring that that wall does not intrude onto the Claimant's property.
 - 3.
 4. Upon the drafting of the easement the Defendants shall forthwith pay to the Claimants \$3,563.00, both parties will equally share the legal costs of drafting and finalizing the easement.
 - 5.
 6. Neither party will place offal, or any form of waste or any other materials that will be deleterious to the quality of the water within 100 feet of the property line between the Claimants and the Defendants.
 - 7.
 8. The Defendant will immediately remove all open air references to either of the Claimants or any member of their family. [singular of Defendant in original.]
 - 9.

- 10.
11. The Defendants will ensure that the field of view of their surveillance cameras does not extend further west than the property line.
12. The Defendants will remove the storage tank currently in place on the pump house.
- [35] In compliance with the settlement agreement, Mr. Usher and Ms. Parsons had their solicitor prepare a draft easement. It included a draft water access easement in its terms. The draft water access easement, in turn, had attached to it a draft reference plan of easement setting out the boundaries of a proposed easement of approximately 1.79 metres in area on 497 Beach Road that covered the area where the well was located and also the area immediately adjacent to the well.
- [36] The defendants took steps in June and July 2014 to discontinue their use of the well and change the setup of the well power in order to carry out the terms of the settlement agreement under which the plaintiffs had purchased their half interest in the well. The defendants began using a new well that they had drilled on their property in late 2010.
- [37] The plaintiffs however refused to sign the draft easement based on an assertion that the fee simple ownership of the easement area was supposed to have been transferred to them under the terms of the settlement agreement, as opposed to them merely being given a right to use the well.
- [38] Mr. Usher and Ms. Parsons, therefore, continued Action 1841 in order to seek remedies against the Mr. and Mrs. Gokey because of their breach of the settlement agreement. This resulted in a six-day trial involving hearing dates in April, June and October 2016 before Judge Seidemann. Reasons for judgment were issued on June 9, 2017. On June 16, 2017, the resulting order was entered. It included the following terms:
 1. The judgment for the total amount of \$5,621.62 is payable forthwith
 - 2.
 3. If the defendant wants to put crab shells in his compost, any such compost must be located at least 100 feet from the property line. The tank or container must be moved to be at least 100 feet from the property line
 4. The defendant's practice of providing food or treats to the claimant's [sic] dog or dogs must cease immediately.
 5. Neither party should interfere with the wall dividing the well house or with anything which will affect the other parties' water supply.
 6. The remainder of the parties' complaints against each other are either not referable to the settlement agreement and must be the subject of a separate action, or are matters that are not legally enforceable.

[39] The June 16, 2017 order in Action 1841 was appealed by the Gokeys (Action No. 10479 in the Supreme Court of British Columbia, Prince Rupert Registry ("Action 10479")).

Supreme Court of British Columbia Action 10479

[40] The appeal was heard on December 4, 2017 by me with reasons for judgment being issued January 17, 2018. The plaintiffs (as appellants) were largely unsuccessful in the appeal. Their application to re-open was dismissed except for a consent amendment to one term of the order that would otherwise have been granted under the January 17, 2018 reasons for judgment.

[41] A further application by the Gokeys to re-open the appeal was heard on February 20, 2018. Oral reasons for judgment were given on the same day dismissing the application to re-open the appeal.

[42] On March 4, 2018, an order was entered in Action 10479 with respect to both the appeal and the application to re-open the appeal. The March 4, 2018 order included the following terms:

1. The payment of \$3,500.00 ordered shall apply to the well and its fittings, not the easement area.
2. The payment of \$63.00 shall be for the easement.
3. The prohibition in the draft Easement Agreement respecting construction on the easement area shall permit a security sleeve on the well-bore.
4. The prohibition in the draft Easement Agreement respecting excavation shall permit excavation incidental to repair and replacement of the well-bore pipe.
5. The reference to 100 feet is 100 feet from the well location on the property line.
6. By consent, the parties agree that Edward Gokey and his spouse can use the well water from his well to service both of Mr. Gokey's properties for residential purposes, but limited to only one residence in total on the two properties. This provision is subject to it not being in conflict with any applicable statutory or regulatory laws.
7. With the exception of the terms as stated above, the appeal is dismissed.

[43] The reference in para. 6 of the March 4, 2018 order in Action 10479 to "both of Mr. Gokey's properties" is a reference to 495 Beach Road and 493 Beach Road. Paragraph 6 was the result of an amendment by the consent of the parties during the February 20, 2018 hearing to the restriction to use for only one residence and restricted use of the water for other purposes to their agreement the water could be used for both of the plaintiff's' lots but only one residence.

[44] The plaintiffs' approval of the form of order was dispensed with, however counsel for Mr. Usher and Ms. Parsons were to forward a draft of the order to Mr. Gokey for his comments before the entry of the order. This approach resulted in the court registry being provided

with a draft order prepared by counsel for Mr. Usher and Ms. Parsons and a form of alternative order being sent to the registry by Mr. Gokey that included a provision that the use of the well would be restricted to one residence on each of 493 and 495 Beach Road, contrary to what was consented to. On March 2, 2018, the Court's registrar approved the form of order prepared by counsel for the defendants.

- [45] The \$3,500 and \$63 payments referred to in the March 4, 2018 order were two components of the \$5,626.62 amount that the plaintiffs had been ordered to pay to the defendants in the June 16, 2017 order in Action 1841.
- [46] In March 2018, Mr. Gokey attempted to file an application to seek a "clarification" of the March 4, 2018 order. Mr. Gokey stated in an affidavit filed in support of the proposed application that the parties had agreed by consent, during the February 20, 2018 hearing, that the well could serve one residence on each of 493 and 495 Beach Road, and that it was an "undisputed fact" that the intention of the parties was that the well serve a residence on each of those properties. That was not the intention of the defendants.
- [47] The application was rejected on the basis that the Court was functus. Mr. and Mrs. Gokey filed two appeals with the British Columbia Court of Appeal with respect to the outcome of Action 10479, the first on February 5, 2018 and the second on March 29, 2018. Because a constitutional question was raised in the appeals with respect to the statutory restrictions in British Columbia on the ability to appeal Small Claims Court orders to the British Columbia Court of Appeal, the Attorney General of British Columbia was named as a respondent in the appeals.
- [48] The two appeals were consolidated and heard by the British Columbia Court of Appeal on December 3, 2019. On December 10, 2019, the Court gave oral reasons dismissing the appeals.
- [49] On January 27, 2020, Mr. and Mrs. Gokey filed an application in the Supreme Court of Canada for leave to appeal the decision. On December 1, 2022, the Supreme Court of Canada dismissed the application for leave with costs to the respondents Gordon F. Usher and Patricia Ann Parsons.
- [50] Those proceedings were not the only ones in existence between these parties.

Provincial Court Action No. 1973

- [51] On May 4, 2016, Mr. Usher and Ms. Parsons commenced a new Small Claims action, again on Haida Gwaii (Provincial Court Action No. 1973, Queen Charlotte Registry ("Action 1973")) against Edward C. Gokey and Diane B. Gokey as defendants, claiming the defendants were interfering with their enjoyment of their property by a campaign of harassment and nuisance arising from smoke, noise, deposits of fish offal and garbage and the use of security cameras directed at their property. A counterclaim was filed by Mr. and Mrs. Gokey.

- [52] In the meantime, on November 17, 2017, Mr. and Mrs. Gokey commenced Action No. S-34501 in the Supreme Court of British Columbia, Chilliwack Registry ("Action S-34501") against Mr. Usher and Ms. Parsons claiming the relief sought here.
- [53] On January 15, 2018, a consent order was made in the Provincial Court that the claims and counterclaims in Action 1973 would be abandoned on the basis that the parties would advance those claims by in Action No. S-34501, and transferring that action from the Chilliwack Registry to the Prince Rupert Registry, which became this action.

Document Production

- [54] Over the years the defendants have taken a significant number of photographs related to their dispute with the plaintiffs. The plaintiffs complain the defendants have failed to produce all relevant photographs and videos. In December 2021 the plaintiffs applied for an order compelling the production of documents by the defendants. On January 27, 2022, the plaintiffs' application seeking such production of some 3000 movies, photographs and documents was heard. The plaintiffs based their demand primarily on gaps in the digital numbering of videos and photos produced by the defendants. The defendants were ordered to produce an affidavit responding to the numerous requests in the plaintiffs' application.
- [55] The defendant Ms. Parsons deposed that the gaps in the numbering of videos produced related to videos of unrelated and irrelevant matters and duplicates of videos already produced. In addition, others sought by the plaintiffs were already listed and had been produced by the defendants. As a result, no further production was ordered.
- [56] Despite that, Mr. Gokey continues to allege production has been deficient. Mr. Gokey in submissions refers to notes he has made on a calendar where he would note a "tick" when the defendants took pictures of him and therefore, he knows how many are missing. The calendar was not produced on the application nor at trial.

Res Judicata and Issue Estoppel

- [57] The defendants submit certain claims of the plaintiffs cannot be pursued as they are res judicata and that issue estoppel applies because of the earlier Provincial Court proceedings concerning previous conflicts between the parties, which are connected to the issues in this proceeding.
- [58] The plaintiffs submit res judicata and issue estoppel are affirmative defenses and must be specifically alleged: *XY, LLC v. Canadian Topsires Selection Inc.*, 2014 BCSC 2017 at para. 31; see also *Anwar Group International Ltd. v. Poulin*, 2015 SKPC 167 at para. 6, citing "Collateral Estoppel" in *Black's Law Dictionary*, 7th ed. (West Group Publishing, 1999) at 256. They submit it is too late for the defendants to rely on them at the end of the trial noting that "[e]stoppel should not be sprung on a party at the last minute": 32262 B.C. Ltd. v. McDonell, 1998 CanLII 3895 at para. 47, [1998] B.C.J. No. 1503 (S.C.). I note that the quoted passage is qualified by the rest of the paragraph where Justice Morrison stated:

- [47] From the cases, it appears the requirement that estoppel be pleaded is not a strict rule. Where it appears clear either from the pleadings or the evidence or both that estoppel is at issue, I believe it is appropriate to consider the issue. The underlying concern is fairness. On one side, the court appears reluctant to be overly technical and deny a party the right to rely on estoppel just because it was not specifically called such in the pleadings, while at the same time, the court appears unwilling to make a determination based on an issue that the parties have not had an opportunity to fully address over the course of proceedings. Estoppel should not be sprung on a party at the last minute. It should only be considered if both parties have had a chance to present evidence and cross-examine witnesses on the matter; such that the parties have had the opportunity to fully address the issue.
- [59] Res judicata and issue estoppel were not pled by the defendants. However, as noted in 32262 B.C. Ltd., Morrison J. found that they could be raised even if not pled: paras. 47-49. Where, as here, it is clear from the pleadings and the evidence that estoppel is an issue, then the Court may consider it. In this instance, the continued litigation and the issues in dispute overlap. As well, while not pled, the parties led evidence and were cross examined on the previous proceedings and the issues involved. To not permit the defendants to raise res judicata and issue estoppel would be unjust and unfair.
- [60] In *The Doctrine of Res Judicata in Canada*, 5th ed. (Markham, ON: LexisNexis Canada Inc., 2021), Donald J. Lange defines the meaning of res judicata:

The doctrine of res judicata is a fundamental doctrine of the justice system in Canada. It has two distinct forms: issue estoppel and cause of action estoppel. It is part of the general law of estoppel comprising estoppel by conduct or representation, estoppel by deed, promissory estoppel, proprietary estoppel, and res judicata. Early terms used for res judicata were "estoppel per rem judicatam," that is, estoppel by the matter decided, and "estoppel by record," that is, estoppel by the written record of a court of record. In Canada, the term most commonly used is "res judicata," which the Supreme Court of Canada has defined as "something that has clearly been decided" and as "it has passed into a matter adjudged." When res judicata applies, a litigant is "estopped" by the previous proceeding. In their simplest definitions, issue estoppel means that a litigant is estopped because the issue has clearly been decided in the previous proceeding, and cause of action estoppel means that a litigant is estopped because the cause has passed into a matter adjudged in the previous proceeding.

[Footnotes omitted.]

- [61] The Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, addressed the rationale for finality in litigation:

18 The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry. The appellant chose the ESA as her forum. She lost. An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once

in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

19 Finality is thus a compelling consideration and judicial decisions should generally be conclusive of the issues decided unless and until reversed on appeal.

20 The law has developed a number of techniques to prevent abuse of the decision-making process. One of the oldest is the doctrine estoppel per rem judicatem with its roots in Roman law, the idea that a dispute once judged with finality is not subject to relitigation: *Farwell v. The Queen* (1894), 22 S.C.R. 553, at p. 558; *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at pp. 267-68. The bar extends both to the cause of action thus adjudicated (variously referred to as claim or cause of action or action estoppel), as well as precluding relitigation of the constituent issues or material facts necessarily embraced therein (usually called issue estoppel): *G. S. Holmsted and G. D. Watson, Ontario Civil Procedure* (loose-leaf), vol. 3 Supp., at 21 s. 17 et seq. Another aspect of the judicial policy favouring finality is the rule against collateral attack, i.e., that a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it: *Wilson v. The Queen*, [1983] 2 S.C.R. 594; *R. v. Litchfield*, [1993] 4 S.C.R. 333; *R. v. Sarson*, [1996] 2 S.C.R. 223.

[62] The plaintiffs advance in this action certain claims advanced in Action 1841. For example, a list of \$2,200 in costs alleged to relate to repairs to the damage to the well house by Ms. Parsons in April 2009 having cut down the wall Mr. Gokey erected down the middle of the well house are the same costs as they advanced in their counterclaim in Action 1841 filed January 10, 2012. Mr. Gokey acknowledged in cross examination that this was a duplication of that claim.

[63] Evidence advanced by the plaintiffs also included sums claimed for the alleged poisoning of their trees by the defendants, various allegations that their water was cut by the defendants resulting in costs being incurred by the plaintiffs and the alleged taking of the well pump. All of these claims were resolved by the April 2014 settlement agreement in Action 1841. That settlement agreement was entered in the Small Claims Court Registry as a settlement conference record which, as Judge Seidemann noted, was effectively an order of the Court.

[64] I am satisfied that such claims were adjudicated in Action 1841. The principles of res judicata and issue estoppel prevent the plaintiffs from trying to relitigate such claims in this action. In any event, even if such claims are not so barred the plaintiffs failed to lead evidence of those claims except for the "Dead Ed" sign issue complained of by Mr. Gokey. That sign was sign addressed in the Provincial Court trial in Action 1841. Judge Seidemann found it was erected by the defendants and was a breach of the settlement agreement. I will return to this sign issue later in these reasons.

[65] I am satisfied that the doctrines of res judicata and issue estoppel apply. The plaintiffs are seeking to relitigate claims advanced and resolved in Action 1841 in the Provincial Court.

Limitation Period

- [66] The defendants submit that the limitation period that applies to their claim in nuisance is May 4, 2016, arising from the smoke issue is May 4, 2014. Regarding the applicable limitation period of May 4, 2016, Mr. Usher and Ms. Parsons filed a notice of claim in Action 1973. The notice of claim sought damages based on allegations that the Gokeys had "carried out a campaign of harassment and nuisance" through various actions including 11burning and the accompanying smoke from various locations on the Defendants [sic] property", disturbing noise from "an extreme telephone bell" and the spreading of garbage obstructions and debris on the Gokey property line adjacent to the property line.
- [67] On December 19, 2016, the Gokeys filed a reply and counterclaim in Action 1973. The counterclaim sought damages based on an alleged campaign of harassment and nuisance against the Gokeys including interference with the Gokeys' reasonable use and enjoyment of their property since 2005 to the present, and the stalking of 11the defendant" (Mr. Gokey presumably) and 11assaulting Mr. Gokey".
- [68] The limitation period for a claim of nuisance is two years under s. 6 of the Limitation Act, S.B.C. 2012, c. 13. As the subject of these proceedings was first addressed in the Provincial Court proceeding no.1973 commenced May 14, 2016, the two-year limitation back to May 4, 2014 applies.
- [69] The defendants submit that despite the limitation period, the pre-May 4, 2014 period, is relevant evidence showing the pattern of burning Mr. Gokey has employed since May 4, 2014, as well as to his motive for such burning.
- [70] The first burning incident occurred in the fall of 2007. Mr. Usher asked that Mr. Gokey cease his burning because of the large quantity of smoke being produced but Mr. Gokey continued to burn. It only stopped because a conservation officer directed that he cease burning.
- [71] The next incident of burning was in March 2008 which resulted in an email exchange between Mr. Gokey and Ms. Parsons. In his March 26, 2008 email to Ms. Parsons, Mr. Gokey stated she had come onto his property to express her "personal hate" of his burning and that she had complained about "five fucking days of smoke" and that "you wanted to be able to go in your back yard". He replied that he "understood" this but "I am here for a short time and must get as much done as possible when I am here. I wish I had the time to wait for the wind to be blowing Northwesterly away from you but I don't". He also said that "I will be burning for a few more days and I am sorry if the wind blows the smoke towards you but it's the wind not me doing it". He also denied that any embers from his burning had caused any damage to the defendants' greenhouse, for which they had submitted an insurance claim.

- [72] Ms. Parsons replied on March 26, 2008 stating that she did not have a problem with his burning "as long as I can go out into my own yard and not have my eyes burning, coughing and choking, headaches, etc. - I know I don't need to tell you about smoke inhalation as you were a member of the fire dept. at one time. Even the dogs wouldn't stay outside". She also reiterated that small burn holes to the greenhouse had been caused by his burning.
- [73] Since then, Mr. Gokey has continued to burn, producing excessive smoke on many of the days he is in Sandspit.
- [74] On December 19, 2017, Mr. Gokey served or attempted to serve Ms. Parsons with several applications in Action 1973. One application sought a stay of all further proceedings in Action 1973 pending the outcome of Action S-34501 as the subject matters of the two proceedings was the same and because Action S-34501 advanced claims and sought monetary damages outside the jurisdiction of the Small Claims Court, or a transfer of Action 1973 to the British Columbia Supreme Court, Chilliwack Registry.
- [75] Another of the December 2017 applications in Action 1973 sought an amendment of the reply and counterclaim in that action, including the advancing of a claim for \$10,000 for the alleged diminution in value to 495 Beach Road caused by the "marijuana operations" at 497 Beach Road.
- [76] On January 15, 2018, Mr. Usher and Ms. Parsons filed a response to civil claim in Action S-34501.
- [77] As noted earlier on January 15, 2018, a consent order was entered in Action 1973 that the claims and counterclaims in Action 1973 would be abandoned on the basis that the parties would advance those claims and counterclaims by a transfer of the proceedings in Action 34501 to the BCSC Prince Rupert Registry (this action) with the Gokeys being plaintiffs and Mr. Usher and Ms. Parsons plaintiffs by counterclaim in the transferred proceeding.
- [78] An amended notice of civil claim ("AN OCC") was filed by the plaintiffs in this Action on October 8, 2019 as a result of an order made at a September 9, 2019 Case Planning Conference that the plaintiffs file an AN OCC by October 25, 2019 to address the lack of particulars in the NOCC as to the claims being advanced by the plaintiffs.
- [79] An amended response to civil claim was filed by the defendants on November 22, 2019 in Action 10740. A counterclaim was filed by the defendants on November 29, 2019, in Action 10740. The plaintiffs filed a response to counterclaim on December 19, 2017.

