

CANADA / JUDGMENT

MacKay v. Brookside Campsite Inc.

2020 BCSC 375

COURT

Supreme Court of British Columbia

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2020 BCSC 375 MacKay v. Brookside Campsite Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacKay v. Brookside Campsite Inc.,

2020 BCSC 375

Date: 20200212

Docket: S57370

Registry: Kamloops

Between:

Robert John MacKay

Plaintiff

And

Brookside Campsite Inc., Marissa Michelle Ferguson, Dana Hal Hendricks, Her Majesty The Queen in Right of the Province of British Columbia and Village of Cache Creek

Defendants

Before: The Honourable Madam Justice Donegan

Oral Reasons for Judgment

re Application for Interlocutory Injunction

Counsel for the Plaintiff appearing by teleconference:

I.M. Knapp

(as Agent for C. Harvey, Q.C.)

Counsel for the Defendants, Brookside Campsite Inc., Marissa Ferguson, and Dana Hendricks
(appearing by teleconference):

A. Farber

Counsel for the Defendant, Her Majesty The Queen in Right of the Province of British Columbia
(appearing by teleconference):

M.N. Weintraub

Counsel for the Defendant, Village of Cache Creek (appearing by teleconference):

J.M. Poole

Place and Date of Hearing:

Kamloops, B.C.

January 21 and 23, 2020

Place and Date of Judgment:

Kamloops, B.C.

February 12, 2020

INTRODUCTION AND OVERVIEW

- [1] The plaintiff, Robert MacKay, is the owner of land and buildings located within the floodplain of Cache Creek (the "MacKay Property"). The defendant, Brookside Campsite Inc. ("Brookside"), owns upstream neighbouring property (the "Campsite Property"). The Campsite Property is also located in the same floodplain.
- [2] Mr. MacKay alleges through this lawsuit that he has suffered loss and damage when the MacKay Property was flooded in the springs of 2017 and 2018 and that Brookside (as well as the other defendants) are responsible for these losses. Grounding his claim in nuisance primarily, he asserts that the flooding to the MacKay Property occurred because Brookside made certain diversions and other changes in and about Cache Creek and its side channels that had the effect of increasing the quantity of water in the main stem of Cache Creek beyond its carrying capacity, flooding his land in the 2017 and 2018 spring freshets.
- [3] During the 2017 freshet, the Village of Cache Creek (the "Village") took emergency measures and installed a temporary berm on the Campsite Property immediately upstream from the MacKay Property (the "Village Berm") in order to protect the MacKay Property from flooding. During the 2018 freshet, the Village took steps to strengthen and enlarge the Village Berm. The Village removed the Village Berm in October 2019. As it was not located on his property, Mr. MacKay was not notified of its removal. He is now concerned that the MacKay Property will be exposed to flooding once again in the spring 2020 freshet, and with

this application seeks a mandatory injunction compelling some defendants to effect the construction of a permanent berm to protect his property from anticipated flood waters. All three defendants are vigorously opposed to this application.

INTERLOCUTORY INJUNCTIONS

- [4] An interlocutory injunction is an extraordinary remedy the court may grant where it is just and convenient to do so: s. 39(3) of the Law and Equity Act, R.S.B.C. 1996, c. 253. Courts have broad discretion to compel or enjoin an action where it is just and equitable to do so, either unconditionally or on such terms and conditions as the court thinks just: *Tracy v. Instalogs Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at paras. 30-33.
- [5] In order to grant mandatory injunctive relief, a court must be satisfied that:
- 1) the applicant has demonstrated a strong prima facie case that it will succeed at trial;
 - 2) the applicant will suffer irreparable harm if the injunction is not granted; and
 - 3) the balance of convenience favours granting the injunction.

R. v. Canadian Broadcasting Corp., 2018 SCC 5 [CBC].

- [6] While this three-part test is the appropriate analytical framework, it is important to remember that it is not a formula to be employed as a series of independent hurdles. Rather, it should be seen in the nature of evidence relative to the central issue of assessing the relative risks of harm to the parties from granting or withholding the interlocutory relief: *Wale* at p. 347. In other words, the three considerations I have just articulated are to guide the court in arriving at the most just and equitable result in the circumstances. The fundamental question in all cases is whether the grant of an injunction is just and equitable in all of the circumstances: *Marine Harvest v. Morton*, 2018 BCSC 1302 at para. 137.

FACTUAL BACKGROUND

- [7] The MacKay Property is bounded to the north by Cache Creek, which flows in a roughly east-west direction. The plaintiff has lived there in a trailer home since 2008. His home is in fairly close proximity to Cache Creek. Brookside purchased the Campsite Property in 2012. As its name implies, it is property used for a commercial campsite and is located to the east and north of the MacKay Property. The southern boundary of a portion of the Campsite Property is the northern natural boundary of the creek flowing between the MacKay Property and the Campsite Property. Both properties are located in the floodplain of Cache Creek and both are vulnerable to the effects of high flows in that watercourse.
- [8] The Village owns land immediately to the east of the Campsite Property upon which an embankment and road have been constructed.

- [9] The property in and the right to use water at any time in a stream in British Columbia are vested in the government, except insofar as private rights have been established under authorizations: Water Sustainability Act, S.B.C. 2014, c. 15 [WSA], s. 5(1)).
- [10] Property in a stream channel below the natural boundary is also typically vested in the Province with reference here of the definition of natural boundary in the Land Act and certain sections there (Land Act, definition of "natural boundary" - ss. 18 and 55).
- [11] By virtue of the WSA, the Province has regulatory jurisdiction over stream channels, which includes the bed and banks of the stream and side channels of the stream.
- [12] In April 1980, the Province granted a change approval to Brookside's predecessor in title to "relocate approximately 500 feet" of channel to "assist in reducing the flood hazard to a campground area". The work approved of at that time included construction of a berm "closing off the existing channel and installation of one or more culverts." The approval was also subject to a number of mandatory conditions.
- [13] In and about that time, a road was constructed to the campsite along the east boundary of the Campsite Property, and a single culvert was installed to accommodate the flow of Cache Creek.
- [14] Brookside added another culvert in 2014. As an "authorized change" under s. 39(1) of the Water Sustainability Regulations, B.C. Reg. 36/2016 [Regulations], Brookside was not required to obtain approval from the Province, but was required to give notice to the Province and comply with Part 3 of the Regulations.
- [15] Sometime between 2014 and 2017, a berm on Village land beside the campsite road, adjacent to the east boundary of the Campsite Property, was built.
- [16] The April/ May 2017 freshet saw significant water flow in the area. Emily Chung, an engineer, ascribes the increase in volume and speed of water during this freshet to increased run-off from the upstream mountains due to climate change causing rapid snow melt, combined with forest and soil conditions that differed from those historically found upstream. These conditions, she believes, may also be the result of deforestation from the Elephant Hill fire and infestation of mountain pine beetle and further pine beetle kill salvage programs.
- [17] In the spring 2017 freshet, the owner of Brookside observed that the level of the water in the creek approached the top of the second culvert on the Campsite Property. Water breached the roadway, so in order to allow the water more room to flow next to the culvert in the main channel of the creek, Mr. Hendricks deposes that he scratched a shallow line across the surface of the roadway. According to his evidence, the flow of the creek then began to erode the line near the culvert. The water cut down and gradually widened the main channel near the culvert to the size it needed to keep flowing. Despite this work, the campground continued to suffer flooding in the 2017 freshet. The MacKay Property also suffered flooding at that time. Indeed, many other properties in the floodplain of Cache Creek were flooded

that year. An expert geomorphologist hired by Mr. MacKay in this litigation, Mr. Stirling, refers to the 2017 freshet in that area as a "25-year event".