Position of the Plaintiffs Edward C. Gokey and Diane B. Gokey

- [80] The plaintiffs' claims are set out in paragraphs 4(a) to (u) of their AN OCC. They advance allegations that the defendants poisoned the plaintiffs' trees in 2008 and 2009, that they cut off their water from the well, that Ms. Parsons cut down, with a chainsaw, the wall Mr. Gokey had built in the easement area, that they placed sharp screws in a retaining wall to injure Mr. Gokey, that they threatened them through the display of a bullet-ridden sign

saying "Dead Ed" and that Mr. Usher assaulted Mr. Gokey on the plaintiffs' property. It further advanced claims of trespass, threatening behavior by use of a pick-up truck, the stalking of Mr. Gokey, threatening phone calls from Mr. Usher, the hosing down of Mr. Gokey by Mr. Usher with a water hose, the theft of a well pump, the putting of water in a sauna and composter and the damaging of a mobile home trailer with smoke.

- [81] The plaintiffs allege the defendants have harassed and inflicted mental suffering upon them by subjecting them to "a continuous bombardment of constant hatred and intrusions into their lives as to put especially Mr. Gokey in a constant and escalating state of fear for his personal safety and life every moment he spent in Sandspit at the Gokeys' residence" consisting of "[c]onstant surveillance, trespass on the Gokeys' property, multiple complaints made to governmental authorities the chainsaw incident and screws intruding into the Gokey's [sic] property, and continuing assaults on Mr. Gokey's person with the obvious intent of driving the Gokeys out of Canada ".
- [82] The plaintiffs further submit that the defendants are liable in nuisance arising from the growing and use of marijuana on their premises and the resulting odour and noise. They also allege the growing of marijuana by the defendants is unlawful.
- [83] They seek injunctive relief enjoining the defendants from acts of nuisance, trespass, harassment, infliction of mental suffering, intimidation, stalking, invasion of privacy, assault and growing and use of marijuana.
- [84] In his opening statement Mr. Gokey stated the plaintiffs were no longer seeking monetary relief.

Position of the Defendants Gordon F. Usher and Patricia Ann Parsons

- [85] The defendants deny the claims of the plaintiffs. In their counterclaim, they advance:
- a) a claim for the assault by Mr. Gokey on Mr. Usher at Mr. Gokey's property on April 14, 2015;
 - b) a claim for the trespass by Mr. Gokey on their property and into their home on December 19, 2017;
 - c) a claim in nuisance due to the noise from the outside phone ringer and low-pressure alarms installed by Mr. Gokey at 495 Beach Road and other interference with their property rights;
 - d) a claim in nuisance due to the smoke generated by Mr. Gokey from various burning activities on his property at 495 Beach Road; and
 - e) a claim for orders and permanent injunctive relief respecting the well easement area and to prevent continued tortious conduct and interference by the plaintiffs against the defendants and their property rights.

Credibility of the Parties and Witnesses

[86] Given the years-long interactions of the parties and the nature of their respective complaints against each other, their credibility and the reliability of their evidence are in issue.

Law on Credibility

[87] In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, leave to appeal to SCC ref'd, 35006 (7 March 2013), Justice Dillon summarized the factors that arise in assessing credibility:

[186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[88] As cited in *Allison v. Radtke*, 2014 BCSC 1832 at para. 120, the Nova Scotia Supreme Court noted in *Novak Estate (Re)*, 2008 NSSC 283:

36 There are many tools for assessing credibility:

- a) The ability to consider inconsistencies and weaknesses in the witness's evidence, which includes internal inconsistencies, prior inconsistent statements, inconsistencies between the witness' testimony and the testimony of other witnesses.
- b) The ability to review independent evidence that confirms or contradicts the witness' testimony.
- c) The ability to assess whether the witness' testimony is plausible or, as stated by the British Columbia Court of Appeal in *Faryna v. Chorny*, [1951] B.C.J. No. 152, 1951 CarswellBC 133, it is "in harmony with the preponderance of probabilities which a practical [and] informed person would readily recognize as reasonable in that place and in those conditions", but in doing so I am required not to rely on false or frail assumptions about human behavior.

- d) It is possible to rely upon the demeanor of the witness, including their sincerity and use of language, but it should be done with caution (*R. v. Mah*, [2002] N.S.J. No. 349, 2002 NSCA 99, paras. 70-75).
- e) Special consideration must be given to the testimony of witnesses who are parties to proceedings; it is important to consider the motive that witnesses may have to fabricate evidence. *R. v. J.H.*, [2005] O.J. No. 39 (Ont. C.A.), paras. 51-56).

37 There is no principle of law that requires a trier of fact to believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence. (See *R. v. D.R.* [1996] 2 S.C.R. 291 at para. 93 and *R. v. J.H.*, *supra*).

[89] As also noted in *Allison*:

121 In deciding which facts are more likely than not, I have weighed competing evidence on several issues applying the words of Mr. Justice O'Halloran in *Faryna v. Chorney* (1951), 4 W.W.R. (N.S.) 171 (B.C.S.C.), at 174:

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

[90] In *R. v. R.E.M.*, 2008 SCC 51, the Supreme Court of Canada addressed the issue of credibility as well:

49 While it is useful for a judge to attempt to articulate the reasons for believing a witness and disbelieving another in general or on a particular point, the fact remains that the exercise may not be purely intellectual and may involve factors that are difficult to verbalize. Furthermore, embellishing why a particular witness's evidence is rejected may involve the judge saying unflattering things about the witness; judges may wish to spare the accused who takes the stand to deny the crime, for example, the indignity of not only rejecting his evidence and convicting him, but adding negative comments about his demeanor. In short, assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization.

50 What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo*, where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility ... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence: *Dinardo*, at para. 30.

51 The degree of detail required in explaining findings on credibility may also, as discussed above, vary with the evidentiary record and the dynamic of the trial. The factors supporting or detracting from credibility may be clear from the record. In such cases, the trial judge's reasons will not be found deficient simply because the trial judge failed to recite these factors.

[91] With these principles in mind, I turn to the credibility and reliability of the parties and other witnesses.

Credibility of the Plaintiff Edward C. Gokey

[92] Mr. Gokey presented as an individual who sees matters favourable to his view of himself. Certain events significantly affect his credibility and reliability.

[93] In April 2012, a sign on a 4 x 8-foot sheet of white plywood appeared on a building of the plaintiffs at 495 Beach Road. It stated in large black capital letters "MOM MAKE GARY STOP". At the same time, on the back of the sauna building at 495 Beach Road, which was also painted white, there were the words "MOM IT HURTS" in large black capital letters. Shortly thereafter in May 2012, an envelope with the plaintiffs' return address and addressed to Gordon Usher was received in the mail. On the back it had the name of the defendant Patricia Parsons' daughter.

[94] Ms. Parsons' daughter was from an earlier relationship. Gary was the name of her former husband, the stepfather of her daughter whom he had sexually assaulted. The sign is a clear reference to that event. Mr. Gokey denied any knowledge of such an assault until 2013 when Mr. Usher phoned and left a message at his home in Washington.

[95] Mr. Gokey also denied having prepared the sign. He stated it had been prepared by a "Bonnie" although he was uncertain of her surname, who was allegedly a friend of the defendants. He testified he had the sign stored in his shop for over a year and that he put it up in 2012. He admitted he had read it before doing so. His explanation for placing the "Mom Make Gary Stop Sign" when he did is that he believed Mr. Usher had dumped garbage on his property and he was trying to make him stop and that he put up the second "Mom It Hurts" sign to stop Mr. Usher from throwing rocks into his yard.

[96] The explanations border on the bizarre. Mr. Usher's name is Gordon, not Gary. The sign makes no reference to a problem with garbage or rocks. Mr. Gokey's "explanations" for the sign make no sense. No believable explanation for the sign's creation, its retention in his shop nor its display was offered by Mr. Gokey. The sign can only be interpreted to refer to the sexual assault of Ms. Parsons' daughter. Its display is inexcusable and reveals much about Mr. Gokey's character and campaign against the defendants. His "explanation" to the Court significantly undermines his credibility.

[97] Mr. Gokey only took the signs down several days later after being ordered to do so by the RCMP.

- [98] Ms. Parsons' evidence is that Mr. Gokey continued to taunt her about her daughter having been sexually assaulted for a couple of years after the signs went up. She produced notes she had made at the time of some of the taunts because she found them so disturbing.
- [99] As well, the April 9, 2014 settlement agreement contained a term that "the Defendant will immediately remove all open-air references to the Claimants or any member of their family". Ms. Parsons' evidence was that the sign referencing "Gary" and the "Mom It Hurts" sign were the reason the family "member" term was included in the settlement agreement. Mr. Gokey was not able to explain why the "any member of their family" term would have been included in the settlement agreement except for the signs having been references to Ms. Parsons' daughter.
- [100] Mr. Gokey has a propensity to use signs. Later in 2012 he mounted another sign on a large piece of plywood on top of the well house stating in similar large capital letters "KEEP OUT GORD" as he did not want Mr. Usher coming onto his property. The printing on that sign is very similar to the earlier signs.
- [101] During cross examination, when counsel put to him documents thought to show his printing, he denied the printing was his, stating that it was his wife's as she helped him complete documents in the litigation. When documents that he agreed had his printing on them were put to him, and then it was suggested the printing on them was very similar to the ones he stated his wife had prepared, he denied the similarity. The similarity is self-evident. I do not accept his evidence on this point.
- [102] Of more significance are other documents in evidence. One is the affidavit (declaration) filed January 25, 2022 in support of Mr. Gokey's application for an order for document production by the defendants which states:

I, Edward C. Gokey, of 2680 Killmore Road, Ellensburg, WA 98926 (USA), Plaintiff pro se, do hereby swear, affirm, and declare under penalty of perjury of both the State of Washington, U.S. A. (RCW 9A.72.085 and GR13 of the General Rules of the Washington State Supreme Court), and the Province of British Columbia, Canada, that:

1. This Affidavit (Declaration) is made in accordance with and pursuant to the provisions of Section 63(f) of the Evidence Act, RSBC 1996, c 124 (2017). See, e.g. Environmental Packaging Technologies, Ltd. v. Rudjuk, 2012 BCCA 342 (CanLII) (Chiasson, J.), at para. 25.
2. I am over the age of 18 and am competent to testify to the following matters and facts based on my own personal knowledge.
3. I am one of the Plaintiffs pro se in the case captioned Gokey v. Usher/Parsons, No. 10479, in the Prince Rupert Supreme Court. I am authorized to make this Affidavit/Declaration by my co-Plaintiff pro se, Diane B. Gokey.

STATE OF WASHINGTON)

U.S.A.) ss: VERIFICATION/DECLARATION

COUNTY OF KITTITAS)

EDWARD C. GOKEY, under penalty of perjury under the laws of the State of Washington, and any comparable laws and rules of the Province of British Columbia, Canada, swears, declares, affirms, and certifies that the foregoing statement of facts are true and correct to the best of his own personal knowledge; he affirms and certifies that the e-file signature as set forth hereinbelow is his personal signature; and that he has not prepared this Affidavit (Declaration) for any improper purpose.

- [103] The affidavit on its face is signed by Edward C. Gokey and then has his name typed underneath stating "Edward C. Gokey (Written)" and also to the right is typed "Edward C. Gokey" and underneath it states "Edward C. Gokey (Printed)".
- [104] When it was put to him, he stated that his name on the signature line was printed by his wife not him. He had relied on the affidavit at a January 27, 2022 application in this action. He confirmed that it was his affidavit, not his wife's, yet he had not signed it--she had--and when it was put to him it was similar to the signature on other documents signed by him, he stated that those too were signed by his wife on his behalf.
- [105] There is very little indication that Mrs. Gokey has been involved in this proceeding nor did she attend to give evidence at trial. I do not find it credible that she was signing documents on behalf of Mr. Gokey. He quite clearly was perfectly capable of preparing and signing documents. In addition, while there is no expert evidence, the printing on the documents is very similar.
- [106] He appeared to have no concern or understanding that by saying his wife had signed it he had misled the Court in this proceeding. His explanation for his wife's signature on his affidavit is not credible but rather appears to be an effort to avoid the defendants' argument that the printing on the sign was similar to his handwriting. That is, to avoid admitting the "Dead Ed" wording on the sign addressed in the Provincial Court proceeding was printed by him.
- [107] I do not accept his evidence that he did not sign the affidavit. In the event that is in error and his wife did, then he knowingly filed a document with the Court which was false and misleading. In either event it creates significant concerns about his credibility and the reliability of his evidence.
- [108] I also find he lacks credibility because he knowingly mischaracterizes events. In the plaintiffs' response to counterclaim it is stated:

The true facts are within the knowledge of the Plaintiffs as well as the Defendants, as it was clearly and expressly agreed between the parties that the Gokeys own the water well in question; that the Gokeys have the absolute right and privilege to freely use the water from their well for the purpose of providing water supply to one residential dwelling located on each of their two lots;...

- [109] As discussed earlier, that is contrary to the evidence of the defendants and the findings of the Provincial Court and this Court. The refusal of Mr. Gokey to accept what he agreed to and was ordered is concerning as it is another example of his misstatement of factual matters and a willingness to mislead.
- [110] In Provincial Court and in this trial, he admitted to commenting to Ms. Parsons regarding her teeth and his allegation of her drug use. There is no evidence of the latter.
- [111] His comments such as he was being "nice" regarding what he has said to Ms. Parsons ring hollow, as they did in the Provincial Court proceeding where Seidemann J. stated:
- [18] What is clear to me is that Mr. Gokey consciously and deliberately likes to "push the buttons" of the claimants. That was apparent in court, when Mr. Gokey on several occasions made comments on Ms. Parsons's appearance, despite her requests not to. Comments which were clearly not meant as sincere compliments, despite the words used.
- [112] I find Mr. Gokey in his evidence was disingenuous, lacking in candor, insincere and knowingly sought to give an appearance of frankness when he was clearly was not. He tended to provide explanations favourable to his claims instead of answering the questions asked.
- [113] I note that Mr. Gokey's evidence or characterization about a particular interaction with others generally conflicted with the evidence of the defendants, Ms. Wagner and Ms. Wilson where they were describing the same events. Where that occurs, I accept the evidence of the defendants and their witnesses, not Mr. Gokey. In short, I find the evidence of Mr. Gokey was neither credible nor reliable. It came across as the evidence of an individual who believes he is always right.
- [114] As a result, the evidence of Mr. Gokey must be considered with care as it has a pattern of justifying his conduct as reasonable, characterizing events in ways not supported by other evidence and indicating a view that he was entitled to do as he pleased and to say what was necessary to justify his behavior and advance his claims.
- [115] This was reinforced by his submissions in which he frequently stated as evidence matters that were not in evidence at trial; hence his submissions had to be considered with care.

Credibility of the Defendant Gordon F. Usher

[116] Mr. Usher was careful in giving his evidence. Even where certain evidence put to him might have been in his favour, he did not accept it. For example, Mr. Gokey testified that at the time of the assault on his property on April 14, 2015, he choked Mr. Usher until he was blue in the face, but Mr. Usher denied that was the case. When Mr. Usher was asked about any physical injuries he suffered he stated they were extremely minor in their effect.

[117] He admitted as well to making the telephone calls to Mrs. Gokey and leaving three messages on her telephone answering machine and that the summaries provided by the plaintiff were reasonably accurate even though they were not admitted in evidence.

[118] I accept he was candid and frank in his evidence.

Credibility of the Defendant Patricia Ann Parsons

[119] Ms. Parsons has had more confrontations with Mr. Gokey and has been the subject of his very insulting comments to her as well as his references to a sexual assault on her daughter by Ms. Parsons' former spouse. Her animosity towards Mr. Gokey is understandable. She admitted to having on occasion sworn at Mr. Gokey. I find that she was more easily provoked by Mr. Gokey because of the nature of his comments to her over the years. Those comments were deeply personal including comments on her appearance and the sexual assault of her daughter. Despite that, her evidence was consistent with that of Mr. Usher and the other witnesses. As well, she kept detailed notes of events and photographs and videos. Overall, where her evidence conflicts with that of Mr. Gokey, I accept her evidence over his.

[120] Given my credibility findings, the facts I find are consistent with and flow from those findings.

Claims and Counterclaims

[121] As noted earlier the claims of the plaintiff can be broken down into a number of events and categories including issues related to:

- a) well usage,
- b) allegations of poisoning of the plaintiff's trees,
- c) an allegation of Mr. Gokey being hosed down by Mr. Usher,
- d) an allegation of water being put down the chimney of Mr. Gokey's sauna by Ms. Parsons and the filling of his composter with water,
- e) alleged smoke damage to a mobile home on their property,
- f) placement of screws in the defendants' retaining wall to injure Mr. Gokey,

- g) an assault on Mr. Gokey by Mr. Usher,
- h) threats by the placement of a sign saying "Dead Ed" facing his property,
- i) threatening actions by Mr. Usher using vehicles directed at Mr. Gokey,
- j) leaving threatening messages on Mr. Gokey's Washington residence phone by Mr. Usher,
- k) smell and noise from the defendant's "marijuana grow op",
- l) false reports to authorities concerning Mr. Gokey's conduct,
- m) invasion of Mr. Gokey's privacy,
- n) alleged letting the air out of Mr. Gokey's his truck tires while it was parked in Sandspit and
- o) the blowing of grass clippings onto Mr. Gokey's property.

[122] I turn to the various claims categorized by their legal basis.

Trespass

[123] As noted, the plaintiffs' claim the defendants committed trespass by spraying water down their sauna steam pipe, by placing screws into a retaining wall projecting onto the plaintiffs' property, filling their composter full of water, conducting an open burn and damaging the mobile home stored on their property, placing fencing of the well on their property, the attendance of Mr. Usher on their property and the use of the chainsaw by Ms. Parsons in the well house.

[124] The defendants in their amended counterclaim submit the defendant Mr. Gokey committed the tort of trespass on December 19, 2017 by entering their home without permission to deliver an envelope and in January 2022 and by building a large structure over the easement area.

Law of Trespass

[125] In *City of Burnaby v. Thandi et al*, 2005 BCSC 1478, Justice Bennett (then of this Court) stated:

113 Trespass to land is defined in G.H.L. Fridman, *The Law of Torts in Canada*, 2nd ed., (Toronto: Carswell, 2002), at p. 37-38:

Trespass to land consists of entering upon the land of another without lawful justification, or placing, throwing or erecting some material object thereon without the legal right to do so. Such interference must be direct rather than consequential. To constitute trespass the defendant must in some direct way interfere with the land possessed by the plaintiff. The requirement of directness differentiates trespass from nuisance, which is committed when the defendant makes a use of his land indirectly affects the land of the plaintiff.

[126] In *Gibson v. Sun*, 2018 BCSC 1277, Justice Abrioux (then of this Court) addressed trespass:

[109] The tort of trespass to land was discussed in *Watson v. Charlton*, 2016 BCSC 664 at para. 224, where the court endorsed the following summary from *Glashutter v. Bell*, 2001 BCSC 1581 at para. 26, "Trespass to land occurs when one enters onto land in the possession of another without lawful justification. Trespass is actionable per se; there is no requirement to prove actual damage to the property".

[127] In addition, as noted by Justice Metzger in *Aschenbrenner v. Yahemech*, 2010 BCSC 905:

34 The law of trespass is summarized by Fleming in *The Law of Torts*, 6th Ed. (1983), at p. 39, as follows:

If a structure or other object is placed on another's land, not only the initial intrusion but also the failure to remove it constitute an actionable wrong.

35 Even minute encroachments constitute trespass. I note that until a survey was completed neither party knew that the fence wandered onto both properties at various places.

36 An innocent trespass is still a trespass. Further, it is not necessary for the plaintiffs to prove actual damages. [See *Boyle v. Rogers*, [1921] 2 W.W.R. 704, at para. 8, aff'd, [1922] 1 W.W.R. 206 (Man. C.A.).] In the case before me, no monetary damage has been proven as a result of the acts of trespass.

Mr. Usher on the Plaintiffs' Property

[128] The plaintiffs allege Mr. Usher has trespassed "repeatedly" and "numerous times". The most "noteworthy" example given is Mr. Usher's attendance on his property to serve documents resulting in the alleged assault on April 14, 2015 discussed later in these reasons. The other allegations that Mr. Usher trespassed on the plaintiffs' property arise from the placement of a chicken wire fence on his property near the well to contain the dirt, the turning off of water, the moving of the electrical panel for the pump onto his property, the pouring of water into his sauna pipe, the poisoning of his trees and an allegation that Mr. Usher was on 493 Beach Road after Mr. Gokey purchased it, taking pictures. Mr. Usher admitted he was on the property with respect to the last allegation because burning was occurring from used oil in an oil drum, and he attended to advise it was a violation; however, he did not know if Mr. Gokey owned the property at that time. No date was in evidence other than this occurring in 2008. Mr. Gokey has not established if he owned the property at the time of the incident. Trespass is not established and is out of time.

Fence Built by Mr. Usher on the Gokeys' Property

[129] The defendants did build a wire fence between the well and 495 Beach Road. The fence, however, did not interfere with the plaintiffs' access to the well as they could still access the well itself by walking through the well house. It also failed to prevent the soil affecting the well. The replacement fence was built because the defendants wanted to create an effective barrier between soil that Mr. Gokey was building up on 495 Beach Road along the fence line

next to the well and the well itself. No survey was provided regarding the location of the fence. In any event, it relates back to 2009 hence the claim by the plaintiffs is statute barred.

Water Down Sauna Steam Pipe and Water Filling Composter

[130] Mr. Gokey alleges the defendants used a hose to pour water down the chimney of his sauna and that they broke into his composter and filled it with water. He did not see either of the defendants do so. He provided no evidence of water entering the sauna or the composter. Instead, he relied on a photograph taken by Ms. Parsons showing a step ladder on her property with a hose spraying into the air filled with smoke from burning devices of the plaintiff.

[131] Ms. Parsons testified there had been smoke coming into her yard that had a sickening smell. She noted that Mr. Gokey had connected a pipe from the tank into which he put fish carcasses to rot for fertilizer to the burning sauna, which was the apparent source of the smell. She had placed a hose on the ladder spraying water into the air in an effort to dampen down the smoke. There is no evidence the spray was entering any of Mr. Gokey's devices.

[132] Mr. Gokey has failed to establish that these alleged acts occurred.

Screws in Retaining Wall

[133] Near Beach Road there are railway ties between 495 and 497 Beach Road to retain an embankment of 8-12 inches between the two properties. Mr. Gokey alleges screws are protruding from the railway ties and that they were placed there by the defendants to harm or threaten him. He alleges they stick out 1.5 inches from the ties. He did not see anyone install the screws. He alleges they were sticking out onto his property and that he hooked his socks on them on one occasion. He testified he called the RCMP about them.

[134] There is no evidence the defendants installed the screws to threaten or harm the plaintiff Mr. Gokey. Nor is there any evidence that they perform a function in the retaining wall. In addition, they do not protrude onto his property as the railway ties are about 6 inches inside the defendants' property line. Mr. Gokey however chooses to do yard and other work at that corner of his property and in doing so enters onto the defendants' property.

[135] The plaintiffs have failed to prove their allegations concerning the screws. They have not established a claim in trespass or nuisance or any other claim against the defendants because of them.

Alleged Poisoning of Trees

[136] Mr. Gokey alleges that in the summer of 2009 Ms. Parsons sprayed his trees with poison, killing a number of trees on 495 Beach Road close to the property line with 497 Beach Road. The trees were planted by Mr. Gokey who used heavy machinery to move the mature trees and their root balls from another area of his property and relocate them to the property

line. Her evidence was she did not poison them, and the only spraying done near them on her property was when cleaning her garage and windows with a cleaning solution and the spray from her hose may have drifted towards the trees. The defendants suggest that given the manner in which mature trees were relocated and planted some losses were to be expected.

[137] Mr. Gokey's claim appears to be based on a supposed "admission" when Mr. Gokey asked Mr. Usher in the summer of 2009 if he had poisoned the trees and Mr. Usher joked that Ms. Parsons must have poisoned them because if he had done so they all would have died. Mr. Usher's evidence was that he did not spray or poison any of Mr. Gokey's trees.

[138] Mr. Gokey called no expert evidence regarding the trees and their alleged poisoning. In any event, the claim was addressed in the Provincial Court trial and is also out of time.

Hosing of Mr. Gokey While Welding

[139] Mr. Gokey alleges that Mr. Usher deliberately hosed him down while he was doing welding on his property, apparently in 2010. Mr. Usher testified that the welding and grinding Mr. Gokey was doing about a foot and one half from their property line was causing sparks to land on his garage roof posing a fire risk. He hosed down his garage roof to reduce that risk. He denied deliberately hosing Mr. Gokey but conceded some spray could have drifted to him.

[140] Mr. Gokey's evidence regarding being "hosed down" was limited to that assertion. He provided no descriptive detail of what that meant. He provided no description of a deliberate act to direct a hose at him by Mr. Usher.

[141] As noted earlier, where there is a conflict between the evidence of Mr. Gokey and the other witnesses, I accept their evidence over his. Mr. Gokey has failed to prove any deliberate act to hose him down if indeed such in fact occurred.

Smoke Damaging Mobile Home

[142] In August 2009 Mr. Gokey alleges the defendants started an open fire near their property line causing smoke damage to a mobile home located on his property. He produced what he said was a photograph showing the alleged smoke damage. He complained to the local fire chief. He also said several people had complained to him about the fire. The defendants produced photographs of the location of the fire which they took after the fire chief contacted them. They show a small fire pit and no scorching of the grass in the surrounding area. The plaintiff did not call any of the alleged complainants he referred to.

[143] The mobile home in question was old as it was on 493 Beach Road before the plaintiffs purchased that property. They later moved the mobile home to 495 Beach Road.

- [144] The photograph of the alleged smoke damage is of the interior of the mobile home. It is not possible to determine if the damage was caused by smoke or mold. There is no allegation of any smoke damage to the exterior.
- [145] The email Mr. Gokey sent to the fire chief referred to open burning regulations that required that a fire had to be 100 metres from any structure. That is a regulation that Mr. Gokey has clearly violated repeatedly with his burning activities over the years both before and after 2009.
- [146] Given my findings regarding the credibility of Mr. Gokey and his pattern of aggressive behaviour towards the defendants, his failure to call any witnesses regarding this allegation and his failure to prove damage to his mobile home due to smoke, I find he has failed to prove such occurred. In any event, the limitation period for this claim has passed.

Trespass Claims of the Defendants

- [147] The defendants allege two instances of trespass by Mr. Gokey, the first by entry into their home and the second by building the structure in the easement area in January 2022.

Trespass into Defendants' Home

- [148] On December 19, 2017, Mr. Gokey attended at the defendants' home at 497 Beach Road. Ms. Parsons testified it was early in the morning after Mr. Usher had left for work. She was upstairs when there was a loud banging on the front door on the main floor of the house and she heard Mr. Gokey speaking to one of their dogs. She did not answer the door nor respond saying she was too terrified. Mr. Gokey opened the door and left an envelope on the floor in the defendant's home. When put to him that Ms. Parsons did not give him permission to open the door he responded: "I swear I heard a window open, and she said put it on the floor".
- [149] In the past, Mr. Gokey had delivered documents to the defendants by leaving them on a chair outside the front door. The chair was there on December 19, 2017.
- [150] His explanation for not doing so was that Ms. Parsons asked him to leave the envelope on the floor. This does not explain why he knocked, particularly since he explained he did not deliver the envelope to the defendants until after Mr. Usher had left that morning so that he could avoid a confrontation.
- [151] By December 17, 2017, any civil relationship between the plaintiffs and the defendants had long passed. Given Mr. Gokey's treatment of Ms. Parsons including the signs, the taunting of her regarding her daughter who had been sexually assaulted, his comments about her teeth, her looks and her supposed use of crack, the unwanted and uninvited sexist remarks and his aggressive behavior towards her on June 10, 2013 on the beach, I do not accept his evidence that Ms. Parsons invited him to open the front door.

- [152] Mr. Gokey was well aware of the effect of his behavior on Ms. Parsons. He knew she had called the police after the beach incident. He also knew Mr. Usher had tried to contact Mrs. Gokey in the U.S. by phone to try and get her to persuade him to stop his threatening and abusive behavior towards Ms. Parsons.
- [153] It is not credible that Ms. Parsons would invite him into the home even if just to deliver documents. Nor is it credible that Mr. Gokey would expect her to do so.
- [154] There is a pattern to Mr. Gokey's aggressive behavior. His "Mom Make Gary Stop" sign was put up just before a scheduled settlement conference in Provincial Court. He escalated his conduct toward the defendants as well as Ms. Wagner in January 2022, just prior to the trial.
- [155] On a balance of probabilities, I find that Mr. Gokey trespassed by opening the door of the defendant's home on December 17, 2017, in order to deliver documents to the defendants.

Trespass on the Easement Area in January 2022

- [156] In January 2022, Mr. Gokey built a large structure in the easement area. As the easement area is the defendants' property his structure and its construction are a clear trespass. In addition, such acts were in breach of two Court judgments. He essentially treated the easement area as his own property so that the defendants could not monitor his activity on their property. His view was that they had no reason to monitor the easement area and if they needed to, they could use a ladder to climb up and look over the top of what he had constructed. In addition, also in January 2022 he used his Bobcat on January 6 and 8 on part of the front of the defendants' property which was also a trespass. Damages are not sought for the January trespasses but are relevant to the defendants' claim for injunctive relief.
- [157] In *Wasserman v. Hall*, 2009 BCSC 1318, Justice Macaulay addressed trespass to land involving the placement of a structure on another's land, in that case a fence:
- [68] There is no doubt, as I set out at the beginning of my reasons that the fence encroaches on the Wasserman property although the degree of encroachment is minor. This engages the law of trespass that Fleming summarizes in *The Law of Torts*, 6th Ed. (1983), at p. 39, as follows:

If a structure or other object is placed on another's land, not only the initial intrusion but also the failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains ...

- [69] As a result, any encroachment, even if minute, is a trespass. It is not necessary for Mr. Wasserman to prove actual damages and here there are none: see *Boyle v. Rogers*, [1921] 2 W.W.R. 704, at para. 8, *affd* [1922] 1 W.W.R. 206 (Man. C.A.).

- [158] The easement has never been finalized. As described in the settlement agreement, it was an easement granting the plaintiffs "permanent access [to] the borehole, the radius of the easement shall be 3 ½ feet centered on the borehole". It was ordered in this Court that the prohibition in the draft easement agreement respecting construction on the easement area would be varied to permit a security sleeve on the well bore only.
- [159] It is clear his construction of an excessively large bore sleeve and the building in the easement area was a trespass.
- [160] With respect to the use of his Bobcat on January 6, 2022, Mr. Gokey used his Bobcat to pile snow past the fence post of the defendants' property, piling snow five to six feet into their driveway, impeding their access. The pile remained there until Mr. Usher removed it on January 8, 2022 using a front-end loader. Such action was trespass by Mr. Gokey. Any snow that was also piled on the area between the defendant's property and the roadway impeding their access was part of Mr. Gokey's ongoing efforts to harass and cause distress to the defendants and as such was a nuisance.

Assault and Battery

- [161] The plaintiffs allege a number of occurrences of assault and battery by the defendants. These include the April 14, 2015 incident between Mr. Usher and Mr. Gokey, the vehicle incidents and the chainsaw incident with Ms. Parsons.

Law of Assault and Battery

- [162] The defendants refer to *Mittenen v. Dudley*, 2015 BCSC 2247, where Justice Verhoeven described the tort of assault and battery:
- [76] I described the tort of assault and battery in a decision I rendered in 2009, *McBeth-Kearns v. Marples*, 2009 BCSC 802, at para. 67:

Assault is the intentional creation of the apprehension of imminent harmful or offensive contact. Battery consists of intentionally causing a harmful or offensive contact with another person. Assault should be distinguished from battery, although the two are often blurred together and called "assault": Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law*, 8th ed. (LexisNexis Butterworths, 2006) at 46. In this case, as in most cases, blurring of the terms does not matter very much as the assault and the battery occurred in rapid succession, and for the purposes of assessment of damages, the assault is insignificant.

The April 14, 2015 Assault

- [163] Mr. Gokey alleges Mr. Usher assaulted him on April 14, 2015, when Mr. Usher attended his property to complain about the noise of their phone ringer and low water alarm and serve documents in the Provincial Court proceeding.

- [164] Mr. Gokey testified that Mr. Usher entered his property and started circling him rapidly "like a rooster" so he put his arm on his shoulder and asked him to leave. He alleges Mr. Usher then struck him with a backhanded blow, breaking his glasses and bloodying his nose. He stated that Mr. Usher was preparing to take another punch so he responded to this threat by taking Mr. Usher to the ground, then laying across him and putting his arm across his neck, choking him until he was blue in the face; he only let him up once Mr. Usher agreed to leave his property. Mr. Gokey denies the alarm was sounding by then.
- [165] Mr. Usher stated he entered the plaintiff's property as the alarm had been going off all day and at the suggestion of the RCMP he went over to ask Mr. Gokey to turn down the alarm. He also had documents to serve on Mr. Gokey. A summary prepared by Mr. Usher shortly after the incident noted that Mr. Gokey told Mr. Usher he would turn the alarm off after the system finished being flushed. Mr. Usher then noted that he reached into his pocket to serve Mr. Gokey with some Court papers being his application to a judge in the Provincial Court, and that Mr. Gokey told him he could not serve him. When he told Mr. Gokey he could and took out his cell phone to take a photo to confirm service, Mr. Gokey ordered Mr. Usher off his property, bumped him with his chest and stated he did not want to hurt him. Mr. Gokey then pushed him, struck him twice, hit him again and pushed him down. Mr. Usher stated he grabbed for Mr. Gokey's glasses and pulled them off as he was on his back on the ground. He then got up and left the property.
- [166] The evidence of Mr. Usher is to be preferred over that of Mr. Gokey because firstly I have found Mr. Usher credible and Mr. Gokey not credible. Mr. Gokey initiated physical contact. In addition, Mr. Usher minimized the assault by Mr. Gokey whereas Mr. Gokey described his actions as more serious. He also described the whole incident as "a blur" to him. He did admit that he placed his arm on Mr. Usher initially. Mr. Gokey being the aggressor is more consistent with his behavior and his evidence regarding aggressive actions such as the January 8, 2022 incident where he stated he stood his ground and that he was "asserting the Irish" in him when he stood in front of Mr. Usher's snow plow truck. The plaintiff clearly likes to be perceived as a "tough guy". Indeed, he appears to enjoy confrontations not only with the defendants but others such as Ms. Wagner and her son.
- [167] I am satisfied Mr. Gokey did not strike Mr. Usher in self-defence. Mr. Gokey pushed and struck him because he did not like Mr. Usher being on his property nor did he like being served.
- [168] Mr. Usher stated his injuries were minor.
- [169] I am satisfied the tort of assault and battery by Mr. Gokey of Mr. Usher has been established on a balance of probabilities.

Assault Alleged by Ms. Parsons with Chainsaw

- [170] Mr. Gokey alleges that in April 2009, Ms. Parsons used an electric chainsaw to cut through a plywood wall he had built down the centre of the well house knowing he was on the other side. He alleges when she did so he was behind the wall and fell backwards and that she knew he was there. He also testified the valves controlling water to the defendants were open.
- [171] Ms. Parsons testified that she had asked him several times during his building of the wall not to put the wall up or she would call the RCMP. She did so but testified the RCMP would not take any action. The wall prevented the defendants from accessing the controls to the water supply from the well. Their water supply had been cut off by Mr. Gokey.
- [172] She testified she did not know Mr. Gokey was on the other side of the wall when she used an electric chainsaw to cut through the wall so she could turn on the defendants' water supply. At the time, Mr. Usher was away for several days.
- [173] During the time the parties shared the well, the defendants repeatedly suffered from water shortages. They had complained many times to Mr. Gokey that they were without water. Ms. Wagner testified that the defendants would get water from her property because they could not get water from the shared well.
- [174] I accept the evidence of Ms. Parsons that she did not know Mr. Gokey was present. It is not clear why if he was close to the plywood, he would not have been aware of the saw. There is no evidence Ms. Parsons was threatening him. Upon being made aware he was on the other side of the wall, she ceased using the chainsaw.

Threatening Use of Vehicles

F-150 Allegation - April 16, 2016

- [175] Mr. Gokey alleges that on April 16, 2016, he was working on the right of way in front of his home when, as he came closer to the defendants' property, Mr. Usher pulled out of his driveway in his F-150 pickup truck. His evidence was that Mr. Usher deliberately "came at him" with the truck. He testified that Mr. Usher drove up to within one inch in front of him and was taking pictures of him from the truck and that he then got out of the truck and said to him "I have four guns and I know how to use them". He stated Mr. Usher accused him of taking gravel from his property but he denies that was the case, stating he was only raking the gravel.

- [176] Mr. Usher testified that he observed Mr. Gokey scraping gravel from his property along the roadway and the soft shoulder area of the roadway so he drove towards Mr. Gokey to talk to him. He stated he was stopping well short of Mr. Gokey but Mr. Gokey at the same time walked rapidly towards him so the distance between them was less than he anticipated but still posed no danger to Mr. Gokey. I note the video taken by Ms. Parsons supports this evidence.
- [177] Mr. Usher's evidence is that he stayed in the vehicle and told Mr. Gokey that he was removing his gravel. His evidence is that Mr. Gokey responded that he would remove more "if I fuckin' want". Mr. Usher said that Mr. Gokey said more than once "come on tough guy" which Mr. Usher took to be an invitation to get out of his vehicle. Mr. Usher stayed in the vehicle and took two pictures of Mr. Gokey. Mr. Usher then returned to his home.
- [178] Mr. Usher denies making any reference to having guns. Mr. Gokey acknowledged in his response to a question from the bench that he had said the "come on tough guy" comment. Of note is the fact that Mr. Gokey did not cross-examine Mr. Usher about the alleged gun comment.

Sand Truck Incident - March 11, 2017

- [179] Mr. Gokey alleges that on March 11, 2017, while he was on his Bobcat removing snow from the right of way, he saw Mr. Usher in a sand truck in the distance. Mr. Usher crossed the centre line of Beach Road while driving a sand truck and headed towards Mr. Gokey while he was working on his Bobcat. Mr. Gokey alleges Mr. Usher crossed the road and veered towards him. Mr. Usher testified he had slowed the sand truck down to look at what Mr. Gokey was doing because road maintenance and clearing is Mr. Usher's responsibility, not Mr. Gokey's, and because the Bobcat was unlicensed.
- [180] As Mr. Usher approached the shoulder area with his sand truck he sounded his horn three or four houses away expecting Mr. Gokey would move out of the way. Mr. Gokey did not move. Mr. Usher stopped and then pulled out and around Mr. Gokey without plowing that area. Mr. Gokey continued doing his work.
- [181] Mr. Usher complained to the RCMP about Mr. Gokey using an unlicensed Bobcat on the road. Mr. Gokey subsequently licensed his Bobcat.
- [182] Ms. Parsons took a video of the incident. It does not show any veering towards Mr. Gokey or that the vehicle came anywhere close to him. Mr. Gokey has failed to establish that Mr. Usher used his truck in a threatening way.

The "Dead Ed" Sign

- [183] Mr. Gokey alleges that in January 2016 the defendants put up a sign facing his property with the words "DEAD ED" on it and a drawing of a human head. That along with the bullet holes in the sign was viewed by him as a threat.

- [184] He testified the sign appeared originally in the fall of 2014 or 2015 and then another similar sheet of plastic appeared in January 2016 also with bullet holes in it but no words. He complained to the RCMP about the 2016 sheet of plastic. He denied that the printing on the "Dead Ed" sign was his printing.
- [185] Mr. Usher denies placing the "Dead Ed" wording on the plastic sheet but agrees the sheet had bullet holes on it as it was used by him for target practice out of town at a range when he was a fishery officer.
- [186] In any event, the "Dead Ed" sign is of little significance as Mr. Gokey failed to establish who took the photo and when it was taken. In addition, Seidemann J. in Provincial Court had addressed the issue concluding it was authored by the defendants; hence it is *res judicata*. I come to no conclusion on its author as a result.
- [187] I conclude the plaintiff Mr. Gokey has failed to establish on a balance of probabilities that he has been assaulted in any of the circumstances alleged by him. As noted earlier, the assault by Mr. Usher is not proven while Mr. Gokey's assault of Mr. Usher is. The vehicle incidents for the reasons given did not amount to assaults by the defendants of Mr. Gokey. His claims of assault and battery are dismissed.
- [188] The final assault allegation is that of Ms. Parsons that Mr. Gokey threatened her with a leaf blower on the beach in front of the parties' properties on June 10, 2013. I will address that allegation later in these reasons.

Invasion of Privacy

- [189] Mr. Gokey alleges the defendants have violated his privacy by their surveillance of his property and activities, the recording of videos and the taking of photographs contrary to the Privacy Act, R.S.B.C. 1996, c. 373, which provides:
- 1 (1) It is a tort, actionable without proof of damage, for a person, wilfully and without a claim of right, to violate the privacy of another.
 - (2) The nature and degree of privacy to which a person is entitled in a situation or in relation to a matter is that which is reasonable in the circumstances, giving due regard to the lawful interests of others.
 - (3) In determining whether the act or conduct of a person is a violation of another's privacy, regard must be given to the nature, incidence and occasion of the act or conduct and to any domestic or other relationship between the parties.
 - (4) Without limiting subsections (1) to (3), privacy may be violated by eavesdropping or surveillance, whether or not accomplished by trespass.

Exceptions

- 2 (1) In this section:

"court" includes a person authorized by law to administer an oath for taking evidence when acting for the purpose for which the person is authorized to take evidence;

"crime" includes an offence against a law of British Columbia.

(2) An act or conduct is not a violation of privacy if any of the following applies:

- (a) it is consented to by some person entitled to consent;
- (b) the act or conduct was incidental to the exercise of a lawful right of defence of person or property;
- (c) the act or conduct was authorized or required under a law in force in British Columbia, by a court or by any process of a court;
- (d) the act or conduct was that of
 - (i) a peace officer acting in the course of his or her duty to prevent, discover or investigate crime or to discover or apprehend the perpetrators of a crime, or
 - (ii) a public officer engaged in an investigation in the course of his or her duty under a law in force in British Columbia,

and was neither disproportionate to the gravity of the crime or matter subject to investigation nor committed in the course of a trespass.

(3) A publication of a matter is not a violation of privacy if

- (a) the matter published was of public interest or was fair comment on a matter of public interest, or
 - (b) the publication was privileged in accordance with the rules of law relating to defamation.
- (4) Subsection (3) does not extend to any other act or conduct by which the matter published was obtained if that other act or conduct was itself a violation of privacy.

[190] Mr. Gokey complains the defendants have breached his privacy by "stalking" him, watching his activities on his property and making videos and taking pictures of his activities effectively placing him under "continual surveillance". He says that such is not restricted to only matters that they complain about, but rather includes normal day-to-day activities.

[191] In *Wasserman, Macaulay J.* considered when "the installation of security cameras on one's own property can result in an invasion of a neighbour's privacy or a private nuisance": para. 72. He stated:

[75] There has been relatively little judicial consideration of the legislative intent underlying s. 1(2) of the Act. Nonetheless, it seems obvious that a person's reasonable expectation of privacy in his or her own home is ordinarily very high whereas surveillance in a public place would be substantially less so.

- [76] In *Milner v. Manufacturers Life Insurance Co. (c.o.b. Manulife Financial)*, [2005] B.C.J. No. 2632 (S.C.), the court addressed the effect of a private investigator conducting video surveillance of the plaintiff from a parked car in a public place through a window of the plaintiff's house at night. In *Milner*, the court affirmed the high expectation of privacy in one's home but went on to state that a plaintiff on private property who is in full view of passersby has no reasonable expectation of privacy (paras. 76 and 78). The court found that the plaintiff's expectation of privacy in her home on the night in question was low; the lights were on inside the house and the blinds on the window were open. Further, the plaintiff ought reasonably to have known that Manulife was investigating her claim and it was possible that video surveillance would be used (para. 83). Accordingly, the existence of a dispute may serve in some circumstances to reduce the level of privacy that one could otherwise expect even in their own home.
- [77] In my view, the Halls had no reasonable expectation of privacy when working on or in the immediate area of the fence line but did, at all times, have a reasonable expectation of privacy when inside their own home. Unlike, the investigator in the *Milner* case, the dispute with Mr. Wasserman did not entitle him to any information that might be obtained as a result of surveillance of activities inside the Hall residence. Accordingly, the Halls' expectation of privacy inside their home was very high throughout the entirety of the dispute.
- [78] In the context of the Act, "wilfully" means "an intention to do an act which the person doing the act knew or ought to have known would violate the privacy of another person": see *Watts v. Klaemt*, [2007] B.C.J. No. 980 and *Hollinsworth v. BCTV*, a division of Westcom TV Group Ltd., [1998] B.C.J. No. 2451 (B.C.C.A.) referred to therein.
- [192] Mr. Gokey states he is being watched "all the time". Mr. Gokey submits this shows that everything he does bothers them.
- [193] That is an inaccurate description of the defendants' complaints. The activities that affect them include excessive smoke, offensive smells, the feeding of their dogs, water issues relating to the well, trespasses on their property, harassing behavior, noise such as the telephone ringer and low water pressure alarm and verbal and physical abuse.
- [194] Ms. Parsons testified that she started taking and kept keeping records of Mr. Gokey's conduct partly because RCMP officers and conservation officers had informed her that such records were necessary in order for them to act on any complaints about Mr. Gokey's conduct.
- [195] It is correct the defendants have accumulated a considerable record of Mr. Gokey's activities for a number of years. Those records formed the basis for much of the evidence they introduced in this trial, both in their defence of the plaintiffs' claims and in support of their counterclaim.

- [196] They recorded the repeated and continual conduct by Mr. Gokey interfering with their use of their property or that they considered threatening, potentially threatening or at the very least disturbing.
- [197] Interestingly, the plaintiff Mr. Gokey complains of the defendants' record keeping but takes the position that if the defendants do not have a video or a photographic record of a particular incident then the incident did not occur.
- [198] The defendants submit they only observe and record Mr. Gokey when he is engaged in activities that affect their property and other rights. Given my credibility findings, I accept the evidence of the defendants. Mr. Gokey exaggerates the alleged privacy violations and has failed to produce evidence supportive of his allegation of constantly being watched. The defendants on the other hand maintained a detailed logbook and calendar of relevant events.
- [199] There is no allegation by the plaintiffs that they are being observed when inside their home.
- [200] Under s. 2(2)(b) of the Privacy Act an act or conduct is not a violation of the act if "the act or conduct was incidental to the exercise of a lawful right of defence of person or property".
- [201] In *Minicucci v. Liu*, 2021 BCSC 1640, the plaintiff's neighbour topped trees on the plaintiff's property after being told not to. The defendants did so to improve their view. The plaintiffs subsequently installed two outdoor surveillance cameras in order to detect and deter further interference with the cedar trees. The defendants argued one of the cameras had a view of their back yard and swimming pool and in doing so violated their right of privacy.
- [202] Justice E. McDonald stated:
- [65] The defendants also rely on *Suzuki v. Munroe*, 2009 BCSC 1403 where Justice Verhoeven concluded that a surveillance camera set up that monitored, among other things, the Suzuki's entrance, front yard and driveway was an intolerable interference with the Suzuki's use and enjoyment of their property. In *Suzuki*, at paras. 99 to 100, Verhoeven J. stated:
- [99] I have no doubt that a surveillance camera continuously observing the entrance areas to a neighboring property, or any part thereof, in these circumstances, is an intolerable interference with the use and enjoyment of the neighboring property. There is no reason the Munroes could not monitor the side of their home utilizing a camera positioned so that it takes in no part of the Suzuki property. No useful purpose of any kind is served by having the camera directed at any part of the Suzuki property. I am forced to conclude that the Munroes installed the camera and refused to remove or redirect it at least in part in order to provoke and annoy the Suzukis.
- [100] Acts done with the intention of annoying a neighbor and actually causing annoyance will be a nuisance, although the same amount of annoyance would not be a nuisance if done in the ordinary and reasonable use of the property: A.M. Dugdale & M.A. Jones eds., Clerk &

Lindsell on Torts, 19th ed. (London: Sweet & Maxwell, 2006) at 11782. In my view this is the natural corollary of the principle that the social utility of the activity complained of may be considered in deciding whether the activity is unreasonable. Activities designed to annoy one's neighbors and having little or no redeeming social utility are unreasonable and should be discouraged by the law.

- [66] In the case before me, there is evidence that Mr. Minicucci installed the Front Camera and the Back Camera for the specific purpose of monitoring the cedar trees. He angled the cameras as best he could to capture as much of the top of the trees and as little of the defendants' adjacent yard as possible.
- [67] It must be kept in mind that after Mr. Liu topped the trees, he stated to Mr. Minicucci in his September 17, 2018 email that, "... I will report to the by-law about the exhaust, and trim the trees over the fence and send you the bill". In my view, Mr. Minicucci and the plaintiff's fear that Mr. Liu might "trim" more of their cedar trees was not unreasonable in the circumstances. Mr. Liu topped the trees when the plaintiff was away from her home and I do not find it unreasonable that she and Mr. Minicucci would resort to surveillance cameras to help protect their trees from further damage.
- [69] Given the configuration of the properties, including the location of the defendants' pool area, and the height of the plaintiff's cedar trees, I do not see how Mr. Minicucci's orientation or placement of the Back Camera, could have eliminated the possibility of capturing some view of the defendants' back yard or pool area.
- [70] In light of all of the circumstances, I do not find that the installation of the Back Camera was an unreasonable step by the plaintiff taken merely to provoke or annoy the defendants. Rather, I find that the Back Camera was installed as a direct result of the defendants' trespass and topping of the plaintiff's cedar trees and the plaintiff's reasonable fear that the trees were at further risk of being damaged.
- [203] As a result, the defendants' claim for the tort of breach of privacy was dismissed.
- [204] The plaintiffs rely on T.K.L. v. T.M.P, 2016 BCSC 789, and Fouad v. Longman, 2014 BCSC 785, rev'd on other grounds Fouad v. Wijayanayagam, 2015 BCCA 272. T.K.L. does not assist because it involved a stepfather surreptitiously observing and video-recording his stepdaughter while she was undressed in her bathroom and bedroom: para. 1. There was no issue such conduct was a breach of the Privacy Act nor was there an issue that an exception applied.
- [205] In Fouad, the Court stated:
- [125] There is a two-step analysis for determining a breach of privacy under the Act - was the plaintiff entitled to privacy? And if so, did the defendant breach that right? (Gatejanc v. Brentwood College Association 2001 BCSC 822 at para. 16). Once proven, damages are presumed.

[206] The plaintiffs' claim fails at the first step. Given Mr. Gokey's conduct, his confrontational acts and his deliberate refusal to cease activities that were actionable in tort, it was not unreasonable for the defendants to monitor his activities when he was engaged in them. The monitoring was not done 24 hours a day but occurred when he was, for example, operating his Bobcat or burning various substances in various devices and creating unreasonable levels of smoke. The defendants were therefore entitled under s. 2(2)(b) of the Privacy Act to record the plaintiff incidental to their "lawful right of defence of person or property". Any alleged tracking of Mr. Gokey's movements were incidental to that lawful right.

[207] The plaintiffs' claim for breach of privacy is dismissed.

Harassment

[208] The plaintiff Mr. Gokey submits:

34. Although mere fear or anxiety may not be sufficient proof of an actionable tort, as proven by substantial competent and persuasive evidence at trial, the Gokeys were in fact subjected to a continuous bombardment of constant hatred and intrusions into their lives as to put especially Mr Gokey in a constant and escalating state of fear for his personal safety and life every moment he spent in Sandspit at the Gokeys' residence. Constant surveillance, trespass on the Gokeys' property, multiple complaints made to governmental authorities leading nowhere but simply to impose added distress on the Gokeys, the chainsaw incident and screws intruding into the Gokey's property, and continuing assaults on Mr. Gokey's person should be sufficient proof of such outrageous conduct by Defendants without any regard for the Gokeys' safety and well-being, with the obvious intent of driving the Gokeys out of Canada - stated to be the objective by one witness. These cumulative actions by Defendants, and those acting in concert with them, are the underpinnings of an actionable tort of harassment.

Law of Harassment

[209] The plaintiffs rely on *Mainland Sawmills Ltd. et al v. IWA - Canada et al*, 2006 BCSC 1195:

17 To determine the issues raised in this application, I decided rather than addressing the issues of whether the tort of harassment is a recognized cause of action in Canada or, if not, whether the law has developed to the point wherein it should be recognized at the outset, to first address whether the evidence of these Plaintiffs established the tort of harassment, the elements of that tort being as the Plaintiffs claimed. That is, I began my analysis of the issues raised in this application by assuming the tort of harassment does or should exist in Canada and that the elements of this tort are outrageous conduct by the defendant, the defendant's intention of causing or reckless disregard of causing emotional distress, the plaintiff's suffering of severe or extreme emotional distress, and the actual and proximate causation of the emotional distress by the defendant's outrageous conduct.

[210] On the assumption the tort exists in Canada, the plaintiffs must prove that they suffered severe or extreme emotional distress caused by the defendants. As noted in Mainland:

19 Though this tort does not require proof of a visible and provable illness, it does require proof of "severe or extreme emotional distress". As described in the Graves quoting, with approval from *Girard v. Ball* 125 Cal. App. (3d) 772 (1981), "[s]evere emotional distress means ... emotional distress of such substantial quantity or enduring quality that no reasonable person in a civilized society should be expected to endure it". For example, in *Moore* the Court held that the requirement was met as the Plaintiff had felt sick and full of fear and anxiety as a result of the Defendant's conduct for the whole period of their relationship which was four years. *Benz*, *Graves*, and *Canine* do not provide much assistance as the issue in them was whether the evidence was sufficient to go to the Jury, not whether it was substantial enough or enduring enough to meet the requirement of severe or extreme distress.

[211] The Court in Mainland assumed for the purpose of its decision that the tort of harassment existed in British Columbia without finding that it actually existed: *Christison v. Parr*, 2022 BCSC 656 at para. 33, citing Mainland at paras. 12-16. Given the conclusion I have reached on the plaintiffs' harassment claim I need not determine if the tort of harassment exists in British Columbia.

[212] The plaintiff Mr. Gokey alleges that Mr. Usher held an anti-American animus against him and his wife. He made similar assertions regarding Ms. Wagner. He was of the view they sought to "drive" them out of Canada. That assertion firstly ignores the fact that for many years they were friends and in fact the defendants had visited them in Washington State. Secondly, he produced no evidence that the defendants expressed such a view and when Ms. Wagner told him to go home, according to her that was reference to his home in Sandspit. The assertion is without merit. What is clear is that the differences between the plaintiff Mr. Gokey and the defendants are due to his conduct, not because he is an American.

[213] I note there is no evidence that Mrs. Gokey has any complaints against the defendants nor they against her.

[214] It is not in issue that the defendants have made many reports to the RCMP and regulatory authorities about Mr. Gokey's conduct, including the smoke and smell he was creating, the signs about Ms. Parsons' daughter and the June 2013 incident at the beach. They are not alone in doing so. Ms. Wagner testified she had made approximately five complaints to the RCMP and conservation officers about Mr. Gokey's conduct.

[215] Neither the plaintiffs nor the defendants called members of the RCMP or conservation officers as witnesses. Why the authorities did not take action is unclear although from the available evidence, it appears certain matters were regarded as civil in nature, there were ongoing small claims proceedings, it was just a "neighbours dispute" and there was a high turnover of officers hence a lack of continuity.

- [216] The evidence is clear that the actions and behavior of Mr. Gokey affected the defendants and their use of their property. Given Mr. Gokey ignored their requests that he cease such activities the complaints to the authorities were justified and appropriate.
- [217] The plaintiffs rely as well on phone messages left on their Washington phone answering machine from Mr. Usher as well as the alleged poisoning of their trees, the hosing of Mr. Gokey while welding, trespass on their property, the sign with bullet holes being a veiled threat, the screws in the retaining railroad ties and the incidents involving the three trucks. Mr. Gokey testified these matters caused him and his wife great anxiety, emotional distress and fear for their personal well-being and safety when in Sandspit.
- [218] Mr. Gokey testified that Mr. Usher left three messages on answering machines of Mr. Gokey or his family in Washington that he considered threatening. He played two before this Court, but the recordings were difficult to hear. They were admitted into evidence. The summaries were not. He no longer had the recording of the alleged third message.
- [219] One of the two recordings was about water being turned off, the well house being locked and Mr. Usher's wife being very upset and asking that something be done about it. The other was about a sign that had been put up concerning Ms. Parsons' daughter.
- [220] Mr. Usher acknowledged that he left a "couple" of messages on what he thought was Mrs. Gokey's telephone answering machine in Washington State. Although the summaries prepared by Mr. Gokey were not admitted into evidence Mr. Usher acknowledged that the summaries (not verbatim transcripts) made by Mr. Gokey of two of them were generally accurate.
- [221] Mr. Usher testified he did not mean to threaten Mr. Gokey or Mrs. Gokey. He was however desperate to try and get Mr. Gokey to cease his conduct because his wife found it physically threatening and emotionally abusive. The evidence does not support Mr. Gokey's claim that the messages were intended to be threatening. Rather, they were those of a justifiably concerned husband about the effect Mr. Gokey's actions were having on his wife.
- [222] Further, I find that Mr. Gokey did not find the messages threatening because firstly Ms. Parsons' evidence was that in August 2013, he joked to her about one message he said Mr. Usher had left on the answering machines in Washington about the June 2013 beach incident and then he played it over the very loud PA system that was hooked into the phone system at his home at 495 Beach Road. Secondly, Mr. Gokey, in cross-examining Ms. Wilson about her evidence that she had heard Mr. Gokey in April 2014 joking and laughing about the "Mom Make Gary Stop" sign, asked her whether it was possible that she had heard him laughing about Mr. Usher's voicemail message complaining about the sign. Ms. Wilson replied that her recollection was clear that he had been laughing about the sign and not a message left by Mr. Usher. The defendants do not accept this suggestion that Mr. Gokey was laughing on the occasion in question about the voicemail message as opposed to the sign.

[223] The evidence does not support a finding that the defendants harassed the plaintiffs. The defendants did not engage in any "outrageous" conduct. I do not accept that Mr. Gokey experienced a "constant and escalating fear for his personal safety and life every moment he spent in Sandspit at the Gokeys' residence". The evidence is to the contrary. Mr. Gokey has engaged in a pattern of overt provocation of the defendants and appears to enjoy doing so. He is deliberately confrontational in his interactions with the defendants. For example, he forced Mr. Usher to drive around him during the "second pass" on January 8, 2022 by standing out in the public roadway along Beach Road while Mr. Usher was engaged in snow clearing. The only harassment in this matter arises from the conduct of Mr. Gokey, who clearly has sought and continues to seek to cause distress to the defendants.

[224] The plaintiffs' claim of harassment is dismissed.

Intimidation

[225] Mr. Gokey alleges the defendants have sought to intimidate him by tracking and documenting his activities on his property. Mr. Gokey submits they have done so by enlisting friends of theirs in the RCMP and the B.C. Conservation Officer Service to intimidate them. He also submits the target sign was done to both harass and intimidate him because it had bullet holes in it. He relies as well on the phone calls made by Mr. Usher to Mrs. Gokey in Washington State. Finally, he submits Ms. Parsons' use of the chainsaw on the well house wall was irrational and hence intimidating.

[226] In *Central Canada Potash Co. Ltd. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42 at 81, 1978 CanLII 21, the elements of intimidation are described:

The tort of intimidation is defined in *Clerk & Lindsell on Torts* (14th ed.) para. 802, p. 414, as follows:

A commits a tort if he delivers a threat to B that he will commit an act or use means unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C. The tort is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure.

[227] The tort of intimidation then requires that plaintiffs satisfy a two-part test. In *Gidda v. Hirsch*, 2014 BCSC 1286, Associate Chief Justice Cullen stated:

[76] It is clear from the decision of the Supreme Court of Canada in *Central Potash Company v. Saskatchewan*, *supra*, that the tort of intimidation requires both an unlawful act or unlawful means against the plaintiffs by the defendants and the consequence that the plaintiffs do some act or refrain from doing an act they were entitled to do thereby causing damage to the plaintiffs.

- [77] Here, the plaintiffs have not shown any unlawful act or unlawful means perpetuated by the defendants, nor have they shown any consequence of damage due to the plaintiffs doing an act or refraining from doing such an act they were entitled to do as a result of the "intimidation".
- [228] The plaintiffs are alleging an ongoing conspiracy between the defendants and various RCMP officers and conservation officers against the plaintiffs over many years. The plaintiffs appear to rely on alleged close relationships between the defendants and those officers. While the defendants knew some of the officers, that is not surprising in a small community. There is however no evidence to support the allegations of the plaintiffs. It is of note as well that despite the defendants complaining to such officers, no formal steps were taken by them in support of the defendants.
- [229] Regarding the target back sheet of plastic, the evidence is that it was stored along the property line by the defendants. It has not been established that it was "put up" in particular locations to threaten anyone.
- [230] There is no evidence from Mrs. Gokey of any anxiety or emotional stress. As for Mr. Gokey, contrary to these assertions, his demeanor when giving evidence, the evidence of his behavior over the years and his overall behavior on the trial reveal the opposite of the alleged stress, anxiety or distress. Rather, he is revealed as an individual who thrives on confrontation.
- [231] The plaintiffs have failed to prove their claims of harassment and intimidation on a balance of probabilities. The evidence of the plaintiffs fails to establish any unlawful act or means being used by the defendants against the plaintiffs.

Nuisance

- [232] Both sides advance claims of nuisance against the other. The plaintiffs allege nuisance by the defendants from the smell from their marijuana-growing operation and its fan noise. The defendants allege the plaintiffs are liable in nuisance for smoke, smell, the noise of the plaintiffs' telephone ringer and low water pressure alarm and the feeding of the defendants' dogs.
- [233] The underlying principle of nuisance is the Latin maxim *sic utere tuo ut alienum non laedas* (use your own property so as not to injure that of your neighbours): Allen M Linden & Bruce Feldthusen, *Canadian Tort Law* (Markham: Butterworths, 2006) at p. 559). Compensation is recoverable where one's use or enjoyment of private land is interfered with by the unreasonable use of another's land (p. 660). Private nuisance can arise from objectionable activities such as noise, vibrations, noxious odours, air and water pollution (p. 560).
- [234] In *Royal Anne Hotel Co. Ltd. v. Village of Ashcroft*, 95 D.L.R. (3d) 756 at 759-760, 1979 CanLII 2776 (B.C.C.A.), the Court said this about nuisance:

The cases on this subject are many and often difficult to reconcile. Text writers have striven to bring some order into this field and I have found assistance in Street, *Law of Torts*, 5th ed. (1972); Fleming, *Law of Torts*, 4th ed. (1971), and in a helpful article by J. P. S. McLaren appearing in Linden's *Studies in Canadian Tort Law* (1968) at p. 320, entitled "Nuisance in Canada". From a study of the cases referred to by counsel and cited in the above sources, the following principles emerge.

As has been said: "The essence of the tort of nuisance is interference with the enjoyment of land." (Street, *Law of Torts*, at p. 212.) That interference need not be accompanied by negligence. In nuisance one is concerned with the invasion of the interest in the land, in negligence one must consider the nature of the conduct complained of. Nuisances result frequently from intentional acts undertaken for lawful purposes. The most carefully designed industrial plant operated with the greatest care may well be or cause a nuisance, if for example effluent, smoke, fumes or noise invade the right of enjoyment of neighbouring land owners to an unreasonable degree: see *Lord Mayor, Aldermen & Citizens of City of Manchester v. Farnworth*, [1930] A.C. 171, and *Walker v. McKinnon Industries Ltd.*, [1949] 4 D.L.R. 739, [1949] O.R. 549 [affirmed [1950] 3 D.L.R. 159 [1950] O.W.N. 309; affirmed [1951] 3 D.L.R. 577], as examples.

When then can it be said that the tort of nuisance has been committed? A helpful proposition is advanced by the learned author of Street, *Law of Torts*, at p. 215 in these terms:

A person then, may be said to have committed the tort of private nuisance when he is held to be responsible for an act indirectly causing physical injury to land or substantially interfering with the use or enjoyment of land or an interest in land where, in the light of all the surrounding circumstances, this injury or interference is held to be unreasonable.

This proposition stated in a variety of ways has been accepted generally in the authorities.

The test then is, has the defendant's use of this land interfered with the use and enjoyment of the plaintiffs' land and is that interference unreasonable? Where, as in the case at bar, actual physical damage occurs it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where the interference results in lesser or no physical injury but may give offence by reason of smells, noise, vibration or other intangible causes. No finding is required regarding the exercise of care by the defendant and while its conduct may frequently be such that a finding of negligence could be made it is not necessary and the existence of due care will afford no defence if the other ingredients are present. Again this is well rooted in authority. For example see the words of Lord Simonds in *Read v. J. Lyons & Co. Ltd.*, [1947] A.C. 156 at pp. 182-3, where the principles laid down in *Rylands et al. v. Fletcher* (1868), L.R. 3 H.L. 330, were under discussion:

My lords, it was urged by counsel for the appellant that a decision against her when the plaintiff in the Rainham case, [1921] 2 A.C. 465, succeeded would show a strange lack of symmetry in the law. There is some force in the observation. But your Lordships will not fail to observe that such a decision is in harmony with the development of a strictly analogous branch of the law, the law of nuisance, in which also negligence is not a necessary ingredient in the case. For if a man

commits a legal nuisance it is no answer to his injured neighbour that he took the utmost care not to commit it. There the liability is strict, and there he alone has a lawful claim who has suffered an invasion of some proprietary or other interest in land.

In my opinion the rationale for the law of nuisance in modern times, whatever its historical origins may have been, is the provision of a means of reconciling certain conflicting interests in connection with the use of land, even where the conflict does not result from negligent conduct. It protects against the unreasonable invasion of interests in land.

What is an unreasonable invasion of an interest in land? All circumstances must, of course, be considered in answering this question. What may be reasonable at one time or place may be completely unreasonable at another. It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover. It is impossible to lay down precise and detailed standards but the invasion must be substantial and serious and of such a nature that it is clear according to the accepted concepts of the day that it should be an actionable wrong. It has been said, see McLaren, "Nuisance in Canada", *supra*, that Canadian Judges have adopted the words of Knight Bruce, V.-C., in *Walter v. Selfe* (1851), 4 De G. & Sm. 315, [at p. 322], 64 E.R. 849, to the effect that actionability will result from an interference with "the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions". These words were approved by Middleton, J., in the Ontario High Court in *Appleby v. Erie Tobacco Co.* (1910), 22 O.L.R. 533 at pp. 535-6. In reaching a conclusion, the Court must consider the nature of the act complained of and the nature of the injury suffered. Consideration must also be given to the character of the neighbourhood where the nuisance is alleged, the frequency of the occurrence of the nuisance, its duration, and many other factors which could be of significance in special circumstances. While an owner of land in a quiet residential district may well expect to be protected from the operation of a boiler factory on his neighbour's land, he may not be entitled to expect to prevent the boilermaker from pursuing his lawful calling when he seeks to put his residence in an industrial area next to the factory. The conflicting interests must be weighed and considered against all the circumstances. The social utility of the conduct complained of must be weighed against the significance of the injury caused and the value of the interest sought to be protected. But where the conduct of the defendant has caused actual physical injury to the plaintiffs' land the mere fact that such conduct may be of great social utility, for example construction and maintenance of a sewer, will not attract greater licence or immunity. There is no reason why a disproportionate share of the cost of such a beneficial service should be visited upon one member of the community by leaving him uncompensated for damage caused by the existence of that which benefits the community at large. The weighing of conflicting interests in the case at bar, therefore, causes little difficulty. The interference with the plaintiffs' right of enjoyment of their land and the damage caused to their land is clearly such that the action for nuisance lies in the absence of any defence of statutory authorization.

[Emphasis in original.]

- [235] I turn first to the plaintiffs' claim of nuisance regarding the growing of marijuana by the defendants and noise from a radio left on to discourage break and enters.
- [236] In May 2009, the defendants obtained a license under the two personal use production licences issued by Health Canada for medical reasons. Ms. Parsons suffers from back pain and arthritis and Mr. Usher from lymphoma and prostate cancer as well as other medical problems. They were also authorized to grow plants for a third individual under a designated persons production licence because of that individual's medical condition. He has since died. They subsequently provided marijuana to another approved individual.
- [237] The defendants' three licenses from Health Canada have expired and Ms. Parsons testified Health Canada no longer requires such licences because of the Federal Court's decision in *Allard v. Canada*, 2016 FC 236, reconsideration ref'd, 2016 FC 492, which to her understanding permits the growing of marijuana for personal use without requiring a license.
- [238] Mr. Gokey claims the growing of marijuana creates a skunk smell and noise from fans running which unreasonably and substantially interfere with the plaintiffs' enjoyment of their property. He complains of the lack of licensing for growing medical marijuana because the defendants' licenses have expired. He alleges the value of his property has been reduced by the presence of the "grow op".
- [239] Ms. Parsons testified that the plants on occasion can produce some smell; however, in her opinion it is a mild smell and they have taken steps to minimize it by decreasing the need to exhaust air from the garage. The vents are also placed such that the prevailing wind blows the smell onto their property and not that of the plaintiffs.
- [240] Mr. Gokey's evidence of noise and smell is his alone. He called no other witnesses regarding the smell nor the alleged noise of fans. As for the illegality of the marijuana production, he has not established that to be the case.
- [241] I accept the evidence of Ms. Parsons over that of Mr. Gokey for the reasons given earlier. In addition, Mr. Gokey's credibility suffered from his evidence concerning the effect of the growing of marijuana on the value of 495 Beach Road by insisting at trial that the Property Assessment Appeal Board had recognized the impact of the growing in reducing the assessed value of his property in its 2013 and 2015 decisions. He maintained his position even when the two decisions of the Property Assessment Appeal Board were put to him, both of which stated that there was no reduction in the assessed value applicable to the marijuana growing by the defendants given the lack of evidence from Mr. Gokey that its presence affected the market value of 495 Beach Road. He maintained this position to the end of the trial process.

- [242] Nor could Mr. Gokey provide any evidence at trial to support his submissions to the Property Assessment Appeal Board that the marijuana growing had resulted in "traffic, smell & noise" nor that "many [of the defendants' customers] have told me 'it is the best dope on the islands'". He admitted under cross examination that his submission to the Property Assessment Appeal Board that the defendants had over 300 plants and were clearing \$120,000 to \$180,000 a year tax-free was based simply on his speculation.
- [243] Once again such reflects his misleading evidence, its lack of reliability and his reliance on his opinion or view of matters based on unproven facts.
- [244] In summary the plaintiffs' claims are dismissed in their entirety for the reasons given above.

Defendants' Counterclaim

- [245] As noted, the defendants counterclaim advances issues of res judicata and issue estoppel previously addressed, as well as assault and battery, trespass and nuisance.

Assault by Mr. Gokey on Mr. Usher

- [246] As previously discussed, the claim of assault advanced by Mr. Gokey by Mr. Usher is dismissed but Mr. Usher has proven on a balance of probabilities that Mr. Gokey assaulted him.

Assault on Ms. Parsons by Mr. Gokey

- [247] Ms. Parsons testified that on June 10, 2013, she had gone onto the public beach area to rake moss that Mr. Gokey had blown from in front of their properties across Beach Road onto the public beach area, and to put the moss around the trees in the beach area for mulch. Mr. Gokey had then come across onto the beach area and advanced towards her with his leaf blower running. He told her to stop what she was doing and started waving the leaf blower up and down very close to her with mulch getting blown onto her. She says the end of the leaf blower was six inches from her face.
- [248] She said that he then started making a number of comments about her daughter such as asking whether her daughter had enjoyed having sex with her then-husband and asking questions such as whether Ms. Parsons was a "crack junkie" and making observations about the effects of the supposed use of crack upon her skin and teeth, and about Ms. Parsons and her family being "losers". Her evidence is that Mr. Gokey also commented that "Gord can't get it up".
- [249] Ms. Wagner noticed from her property that Mr. Gokey had come over onto the beach towards Ms. Parsons, observed what she considered were threatening gestures with the leaf blower and went over to intervene. She did not hear the initial comments Mr. Gokey made but heard his comment about Mr. Usher. Ms. Wagner then led Ms. Parsons away.

- [250] Ms. Parsons stated Mr. Gokey's behavior terrified her. Mr. Usher was away at the time. After the incident Ms. Wanger stayed with her for the rest of the day. She was hesitant to call the RCMP because she feared Mr. Gokey's reaction if she did so, but eventually did so because she considered it was the right thing to do.
- [251] Mr. Gokey's evidence at trial was that he had made the comment about Ms. Parsons' teeth and her supposed crack usage, but not the other comments. The evidence of Ms. Parsons and Ms. Wagner was credible and reliable with respect to this incident. The comments about Ms. Parsons, her daughter and Mr. Usher were consistent with his pattern of making offensive comments to Ms. Parsons.
- [252] Ms. Parsons' notes and records in the evidence are replete with references to such comments. Mr. Gokey does not admit to having made all of them but he admitted in response to a question from the bench during the trial that he had probably said "words to that effect" when asked if he had made the comment to Ms. Parsons set out in her notes about her taking pictures of him so that she could use them to "please herself". Further, he sent her an email on June 2, 2014, with the comment in it that "[y]our weight loss has shaped your body nicely and I am enjoying our conversations over the fence". Given his pattern of such comments I accept such were intended to offend Ms. Parsons, not as compliments.
- [253] I am satisfied that Mr. Gokey's actions with the leaf blower amounted to an assault as they were threatening, and Ms. Parsons experienced an apprehension of imminent harm. The incident however is not a basis for damages as it occurred in 2013.

Trespass by Mr. Gokey on 497 Beach Road

- [254] It is not disputed that Mr. Gokey went onto 497 Beach Road on December 19, 2017, nor is it disputed that Mr. Gokey opened the door and placed or dropped an envelope inside the front door. For the reasons given, I am satisfied that Mr. Gokey did so without the permission of Ms. Parsons.

Nuisance

- [255] As noted, the defendants have successfully advanced a claim in nuisance against Mr. Gokey arising from his phone ringer and low-pressure alarms and because of the smoke Mr. Gokey generates from his burning at 495 Beach Road.
- [256] Private nuisance arises when an individual's use or enjoyment of land is interfered with. In *Allison*, Justice Ker stated:

- [160] In *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 [Antrim], the Supreme Court of Canada addressed the legal principles governing private nuisance. A nuisance "consists of an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable" (para. 18). Cromwell J., writing for the Court, elaborated on the test for private nuisance at para. 19:
- [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. This two-part approach found favour with this Court in its most recent discussion of private nuisance and was adopted by the Court of Appeal in this case, at para. 80
- [161] Justice Cromwell in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, described the first part of the test for private nuisance (a substantial interference with the owner's use or enjoyment of land) as follows:
- [22] What does this threshold require? In *St. Lawrence Cement*, the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre*, while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance: p. 915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. As La Forest J. put it in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes", and not claims based "on the prompting of excessive 'delicacy and fastidiousness'": p. 1191. Claims that are clearly of this latter nature do not engage the reasonableness analysis.
- [23] In referring to these statements I do not mean to suggest that there are firm categories of types of interference which determine whether an interference is or is not actionable, a point I will discuss in more detail later. Nuisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier: *Tock*, at pp. 1190-91. The point is not that there is a typology of actionable interferences; the point is rather that there is a threshold of seriousness that must be met before an interference is actionable.
- [162] Justice Cromwell described the second part of the test for private nuisance (an unreasonable interference with the owner's use or enjoyment of land) as follows:

- [25] As in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.
- [26] In the traditional law of private nuisance, the courts assess, in broad terms, whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances: see, e.g., A. M. Linden and B. Feldthusen, *Canadian Tort Law* (9th ed. 2011), at p. 580. The Divisional Court and the Court of Appeal identified several factors that have often been referred to in assessing whether a substantial interference is also unreasonable. In relation to the gravity of the harm, the courts have considered factors such as the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff: see, e.g., *Tock*, at p. 1191. The frequency and duration of an interference may also be relevant in some cases: *Royal Anne Hotel*, at pp. 760-61. A number of other factors, which I will turn to shortly, are relevant to consideration of the utility of the defendant's conduct. The point for now is that these factors are not a checklist; they are simply "[a]mong the criteria employed by the courts in delimiting the ambit of the tort of nuisance": *Tock*, at p. 1191; J. P. S. McLaren, "Nuisance in Canada", in A. M. Linden, ed., *Studies In Canadian Tort Law* (1968), 320, at pp. 346-47. Courts and tribunals are not bound to, or limited by, any specific list of factors. Rather, they should consider the substance of the balancing exercise in light of the factors relevant in the particular case.

Smoke

- [257] Mr. Gokey does not dispute that he burns but disputes the allegation that the volume of smoke produced is anything out of the ordinary for the area. He further suggests that the pictures of smoke over the defendants' yard is not severe or compromising. He asserts it is not uncommon in that area for homeowners to heat or supplement their homes heat with wood-burning devices. He submits that he cannot only burn when the wind directs the smoke away from the defendants as he is only a part-time resident and has to attend to his burning when there.
- [258] It is clear from the evidence of the defendants that they raise no objection to the smell of wood-burning related to home heating. There is no evidence there were any issues with smoke in the area before Mr. Gokey purchased his property. Mr. Gokey's unsupported attempts to justify his burning as comparable to household heating smoke are rejected.
- [259] However, the activities of Mr. Gokey producing the smoke establish he has deliberately placed some of the devices used to burn immediately adjacent to the property line he shares with the defendants and that given the prevailing winds, when he burns the smoke drifts over their property and not his. He also uses multiple devices to burn, sometimes several at once. He also burns noxious-smelling substances.

- [260] He does not burn occasionally. He burned frequently. The records kept by Ms. Parsons date from January 1, 2010 to November 16, 2021. The number of days when Mr. Gokey was present in Sandspit are estimated while the number of days with smoke are not. It is acknowledged that he does not burn every day he is Sandspit. She testified that in the early years of her record keeping she only recorded the days when the smoke was particularly bad and often "gave up" keeping the records as she doubted it would ever serve any purpose.
- [261] His burning increased from 2017 up to the COVID-19 travel ban, when it paused as he was not present. It then continued at this increased level after the end of the travel ban. Mr. Gokey has also increased the number of devices or locations from which he burns at the same time; he sometimes burns from up to three locations.
- [262] He does so knowing it is a significant issue for the defendants. Instead of modifying his behavior out of consideration for his neighbours he continues to burn excessively. In my view, he deliberately produces excessive smoke and does so when the prevailing winds cause it to envelope the defendants' property.
- [263] His evidence that the smoke is acceptable as it is at the level of the defendants second and third floors so they can still use the ground floor and their yard is absurd. In any event, the evidence is the smoke is at ground level and above. It prevents the use of the defendants' yard and permeates their home.
- [264] Mr. Usher testified the conduct of Mr. Gokey has caused them such stress that they "can't take it". He describes the plaintiff's conduct as "unacceptable" and that it has put them through "hell". He has particular concerns for his wife and the stress she is under given the conduct of the plaintiff generally and his conduct more specifically directed at her.
- [265] He testified their use and enjoyment of their property has been impaired by the smoke, smell and noise. Multiple burners are used. He stated "it has been terrible" and that if these issues are not resolved they "cannot live like this".
- [266] Ms. Parsons described thick smoke often with a rotten smell as well. At times the smell is that of dead animal being burned. She notes he produces what she describes as "industrial types of smoke". She stated it hurts her eyes and affects her ability to breathe. She ends up with a sore chest and cannot work in her greenhouse because of the smoke. She described the smell and intensity of the smoke such that it makes her gag and that she has tried using a water sprinkler to dampen it without success. The smoke made it both difficult and unpleasant to be outside. She described coughing, choking and getting headaches from it. It is so thick she testified they sometimes cannot see the end of their deck which is a mere 16 feet away. She stated that in January 2022 Mr. Gokey was there for ten days and burned for eight of them in a row. She said he often burns 24 hours a day.

- [267] They noted that smoke is not an issue in their community except when Mr. Gokey is present and burning. Ms. Parsons said that while people do burn in Sandspit there is "nothing else like" the burning done by Mr. Gokey. While residents of the area have wood stoves they also use catalytic converters which reduce the smoke produced very significantly.
- [268] The photos and videos in evidence reveal thick lingering smoke rendering the defendants back yard uninhabitable. Mr. Gokey has denied the smoke is a problem when in the face of the documented evidence there clearly is. He has offered no rational explanation for the types of smoke he produces, its volume and his use of more than one device at a time. I am satisfied he is deliberately creating as much smoke as often as he can.

Damages and Remedies

- [269] The defendants seek general damages, punitive damages and aggravated damages as well as injunctive relief, pre-judgment interest and costs.
- [270] The history of this litigation illustrates Mr. Gokey's pattern of provocation and interpreting any interaction between him and the defendants in his favour. He has shown the same attitude towards the Court judgments and orders issued in both the Provincial Court in Action 1841 and the appeal in this Court. He either ignores orders or interprets them to suit his interests.
- [271] In the Provincial Court, Judge Seidemann noted in his reasons for judgment that "the most significant part" of the settlement agreement was the term under which Mr. Usher and Ms. Parsons were to provide to the Gokeys an easement over the easement area, not a grant of fee simple ownership. As is clear from the subsequent proceedings and his submissions, Mr. Gokey does not accept that.
- [272] At trial in this Court he still did not accept the agreed-to terms of the settlement agreement despite acknowledging he had initialled the bottom pf each page of the settlement agreement. In addition, his actions illustrate that he has and continues to treat the easement area as his own property. Examples include his placing of plywood and tree branches so as to prevent the defendants from monitoring his use of the easement area and, instead of placing a security sleeve over the well bore erecting a structure of approximately eight feet in height over the entirety of the easement area in January 2022.
- [273] Of additional concern is the timing of this latter construction as it was erected shortly after Mr. Gokey attended an examination for discovery in this action on January 7, 2022, where he was questioned about his failure to comply with Mr. Usher's requests in the fall of 2021 to take down the sheets of plywood.

[274] Mr. Gokey made clear in his evidence at trial that he blames the defendants and the Court for the March 4, 2018 order restricting the use of the well. As referenced earlier in his response to the defendants' counterclaim, he made his refusal to comply with the settlement agreement and Court orders clear when he stated:

The true facts are within the knowledge of the Plaintiffs as well as the Defendants, as it was clearly and expressly agreed between the parties that the Gokeys own the water well in question; that the Gokeys have the absolute right and privilege to freely use the water from their well for the purpose of providing water supply to one residential dwelling located on each of their two lots;...

Damages for Assault and Battery

[275] The defendants submit the damages suffered by Mr. Usher from the August 15, 2015 assault were minor. They seek general damages of \$10,000. They also seek punitive damages of \$10,000 for the assault and battery on the grounds that Mr. Gokey's conduct was high-handed, oppressive and motivated by his malice towards the defendants.

[276] In *Mittenen, Verhoeven J.* awarded damages of \$17,500 for a violent attack with some "significant persistent injuries, mainly in the psychological realm": para. 79.

[277] Mr. Usher stated he had a small mark behind his ear but was not aware of any other bruising. He did not testify to any further injuries.

[278] In my view, general damages of \$2,500 for the assault and battery are appropriate.

[279] I will address the claim for punitive damages later in these reasons.

Damages for Trespass on December 19, 2017 and January 2022

[280] The defendants seek damages of \$20,000 for the December 19, 2017 trespass into their home. They submit the trespass resulted in Ms. Parsons suffering significant fear during the incident itself, and also exacerbated her pre-existing fear of Mr. Gokey that had started with his putting up of the "Mom Make Gary Stop" sign and then had further increased because of the beach incident. She has continued to suffer from this fear. With respect to Mr. Usher, it obviously increased his pre-existing concern and apprehension about the vulnerability of his wife to Mr. Gokey's verbal and physical harassment and intimidation of her.

[281] They also seek punitive damages of \$10,000 for the December 2017 trespass, submitting that Mr. Gokey's conduct was high-handed, oppressive and motivated by malice towards the defendants.

[282] As noted, I am satisfied that Mr. Gokey trespassed by entering the home of the defendants without permission.

- [283] As for damages, in Gibson, the defendant had entered onto the outside land of the plaintiffs at various times to either move a fireplace and barbeque and/or to place boxwood hedges, and to remove fence posts or landscaping material. Nominal damages of \$500 for each of those acts of trespass were awarded. Justice Abrioux stated:
- [112] Damages in trespass and nuisance are, by their nature, contextually driven. Where a technical trespass is committed, such as an unintentional encroachment, damages may be nominal only: *Wasserman v. Hall*, 2009 BCSC 1318 at para. 90.
- [124] As mentioned previously, part of the malicious conduct alleged is that Ms. Sun made a racist comment to Ms. Gibson and her husband. I have concluded that such a racist comment was in fact made.
- [125] Accordingly, I also award punitive damages in the amount of \$5,000 for Ms. Sun's high-handed conduct in exercising a self-help remedy, the aggressive conduct displayed over time and the derogatory comments apparent on at least one of the videos, and the act of offering passers by property that was not hers to give.
- [126] I am of the view that an award of punitive damages is appropriate to sanction this behaviour rather than an award of aggravated damages. It is clear that much of Ms. Sun's behavior has been malicious and oppressive, and the evidence highlights the inappropriate and disruptive nature of Ms. Sun's conduct rather than show that her conduct has inflicted significant anguish, humiliation, or damaged self pride that would justify a compensatory award.
- [127] I note that instead of unilaterally demolishing the privacy fence and continuing to direct various forms of oppressive conduct at the plaintiff and her family, Ms. Sun could have applied to the court under s. 36 of the Property Law Act, R.S.B.C. 1996, c. 377, for an order that the plaintiff remove or relocate the fence. Although this would have required her to order a survey of the properties, which she could have perhaps jointly financed with Ms. Gibson, it would have provided a convenient and fair way to resolve the dispute. See, for example, *Epp v. Franson*, 2008 BCSC 1133. Instead, Ms. Sun took the law, wrongfully, into her own hands.
- [284] Here, the trespass involved opening the door to their home and depositing an envelope on the floor inside the home. It appears that Mr. Gokey's entry was limited to that brief act. I do not accept the Mr. Gokey had permission to enter. It was not inadvertent or simply a technical entry. It was entry to the defendants' home at a time when the plaintiff Mr. Gokey was well aware they were not communicating and that their relationship was hostile and difficult. His act of entry was not bona fides (*Webb v. Attewell*, [1994] 4 W.W.R. 404 at para.17) hence more than nominal damages are warranted. In addition, past delivery by leaving on the chair by the door was sufficient. There was no need for Mr. Gokey to open the door and deliver the envelope into the house.

[285] In my view, general damages of \$2,500 are appropriate. The issue of punitive damages under this head of damages will be addressed later in these reasons.

General Damages

[286] The defendants' claim for general damages relates primarily to the smoke and its interference with their enjoyment of their property. It also includes damages relating to the phone ringer, the low-pressure alarm, the odours created and other interferences with their property rights. They seek general damages in the range of \$400,000 to \$500,000. They concede that they could not find authorities for the level of nuisance and its ongoing nature similar to the case at bar.

[287] As the two signs relating to Ms. Parsons' daughter were addressed in the Provincial Court, no claim for damages is advanced for such.

[288] The defendants do not seek damages against Mrs. Gokey as she has not been present on the property for many years and in any event, there is no evidence she has been responsible for or supports Mr. Gokey's behavior. Nor is there any evidence that she could have restrained Mr. Gokey's activities.

[289] The defendants submit Mr. Gokey in effect laid siege to their home. Such conduct is particularly reprehensible because it is their home that is being violated. Mr. Gokey on the other hand does not see the smoke as an issue, excusing it on the basis that "everyone burns", it is not at ground level and much of it is "steam". Likewise, he does not accept any other claims of nuisance are justified.

[290] Unlike many nuisance cases, in this instance the conduct of the plaintiff is deliberate in the sense it is consciously taken to intimidate the defendants, to taunt them and to make their lives miserable. I am satisfied it is not simply a matter of his use of his property for legitimate purposes creating a nuisance. His use is motivated by an intention to inflict harm on the defendants. His placement of the burning facilities, the nature and frequency of the burning at times with multiple sources producing the smoke, his machinery use (including the use a wood planer at 5:00 a.m.) and the times at which such is operated, lead me to conclude the plaintiff's activities go beyond legitimately conducting matters which incidentally create nuisances. Rather, Mr. Gokey is specifically targeting the defendants and their property.

[291] I am satisfied that the actions of Mr. Gokey have substantially interfered with the defendant's enjoyment of their lands and home and that the interference has been and continues to be unreasonable. Mr. Gokey's actions are not appropriate, particularly in the neighbourhood in which the parties reside. It is out of character for that neighbourhood. His burning is excessive. He has not established it is necessary nor that it serves or provides any public benefit despite submitting he works to keep the neighbourhood presentable.

[292] Although not to be compensated for in damages given the dates of the events and their being previously addressed in the Provincial Court I am also satisfied from his placement of the signs regarding the behavior of Ms. Parsons' ex-husband, his comments to Ms. Parsons on the beach and his deliberate engagement in activities he knows are problems for the neighbours, that he is consciously engaging in deliberate, repetitive and ongoing activities to make their lives miserable. His behavior is the antithesis of being a neighbour. It is abnormal, and inexcusable.

[293] The defendants seek damages of \$400,000 to \$500,000 for nuisance due to the smoke. They concede they have not located an award for nuisance in that range. They justify such an award because of the ongoing actions of the plaintiff Mr. Gokey which have now continued for over 15 years and eight years since the limitation date. The damages are for the period from May 4, 2014 to now given the applicable limitation period.

[294] In *Deumo v. Fitzpatrick*, [2008] O.J. No. 3015, 2008 CarswellOnt 4543 (S.C.), the plaintiffs were neighbours of the defendants. The defendants' burning of wood in a wood stove caused excessive smoke to invade the plaintiff's home and yard. As a result, they had to keep their windows closed and were unable to use their yards. Justice Ramsay of the Ontario Superior Court of Justice stated:

1 The plaintiffs are a married couple who are suing their next door neighbours, another married couple, for nuisance and other torts in connection with smoke from a wood stove operated by the defendant, Mr. Fitzpatrick and permitted by Mrs. Fitzpatrick, the other occupier of the property. The plaintiffs' case is that Mr. Fitzpatrick caused and Mrs. Fitzpatrick permitted repeated improper burning that caused excessive smoke to invade the plaintiffs' yard and home.

2 The approach that the courts take to nuisance is set out in a quotation from Supreme Court of Canada authority that is itself quoted within internal quotations in the Court of Appeal's Judgment in *Mandrake Management Consultants v. T.T.C.*, (1993), 102 D.L.R. (4th) 12. The quotation, is as follows:

Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another. Liability ... is imposed only in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation.

3 Mr. Justice Galligan then goes on to set out the factors that a court ought to weigh in determining a claim of nuisance:

- a) the nature of the locality in question;
- b) the severity of the harm;
- c) the sensitivity of the plaintiff; and
- d) the utility of the defendant's conduct.

[295] In Deumo, the stove in question was used at least 67 times between January 1999 and January 2023: para. 4. That was held sufficient to make out the tort of nuisance if the "smoke was excessive in the sense of [being] unreasonably harmful to the neighbours": para. 4. The defendant was aware of the neighbours' concern, and the town had asked him to restrict his burning to the period between November 1 to April 15 every year. He burned throughout the year including in the summer. Indeed, in the days before the injunction application, he burned on those days all day and night and all weekend: para. 4.

[296] The smoke in Deumo was acrid and lingered in the yards. Because the stove was banked off, limiting the oxygen supply, it caused a long-lasting cool, smoky fire that was heavy and held close to the ground. The photographs showed smoke that the trial judge described as looking like a "London fog": para. 10.

[297] The trial judge found as follows:

21 Applying the law to the facts as I have found them, I say this:

- a) The locality in question is a low density residential neighbourhood consisting of houses on large wooded lots where many people would expect to spend a great deal of time outdoors and everyone would expect to spend some time outdoors.
- b) The harm was severe enough to deprive the neighbours of the ability to stay outdoors in their yards or to go to the house and leave the windows open. It even caused them some disturbance when the windows were closed. It was a severe interference with the use and enjoyment of the property.
- c) The plaintiffs are not unusually sensitive with respect to the use of their yard or their house. Mrs. Deumo is sensitive to irritants such as smoke. Mr. Deumo is not sensitive to irritants such as smoke beyond what one would expect normally. The smoke was such as to bother someone who is not unusually sensitive.
- d) There is no utility in the defendant heating his garage by burning wood as opposed to using any other method available to him.

22 The defendant's persistent insouciance towards 'the well-being and property rights of his neighbours demonstrate that it is necessary to maintain the injunction. He testified in cross-examination that even knowing what he knows now he still wants to burn and I frankly found

that astonishing. I think his self-absorption on this particular issue is remarkable and very unfortunate. I have no doubt that if the injunction is lifted he will continue to burn. He will continue to burn carelessly, incompetently and offensively and to the extent of damaging his neighbours, and he won't care.

23 The acts of the defendant, Travers Fitzpatrick, which were permitted by Valerie Fitzpatrick were reckless, destructive, persistent, pervasive and heedless of their neighbours' physical integrity and property rights. The decision to burn all day and all night all weekend between the adjournment of the motion for an interim injunction and the hearing of that motion was nothing less than contumelious. In my view, punitive damages are appropriate.

[298] General damages of \$80,000 were awarded and punitive damages of \$20,000: para. 24.

[299] I note some similarity between the attitude of Mr. Gokey and the attitude of the defendant in Deumo towards his neighbours, and his belief of entitlement to inflict smoke on his neighbours. In addition, in Deumo the nuisance lasted for about four years compared to the eight years relevant here. As well, Mr. Gokey has an active campaign against the defendants while the defendant in Deumo simply did not care how his actions affected his neighbours.

[300] In *Pyke v. Tri Gro Enterprises Ltd.*, [1999] O.J. No. 5025, 1999 CarswellOnt 4253 (S.C.), aff'd 55 O.R. (3d) 257, 2001 CanLII 8581 (C.A.), leave to appeal to SCC ref'd, 28789 (13 June 2002), the Court assessed damages for injuries to the individual plaintiffs as of the last date of trial when evidence was heard given the nuisance was continuing. Justice Ferguson said this:

20 The caselaw indicates that in assessing damages the courts consider these factors: the frequency, degree and length of the interference; its effect on the health and comfort of the plaintiffs while on the land; the effect on the plaintiff's enjoyment of the land; the effect on the plaintiff's activities on the land.

24 I recognize that in deciding whether or not an act constitutes a nuisance the court must balance a variety of interests but I am doubtful that a plaintiff should be denied damages because an injunction is available. It seems to me that the purposes of damages and injunctions in nuisance cases are entirely different. Damages are intended to compensate for the past harm; an injunction is intended to prevent future harm.

49 In the end the trial judge must assess the loss by choosing an amount of money which reflects the judge's assessment of the damage taking into account the range of awards which the courts of Ontario are currently awarding in a wide range of cases. This is more of an art and public policy issue than a science and there is no formula available. Whether or not the judge is skilful in the art or has made appropriate public policy is decided by the appellate courts.

The assessment of the damages in this case

50 There are a number of factors which distinguish the damage to each plaintiff. Some of the more significant are these: the frequency and degree of intensity of the odour on their property, the frequency and time of day they spent on the property, the extent to which their activities were disrupted, my assessment of the extent to which each was personally affected taking into account their physical and psychological persona. I found no special vulnerabilities which would make the type of impact they suffered unforeseeable and therefore not compensable.

51 As a general approach I have grouped the plaintiffs in terms of the frequency and intensity of odour on their properties. Then I differentiated among those in the group by considering the extent of their exposure; for instance, some were away at work in the daytime, others were at home most of the time, the Pykes moved away before the end of the five year period, Mr. Donnison and Mr. Chapman changed their life styles during the five year period. Then I tried to adjust these figures to take into account all the other factors.

52 I have taken into account only the findings I made in my earlier reasons which I shall not repeat and the additional testimony of the plaintiffs which I heard on the resumption of the trial.

53 I assess the non pecuniary general damages of the plaintiffs for the approximately five years of odour from the fall of 1994 to November 23, 1999 as follows:

[301] Damages were then assessed for various parties at amounts between \$10,000 and \$30,000.

[302] In *Kenny v. Schuster Real Estate Co. Ltd.*, 1990 CanLII 1092, [1990] B.C.J. No. 1420 (S.C.), aff'd *Schuster Real Estate Co. v. Kenny*, 1992 CanLII 1941, [1992] B.C.J. No. 220 (C.A.), Justice Cohen reviewed the subject of damages for nuisance as follows:

With respect to Ms. Kenny's claim for non-pecuniary damages, McGregor on Damages, 15th ed. (London: Sweet & Maxwell Limited, 1988) at p. 869, paragraph 1401 states:

Beyond physical damage to the land however, a nuisance may cause annoyance, inconvenience, discomfort, or even illness to the plaintiff occupier. Recovery in respect of these principally non-pecuniary losses is allowable and may be regarded as part of the normal measure of damages.

Stephenson L.J. in *Bone & Another v. Seale* [1975] 1 All E.R. 787 (C.A.C.D.) considered the measure of damages for interference with the enjoyment of property and at pp. 792-794 said:

On the third ground, that the damages awarded by the judge were far too high, it seems to me that this court has a very difficult task to perform. It has to ask itself: what is the measure of damages for a nuisance of this kind? I start by considering whether there is really any authority which gives us, or which would have given the learned judge, any guidance. The only authority which has been cited in this court is the decision of Veale J. in *Halsey v. Esso Petroleum Co. Ltd.* That was a very different case of an unfortunate plaintiff living in Fulham who had to put up with smells, vibration and noise, by day and night, to an extent which very seriously interfered with his comfort and convenience over a period of something like five years. In 1961 the learned judge gave him, for all that, damages of £200. I do not think it could be suggested that that was a high

figure, even in those days; if it had not been coupled with an injunction, it might well have been higher.

Is there any other guide to which we can turn in considering whether the judge's figure of over £6,000 for each of these plaintiffs is the right sort of figure? It is a figure which I think struck each member of this court rather as the figure in *McCarthy v. Coldair Ltd* struck Denning LJ, and led us to say to ourselves something like 'Good gracious me - as high as that!'

That figure of over £6,000 for what is a nuisance and is offensive but no more - something which is rightly described as a nuisance - does seem at first blush to be a very high figure, and counsel for the defendant has asked us to say that it is a figure which is so high that this court cannot uphold it. We accept the test long ago laid down by Greer LJ in *Flint v. Lovell*. In that case Greer LJ said:

I think it right to say that this court would be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this court, an entirely erroneous estimate of the damage [sic] to which the plaintiff is entitled.

That test was repeated by Lord Pearson, with the agreement of Lord Denning MR and Sir Gordon Willmer, in *Hinz v. Berry*, to which counsel for the plaintiffs also referred.

It is difficult to find an analogy to damages for interference with the enjoyment of property. In this case, efforts to prove diminution in the value of the property as a result of this persistent smell over the years failed. The damages awarded by the learned judge were damages simply for loss of amenity living on their property; and of course their enjoyment of their own property was indirectly affected by these smells inasmuch, as it affected their visitors and members of their families. The nearest analogy would seem to be the damages which are awarded almost daily for loss of amenity in personal injury cases; it does seem to me that there is perhaps a closer analogy than at first sight appears between losing the enjoyment of your property as a result of some interference by smell or by noise caused by a next door neighbour, and losing an amenity as a result of a personal injury. Is it possible to equate loss of sense of smell as a result of the negligence of a defendant motor driver with having to put up with positive smells as a result of a nuisance created by a negligent neighbour? There is, as it seems to me, some parallel between the loss of amenity which is caused by personal injury and the loss of amenity which is caused by a nuisance of this kind. If a parallel is drawn between those two losses, it is at once confirmed that this figure is much too high. It is the kind of figure that would only be given for a serious and permanent loss of amenity as the result of a very serious injury, perhaps in the case of a young person. Here we have to remember that the loss of amenity which has to be quantified in pounds and pence extends over a long period - a period of 12 1/2 years - but it must not take account of any future loss.

Scarman L.J. in the same case, at pp. 794-795 stated:

Nuisance is a wrong to property, but it is well recognised that even when there is no physical damage to property it may cause annoyance, inconvenience and discomfort to the occupier of the property in his enjoyment of it. As Mr. McGregor says in his work on Damages:

When there is a claim for damages in respect of non-pecuniary loss caused by nuisance, recovery of damages is allowable and may be regarded as part of the normal measure of damages.

In such a case as this, therefore, we are thrown back to general principles.

What is the relevant general principle? I think it is that to which Lord Morris of Borth-y-Gest referred in the course of his speech in *H West & Son Ltd. v. Shephard*. That was a case of very severe personal injury, but, speaking of the difficulty of awarding damages where there is no financial yardstick, he said simply: 'All that judges and courts can do is to award sums which must be regarded as giving reasonable compensation'.

Such is the principle, but the difficulty remains: what is reasonable? As Stephenson LJ has mentioned there is very little guidance in the case law. In *Halsey v. Esso Petroleum Co. Ltd.*, to which Stephenson LJ has referred, Veale J. considered £200 appropriate damages for what, on reading the case, one would think was a gross interference with comfort and enjoyment of property over a period of five years or thereabouts. Nevertheless, there is in that case an indication of what one learned judge thought appropriate in a case of nuisance by noise and smell in 1961, and, unless it can be said that his estimate was itself wholly erroneous, it is something we must bear in mind when attempting to adopt a consistent legal pattern in the assessment of damages at large.

Where else can one go to for assistance as to what is reasonable? As Stephenson LJ has indicated, it is appropriate to go to personal injury litigation and to note the sort of figure that judges award for the element of loss of amenity. It is difficult to be precise in such matters, and I think not helpful to refer to specific cases. But the indications, both from one's own experience and from such works as have collated damages in these cases, are that £6,000 for 12 years' discomfort in a matter of smell is out of all proportion to awards for comparable loss of amenity in that class of case.

It is not, I think, possible to say that we must adopt, or seek to adopt, any rigid standard of comparison between a nuisance case and personal injury litigation. Nevertheless, overall the law ought to remain consistent when it is dealing with analogous situations.

I find, therefore, both in Veale J.'s decision and in the general approach of judges to the loss of amenity element in damages in personal injury litigation, some indication that the damages awarded in this case were unreasonable.

But that in itself cannot be enough to entitle this court to disturb the award of the trial judge. We have to go as far as Stephenson LJ has mentioned when he quoted the well-known passage from the judgment of Greer LJ in *Flint v. Lovell*. Was there here an entirely erroneous estimate of the damage sustained by the two plaintiffs? This must be a matter of impression - impression derived from experience and a general knowledge of the way in which the law handles analogous claims.

One must bear in mind also a further general principle, that, when one is removed from the world of pecuniary loss and is attempting to measure damages for non-pecuniary loss, an element in reasonableness is the fairness of the compensation to be awarded. There must be moderation; some attention must be paid to the rights of the offending defendant as well as to the rights of the injured plaintiff.

Ms. Kenny says, and I believe, that she did not bring this action out of spite for Mr. Schuster or based on principle but because she lost the enjoyment of her condominium. Until the installation of the fan, she enjoyed living in her condominium. Ms. Kenny's condominium was unique because of its very large patio deck. Mr. Boyer testified that the patio deck is one of the big features of the condominium which adds value to it. But for the installation of the fan, Ms. Kenny planned to stay in her condominium and make improvements to it.

Ms. Kenny concluded, and I find reasonably so, that she had no alternative but to sell her condominium. There is no evidence of anything more she could reasonably have done to minimize the negative impact of the noise and smell from the fan. She asked for the fan to be taken down. She was prepared to sell to Mr. Schuster. She sought an injunction. She listed her condominium for sale. The installation of the fan was a gross interference with the comfort and enjoyment of her condominium over a period of approximately one year and I consider a fair and reasonable award to her for non-pecuniary damages to be \$7,500.

[Emphasis added.]

[303] In *Willis v. Halifax (Regional Municipality)*, 2009 NSSC 244, rev'd in part, *Halifax (Regional Municipality) v. Willis*, 2010 NSCA 76, on the issue of prejudgment interest, the plaintiff successfully established nuisance caused by odours from a sewage treatment plant next to his property. He was awarded damages of \$55,000. The headnote summarizes the nuisance as follows:

Between 1990 and 2008 the sewage treatment plant at North Preston emitted odours frequently. Sometimes they were wretched. Mr. Willis' home and farm neighboured the plant, and he was frequently disturbed, as were his family and guests, by the odours.

[304] As for damages, the Court explained:

52 The interference with Mr. Willis' use of his land was substantial. For almost twenty years he frequently, not so constantly as he remembers but frequent enough to be described as consistent, could not enjoy the out-of-doors at his home and had to close his windows.

53 The locale weighs heavily in favour of finding the interference unreasonable. North Preston is a historic, Black, rural community. Of the three adjectives, rural is the most important here.

54 The municipality made much of the fact that Mr. Willis keeps cattle and, for a few years, raised chickens. Farm smells are common place in pleasant rural communities. What Mr. Willis endured is most uncommon, if not unique. The stench is not to be compared with farm smells.

55 The attraction and value of a pleasant rural home includes the sensual pleasures of sight, hearing, and, indeed, scent in the country side. Frequently, Mr. Willis could not enjoy the country side at his own farm and home.

56 Mr. Willis' ability to share his home, and the country side, with family and friends was also compromised frequently for all those years. That would represent a great loss for most people, but especially so for a person with a long family attachment to a farm property.

57 Without question, the defendant's operation of a sewage treatment plant at North Preston is of great public value. That factor cannot be allowed to totally eclipse Mr. Willis' rights. As will be seen in connection with the defence of statutory authority, the law of nuisance does not require that a person give up their property rights for the public good without compensation.

58 I find that the odours from the sewage treatment plant substantially, and unreasonably, interfered with Mr. Willis' use of his home.

71 Counsel could not refer me to authorities that provided damage awards in similar circumstances, and I have found none either. This is not surprising. An injunction is the usual remedy for a nuisance.

72 Mr. Willis' damages must attempt to restore him to the position he would have enjoyed had the tort not been committed, extremely difficult though it is to convert an intangible loss to money. He is entitled to an amount that would somehow allow him to purchase something that would give him a reward similar to the happiness of which he was deprived.

[305] The Deumo decision is closest factually to this matter.

[306] A higher amount is justified in this instance by Mr. Gokey's concerted effort to torment his neighbours through a relentless course of conduct to interfere with their property rights and inflict as much misery on them as possible, primarily through his production of smoke, sometimes from multiple burn sources, although his use of an excessively loud telephone ringer and failing to silence a low-pressure water alarm contributed as well.

[307] Taking into account the rural nature of the defendants' property and the significance of the nuisance of smoke and its effect on the defendants, as well as its prevalence when Mr. Gokey is in Sandspit and his deliberate placement of burn locations on the property line in addition to other acts of nuisance, I am satisfied a fair award for general damages for nuisance is \$150,000.

Punitive Damages

- [308] As noted, the defendants also seek punitive damages against Mr. Gokey, both with respect to his conduct prior to the litigation and during the litigation. Such damages are sought for the April 14, 2015 assault, and punitive as well as aggravated damages are sought for the December 19, 2017 trespass and the nuisance claim for the smoke.
- [309] Seeking punitive damages for misconduct during the litigation is unusual. Mr. Gokey, after the commencement of this litigation, has continued to commit further acts that in and of themselves would give rise to separate and additional causes of action. These actions include, for example, the December 19, 2017 trespass into the home of the defendants and several weeks of burning over consecutive weeks prior to the start of the trial.
- [310] Usually misconduct during the course of litigation is addressed by an award of special costs as opposed to an award of punitive damages. However, the type of "misconduct" of Mr. Gokey relates to the subject matter of the litigation and not the conduct of the litigation.
- [311] In *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177, the Court stated:
73. In *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29, this Court had the opportunity to contrast the relationship between punitive damages and special costs. Mr. Justice Chiasson explained that punitive damages were a remedy for conduct giving rise to the cause of action while special costs reflected conduct in the litigation. He said:
- [69] The judge conflated the analysis of punitive damages and costs. Punitive damages are a remedy for breach of contract that reflects the conduct of a party at the time of the breach. Costs reflect the results and conduct of parties leading to and in the course of litigation. They are not a remedy for breach of contract.
- [312] As a result, the continued misconduct of Mr. Gokey as it relates to the substance of the claim may be addressed as part of the basis for punitive damages.
- [313] The defendants submit Mr. Gokey's production of smoke has been prolonged, persistent, vindictive and reprehensible, done without any rational justification. Rather, he has "weaponized" it to pursue his claims against the defendants arising from the well and easement. They seek an award of \$500,000.
- [314] Punitive damages are intended to punish for conduct that is malicious, high-handed and oppressive and that offends the Court's sense of decency. In doing so they serve the purposes of retribution, deterrence and denunciation. In *Allison*, Ker J. summarized the principles in *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, the leading authority on such damages:
- [199] The leading authority on punitive damages is *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 [Whiten]. I note the following principles from Whiten:

- a. punitive damages are awarded in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency", meaning misconduct that represents "a marked departure from the ordinary standards of decent behaviour" (para. 36);
- b. punitive damages will largely be restricted to intentional torts or breach of fiduciary duty, although such an award is available for breach of contract in exceptional cases and, on the proper facts, in negligence and nuisance cases (para. 67);
- c. the general objectives of punitive damages are punishment, deterrence, and denunciation (para. 68); and
- d. punitive damages should be resorted to only in exceptional cases and with restraint (para. 69).

[315] There is no question that this is an exceptional case. As is apparent from the plaintiff Mr. Gokey's actions, particularly his placement of various devices for burning and his excessive production of smoke whilst knowing its effect on the defendants and their property, he has engaged in conduct that supports an award of punitive damages. His behavior was high-handed, arrogant, malicious and a deliberate course of conduct directed at the defendants. Well aware of his actions' effects on the defendants, he deliberately continued them over a period of years. His justifications that he has to burn because he is clearing his land, that the smoke is steam, that it is no worse than any other resident's burning in the area and that it is the wind's fault ring hollow. The defendants are entitled to an award of punitive damages.

[316] The assessment of the amount of such damages was addressed by Justice Gomery in *Baring v. Farm Credit Corporation*, 2019 BCSC 1965 [Baring SC], rev'd in part on other grounds, *Baring v. Grewal*, 2022 BCCA 42, leave to appeal to SCC ref'd, 40173 (2 February 2023):

100 Having regard to these points, I am satisfied that I should make an award of punitive damages to give the defendants their just deserts, deter them and others from similar misconduct in the future and mark the community's collective condemnation of what has happened. The difficult question is the amount.

101 Because punitive damages are awarded to punish and not to compensate, there is no obvious starting point for the determination of an amount. Points (3), (7), (9) and (11) from the list of points in *Whiten* offer some guidance. A structured framework, building on *Whiten*, was identified by Hunt and Costigan JJ.A. in *Elgert v. Home Hardware Stores Limited*, 2011 ABCA 112 at para. 82, leave to appeal ref'd, [2011] S.C.C.A. No. 294 and applied by Fenlon J. in *Kelly* at paras. 130-146. Fenlon J. stated:

[130] The governing rule in determining the appropriate quantum of punitive damages is proportionality. The overall award, i.e. compensatory damages plus punitive damages plus any other punishment related to the same misconduct, should be rationally related to the objectives for which the punitive damages are awarded (retribution, deterrence and denunciation): *Whiten* at para. 74.

[Emphasis in original.]

102 Proportionality requires that an award of punitive damages must be:

- i. Proportionate to the blameworthiness of the defendant's conduct -- the more reprehensible the conduct, the higher the rational limits of the potential award. Factors include outrageous conduct for a lengthy period of time without any rational justification, the defendant's awareness of the hardship it knew it was inflicting, whether the misconduct was planned and deliberate, the intent and motive of the defendant, whether the defendant concealed or attempted to cover up its misconduct, whether the defendant profited from its misconduct, and whether the interest violated by the misconduct was known to be deeply personal to the plaintiff.
- ii. Proportionate to the degree of vulnerability of the plaintiff -- the financial or other vulnerability of the plaintiff, and the consequent abuse of power by a defendant, is highly relevant where there is a power imbalance.
- iii. Proportionate to the harm or potential harm directed specifically at the plaintiff.
- iv. Proportionate to the need for deterrence -- a defendant's financial power may become relevant if the defendant chooses to argue financial hardship, or it is directly relevant to the defendant's misconduct, or other circumstances where it may rationally be concluded that a lesser award against a moneyed defendant would fail to achieve deterrence.
- v. Proportionate, even after taking into account the other penalties, both civil and criminal, which have been or are likely to be inflicted on the defendant for the same misconduct -- compensatory damages also punish and may be all the "punishment" required.
- vi. Proportionate to the advantage wrongfully gained by a defendant from the misconduct.

[317] Where conduct that injures a party is malicious, high-handed and oppressive such that it offends the Court's sense of decency punitive damages may be awarded. Such damages are punitive as they serve the purpose of retribution, deterrence and denunciation: *Bailey v. Service Corporation, International (Canada) ULC*, 2018 BCSC 235 at paras. 215-219; *Baring SC* at paras. 95-100; *McKnight v. Hutchison*, 2019 BCSC 944 at paras. 173-176], rev'd in part 2022 BCCA 27 at paras. 157-172 [McKnight CA]; *Samaroo v. Canada Revenue Agency*, 2018 BCSC 324 at paras. 319-323, rev'd on other grounds 2019 BCCA 113, leave to appeal to SCC ref'd, 38645 (10 October 2019).

- [318] The defendants submit the production of smoke by Mr. Gokey from various sources placed along his property line with the defendants was motivated by malice and displayed utter contempt, hostility and disregard towards the defendants and for their health and property rights.
- [319] Regarding the first part of the six-part test noted above, Mr. Gokey's blameworthiness in producing the smoke is high as it was prolonged and persistent. It was deliberate, vindictive and reprehensible. It was not the product of any rational justification. He clearly was deliberately punishing the defendants, likely for his dissatisfaction in failing to gain control of the well for his own purposes.
- [320] The second part of the test, the vulnerability of the defendants, is met. The defendants were both seniors when his conduct started. Ms. Parsons was afraid of him. Mr. Usher was suffering from different types of cancer and the effects of treatments for them.
- [321] The third matter, the harm or potential harm, is clear. The smoke significantly affected the defendants' use of their property and effectively denied its outdoor use when Mr. Gokey was creating the smoke.
- [322] With respect to the fourth and fifth elements of the test (deterrence and proportionality), Mr. Gokey has over the years shown a pattern to ignore and circumvent court orders that he disagrees with. As noted earlier in these reasons he does what he wants and does not consider whether legally or morally he should not. He has shown a complete disregard for the emotional and physical health of the defendants and their property rights. Any award of punitive damage must be sufficient to deter his conduct.
- [323] Regarding the six element of the test, Mr. Gokey has used his property as he wishes, to the detriment of the rights of the defendants.
- [324] Mr. Gokey is a unique individual. His motives for his production of smoke and his persistence and determination in producing the smoke are also unique. A significant punitive damages award against him is not only appropriate but necessary.
- [325] Taking into account the conduct of Mr. Gokey, his high level of blameworthiness, the vulnerability of the defendants, the harm directed at them, the significant need for deterrence and the other factors noted above while at the same time awarding a proportionate amount, I award the defendants punitive damages of \$50,000.

Aggravated Damages

- [326] The defendants seek aggravated damages. They submit the fear instilled in them by Mr. Gokey, which is reinforced every time he burns, and the intentional placement of smoke-producing units as well as the level of smoke deliberately generated justify aggravated damages. They seek an additional \$200,000 each.

- [327] Aggravated damages address intangible losses suffered by a party. They are a form of non-pecuniary damages that compensate a party for the effect of a defendant's conduct on them: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at 1099, 1989 CanLII 93.
- [328] In *Weingerl v. Seo*, 256 D.L.R. (4th) 1, 2005 CanLII 21356 (Ont. C.A.), the Ontario Court of Appeal stated:
- [69] ... The purpose of aggravated damages, in cases of intentional torts, is to compensate the plaintiff for humiliating, oppressive, and malicious aspects of the defendant's conduct which aggravate the plaintiff's suffering.
- [329] In *Allison*, Ker J. discussed the nature of aggravated damages:
- [195] In *Thomson v. Friedmann*, 2008 BCSC 703, aff'd 2010 BCCA 277 [Thomson], the Court discussed the nature of aggravated damages at para. 29:
- Aggravated damages are a compensatory award that takes account of the intangible injuries such as distress and humiliation caused by a defendant's insulting behaviour. Aggravated damages are often claimed as compensation for mental distress caused by a defendant's behaviour. Aggravated damages will frequently cover conduct which would also be subject to punitive damages, but their role is compensatory. They are designed to compensate a plaintiff and are measured by the plaintiff's suffering such as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, and similar matters caused by the conduct of a defendant: *Vorvis v. Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085.
- [196] In *Fouad v. Longman*, 2014 BCSC 785, the Court summarized the nature of aggravated damages in the following terms, relying on the Supreme Court of Canada's decision in *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130:
- [328] Aggravated damages may be awarded where the defendant has acted in a high handed or oppressive manner thereby increasing the humiliation and anxiety of the plaintiff from the libel. The key consideration in a finding of aggravating damages is the extent to which the defendant was motivated by actual malice which increased the injury to the plaintiff either by spreading further afield the damage to his reputation, or by increasing his mental distress or humiliation: *Hill* at para. 190.
- [330] Both defendants testified to the stress and anxiety caused by the conduct of Mr. Gokey. Ms. Parsons testified she fears Mr. Gokey and has done so for years. Her anxiety and stress levels rise when he fills their yard with smoke. Mr. Usher has been concerned and anxious for his wife's well-being when Mr. Gokey is in Sandspit. The behavior of Mr. Gokey has exacerbated his emotional stress given his ongoing cancers.
- [331] I accept the parties have both suffered from the behavior of Mr. Gokey. His ongoing behavior and activities have had significant negative effects on them.

- [332] Aggravated damages in cases of intentional torts address intangible losses suffered by a party for humiliating, oppressive and malicious aspects of the offending conduct. Aggravated damages can be awarded where the conduct of the tortfeasor has been high-handed or oppressive. The damages are compensatory in nature for injuries such as an increase in the humiliation, pain and suffering, and loss of dignity of the injured party where the conduct has had significant impact on the injured party's life. Motive and conduct can be considered in an award of aggravated damages.
- [333] It is clear Mr. Gokey has engaged in seriously offensive conduct. He has done so despite being aware of the effect his activities were having on the defendants. His conduct throughout has been high-handed, placing his perception of his rights ahead of those of the defendants. The parties are entitled to be compensated for that conduct and its resulting effects on them.
- [334] Regarding the appropriate damages to be awarded for aggravated damages the defendants rely on *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419, where an award of \$200,000 made by a jury for aggravated damages was upheld on appeal. The plaintiff in *Boucher* had been constructively dismissed. The award of aggravated damages was for the manner in which she was dismissed which involved flagrant and outrageous contact by her supervisor and the employer's misconduct as well, causing the plaintiff mental anguish.
- [335] In *Pellegrin v. Wheeldon*, 2020 BCPC 143, a factually similar case, also a dispute between neighbours, the actions of the defendant were found to be "harsh, vindictive, reprehensible and malicious" (para. 102). An award for aggravated damages was made in the amount of \$1,000.
- [336] In *Cline v. Johnson*, 2017 ONSC 3916 (affirmed 2019 ONCA 188; leave to appeal dismissed 2019 S.C.C.A No. 131) neighbours disputed adverse possession of part of a driveway. The interference with the plaintiffs' use and enjoyment of their land was significant with incidents of wearing and yelling at the plaintiffs, throwing over 100 cigarette butts on their property and interfering with trees on their property such that they had to be removed. The court found the plaintiffs lived in fear of upsetting Mr. Cline to the extent they felt like "prisoners in their own home" and that for six years on an almost daily basis they had to govern their actions accordingly. They suffered depression and anxiety. The court awarded each plaintiff \$15,000 for interference with and the loss of enjoyment of their home, \$3,000 for mental stress to Ms. Johnson and \$1,500 to Mr. Johnson. The court made no award for aggravated damages awarded were deemed sufficient. Punitive damages were also not awarded as the court did not find the requirements for punitive damages were met.
- [337] In *Campbell v. Blainey*, 2005 BCSC 250 a less severe case than the case at bar, arising from a neighbour interfering with a shared easement the court awarded compensatory and aggravated damages in the amount of \$7,400.

[338] As is apparent, there is a wide range in the sums awarded for aggravated damages depending on the behavior of a party and its context.

[339] The malicious actions of the plaintiff Mr. Gokey over an eight-year period has had a significant impact on the defendants. A sum in addition to the general damages for aggravated damages is appropriate. I award the sum of \$15,000 to Ms. Parsons and \$10,000 to Mr. Usher.

Pre-Judgment Interest

[340] The defendants are entitled to pre-judgment interest on any damages awards that constitute pecuniary damages, such as the general damages and punitive damages for the smoke. The defendants seek such from May 4, 2018, being the mid-point between May 4, 2014 when their cause of action arose and May 14, 2022 when Ms. Wagner testified that the burning started again after the end of the first three weeks of trial in 2022.

[341] Such an approach was used by the Court in McKnight SC:

185 My award for punitive damages is an award that is personal to the plaintiff and is to be paid to him by the defendant and will not form a part of the funds that are available for payment of the partnership's obligations. This award is to address the conduct of the defendant during and following the termination of the partnership. Interest will run on this award from November 8, 2009, which is roughly halfway through the period of conduct it is intended to address because the basis for the award is Mr. Hutchison's ongoing conduct, after the law suit was initiated.

[342] On appeal, while the British Columbia Court of Appeal reduced the quantum of the punitive damages awarded, the start date for the calculation of pre-judgment interest was not changed: McKnight CA at paras. 80, 206.

[343] The defendants are entitled to pre-judgment interest on the award of general damages and punitive damages from May 4, 2018, being a date approximately half-way between May 4, 2014 when their cause of action arose and May 14, 2022, when the burning started again.

[344] The defendants are awarded damages:

- a) General damages for nuisance of \$150,000;
- b) Damages for Assault of \$2,500;
- c) Damages for trespass of \$2,500
- d) Punitive damages of \$50,000;
- e) Aggravated damages of \$15,000 to Ms. Parsons and \$10,000 to Mr. Usher.

Additional Relief Sought

Injunction

- [345] The defendants seek a permanent injunction restraining the plaintiffs, and each of them, by themselves, their servants or agents or otherwise from entering the defendants' property, contacting the defendants directly or indirectly, any burning by the plaintiffs except within their home for heating purposes provided it does not produce excessive smoke, the use of any sound-emitting devices and placing garbage, debris or waste on the defendants property, including food scraps and the like. In addition, they seek prohibition of composting and other material within 100 feet of the well, the erecting of any signs about the defendants or their family members on the plaintiffs' property and any work on the north edge of their property including the municipal lands in front of their property.
- [346] The defendants submit that damages alone are inadequate to prevent the future continuation of the private nuisance, noting that Mr. Gokey is almost certain to continue to produce smoke and will only be prevented by a permanent injunction.
- [347] While damages may be sufficient compensation to a party, that would be tantamount to granting Mr. Gokey a licence to continue his conduct, hence injunctive relief can be granted: *Ward v. Cariboo Regional District*, 2021 BCSC 1495 at para. 312, order partially stayed on appeal, 2021 BCCA 423; 469238 B.C. Ltd. v. Okanagan Aggregates Ltd. (Motoplex Speedway and Event Park), 2016 BCSC 721 at para. 194, aff'd 2017 BCCA 127.
- [348] In this case, I am satisfied that both damages and a permanent injunction are appropriate.
- [349] As noted in these reasons, the plaintiff Edward C. Gokey views matters from his perspective alone. He has clearly decided to inflict his behavior on the neighbours as he sees fit. He has done so for years and the ongoing litigation has not lessened his behavior. Additionally, his failure to adhere to the settlement agreement and the trial decision before Judge Seidemann in addition to his refusal to accept this Court's findings as evidenced by both his appeals, including seeking leave to appeal to the Supreme Court of Canada, illustrate his persistence.
- [350] In summary, the action of the plaintiffs is dismissed. The defendants have been successful in their counterclaim. In addition to the damages awarded I make the following declarations and orders:
- a) I declare the plaintiffs shall have full, free, uninterrupted right, liberty, licence and privilege to exclusively draw water for residential purposes from the well (the "Well") located in the proposed easement area set out in the draft Easement Plan (the "Easement Area"), a copy of which is attached to this order as Schedule "A", and an easement over the Easement Area;
 - b) The plaintiffs shall be entitled to draw water from the Well for residential purposes for both the plaintiffs' property legally described as Lot 17, District Lot 165, Queen Charlotte District, Plan 3734 PID 011-754-176 (the "Plaintiffs' Property") and the property owned by the plaintiffs legally described as Lot 18, District Lot 165, Queen Charlotte District, Plan 12314, PID 013-665-34, but limited to such usage being for only one residence in total on the two

properties and where usage of the Well does not conflict with any applicable statutory or regulatory laws; and,

- c) The plaintiffs shall make use of the Easement Area exclusively for access to the Well and well casing and shall not:
 - i. construct, erect or place any buildings, fences, or other edifices on the Easement Area, except for the construction of a security sleeve on the well-bore of not greater than 3' in height from the ground to the top of the sleeve and no more than 1' in diameter,
 - ii. make any excavations on the Easement Area, except excavation incidental to repair and replacement of the well-bore pipe;
 - iii. place or deposit any objects, debris, detritus or material of any nature on the Easement Area including without limitation any objects, debris, detritus or material that Easement Area that interferes with or restricts the Defendants' ability to monitor or observe the Easement Area through the use of surveillance equipment or cameras; or
 - iv. hinder the defendants' access to the Easement Area.
 - d) The plaintiffs shall remove from the Easement Area any structure or material presently in the Easement Area that does not comply with the restrictions in c. i to iii and only replace same with a well sleeve that complies with the terms in c.to i.;
 - e) The orders set out in paragraphs c) and d) above shall be enforceable by the Royal Canadian Mounted Police;
 - f) The defendants shall have liberty to apply to vary the restrictions in paragraphs c. and d. above in the future if deemed necessary because of the conduct of the plaintiffs or either of them;
- [351] The defendants and each of them are hereby granted a permanent injunction restraining the plaintiffs, and each of them, by themselves, their servants or agents or otherwise from:
- a) Entering any part of the property owned by the defendants and legally described as PID 009-561-838, Lot 16, District Lot 165, Queen Charlotte District, Plan 3734 (the "Defendants' Property") without the prior written permission of the defendants, except for the Easement Area;
 - b) In the case of the plaintiff Edward Gokey, from initiating any in-person physical or verbal contact or communications with the defendants or either of them on or from the Defendants' Property, in the vicinity of the Defendants' Property, or from the Plaintiffs' Property, except for in-person contact or communications that occur on property owned by the plaintiffs if the defendants or either of them have first entered such property or by written communications from the plaintiff Edward Gokey to the defendants or either of them delivered through Canada Post or third party courier to the Defendants' Property, subject to the defendants having liberty to apply for further restrictions on the type of

communications that the plaintiff Edward Gokey is permitted to have with them.

- c) The burning of any material including without limitation yard waste, branches, leaves, entire trees or parts of trees, roots, construction debris, garbage, fish offal, crab shells, food scraps on any location on the Plaintiffs' Property, or in any device, shack, building or other structure located anywhere on the Plaintiffs' Property, except for burning done within the main residence on the Plaintiffs' Property for heating purposes and only to the extent such burning in the main residence does not produce smoke that interferes with the defendants or their use of their property and only if the smoke from such burning is vented in a chimney extending above the highest point of the roof of the main residence;
- d) The use of a sound emitting device or devices on the Plaintiffs' Property, the Easement Area or Lot 18, District Lot 165, Queen Charlotte District, Plan 12314, PID 013-665-34, including but not limited to telephone bell ringers and to alarm systems, that produce(s) a level or type of noise that disturbs or is liable to disturb the defendants' reasonable enjoyment of the Defendants' Property;
- e) Discarding and/or spreading garbage, debris, waste material and/or soil into or onto the Defendants' Property including the Easement Area; and,
- f) Throwing or placing food scraps, bones, treats and/or other edible material onto or on the Defendants' Property including the Easement Area;
- g) Placing or composting any material, including but not limited to offal and crab shells, within 100' of the Well;
- h) Erecting or placing any signs on the Plaintiffs' Property, the Easement Area or Lot 18, District Lot 165, Queen Charlotte District, Plan 12314, PID 013-665-34, containing comments about, or which could reasonably be interpreted as being comments about, the defendants or the defendants' family members.
- i) Doing any type of work, including work done using hand tools or machines, or driving any tractor, plow and/or grass cutting vehicle, on the Defendants' Property, on the municipal land between Beach Road and the north edge of the Defendants' Property as well as on the municipal land between the north edge of 499 Beach Road and Beach Road.
- j) The orders set out in paragraphs a. to i. inclusive above shall be enforceable by the Royal Canadian Mounted Police and the orders set out in paragraphs c. to g. inclusive above also shall be enforceable by the British Columbia Conservation Service Office.
- k) The defendants shall have liberty to apply to vary the restrictions in paragraphs a. to i. above in the future if deemed necessary because of the conduct of the plaintiffs or either of them;

[352] The plaintiffs' approval as to the form of order is dispensed with.

Costs

[353] The defendants wish to address the issue of costs once reasons for judgment are released. The defendants shall file written submissions on costs not to exceed 15 pages in length along with any supporting authorities within 30 days. The plaintiffs shall file reply submissions not to exceed 15 pages along with any supporting authorities within 15 days thereafter. The defendants may file reply submissions within seven days thereafter, not to exceed five pages.

"The Honourable Mr. Justice Punnett"

SCHEDULE "A"

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