- [18] Tracy Meldrum is a regional hydrologist, statutory decision-maker, and assistant water manager for the Thompson-Okanagan Region under the WSA. She provided an affidavit explaining the various government processes under the WSA. With respect to emergency works, she explained that Part 3 of the Regulations makes special provision for erosion protection works or flood protection works placed by the Province or local governments during a declared state of emergency, and that similar provision is made for the clearing of an obstructed bridge or culvert in emergency circumstances. These emergency situations are considered authorized changes under ss. 39(1)(o) and (p) of the Regulations.
- [19] Ms. Meldrum also explained that the Province provides a guidance document to local governments which outlines the work and reporting expectations in emergencies. Emergency Management BC provides separate guidance to the public regarding construction of temporary berms and dikes during flooding emergencies through EMBC Policy 5.12. Policy 5.12 provides that temporary berms must be removed by the local government before a reimbursement claim for construction and deconstruction can be processed. The policy also reminds that WSA authorization is required for in-stream work completed outside of an emergency declaration issued under the Emergency Program Act, R.S.B.C. 1996, c. 111.
- [20] During the 2017 flooding of the creek, the Village undertook various measures as part of its overall sustained emergency response, including placing a temporary berm (the "Village Berm"), on the Campsite Property next to the creek, upstream from the MacKay Property. As Ms. Meldrum deposes, this was considered an authorized change pursuant to the Regulations (s. 39(1)(o)).
- [21] Brookside also took steps to prevent or minimize flooding to the Campsite Property, including steps to increase the flow of water along the main channel, past the culverts which had reached their maximum capacity. These steps included bolstering, reinforcing, or increasing the height of the embankment, serving to keep waters that flowed in the stream, in the stream.
- [22] Notwithstanding the erection of the Village Berm, the MacKay Property experienced flooding. The extent of the flooding and/or damage caused by the flooding is somewhat unclear from the record before me. In his Notice of Application, Mr. MacKay asserts that he suffered "significant flood damage to his land in 2017" and that his land was "incapable of use that year". Yet, in his affidavit, he deposes that the Village Berm saved his property from extensive damage that year.
- [23] In any event, the 2018 freshet was even worse for the Cache Creek area. Mr. Stirling calls it a "50-year event". The Village and Brookside took steps to protect property. The Village fortified the Village Berm, actions that are said to constitute an authorized change under the Regulations. Mr. Hendricks, on behalf of Brookside, deposes that on April 25, 2018, to avoid

any potential pooling or breach of the road at the mouth of the culverts, and to further avoid an uncontrolled event, he dug a small ditch about three to four feet deep next to the culvert that sloped from the downstream end of the culvert back to the upstream top of the culvert. He deposes that as soon as the culvert reached capacity, with some controlled assistance, the water began to find and gradually use the overflow ditch beside the culvert. As the water began to use this space beside the culvert, over time it eroded the overall channel wider, as the run-off began to increase overnight and the following days.

- [24] Recognizing that the two culverts were no longer effective, Brookside applied to the Province for approval to replace both culverts with a clear span bridge. In support of this application, Brookside obtained an environmental management plan report from an engineer. That report, prepared by an engineer with D.W.B. Consultants Ltd., is before the court on this application and it shows the level of planning, preparation, engineering, and accommodation that went into Brookside's bridge proposal. The Province granted Brookside approval for the bridge in April 2018 and it was constructed later that same year.
- [25] Despite the presence of the fortified Village Berm, the MacKay Property still experienced flooding in the "50-year event", the 2018 freshet. Mr. MacKay asserts that his losses as a result of this flood are in the range of \$140,000, although he provides no breakdown of that amount.
- [26] The application record materials do not disclose any evidence of flooding to the subject properties during the 2019 freshet.
- [27] In October 2019, the Village removed the Village Berm. As a temporary berm that the Village had not yet removed, Brookside had initiated a process seeking to remove the rip rap that composes the Village Berm, because it saw that it was sending water back onto the Campsite Property, eroding and making unusable multiple campsites. In response to this application, the Province contacted the Village and sought to have it comply with Policy 5.12 and remove the berm.
- [28] The Village complied with the policy and did so. As Ms. Meldrum deposed, the removal of the Village Berm is considered an authorized change under s. 39(1)(h) of the Regulations to restore the stream channel.
- [29] Ms. Meldrum explained the rationale behind the Province's removal policy. Berms and dikes built with rip rap as emergency measures are not designed appropriately, she deposes, from an engineering standpoint. They are not built with any consideration for things such as aquatic habitat values and have not been the subject of consultation with other affected parties, such as various First Nations groups and/or the Department of Fisheries and Oceans. Cache Creek is a federally fish-bearing stream. These temporary structures, she deposes, need to be removed once the threat has passed, because they could cause unintended harm in many other ways.

- [30] The Village was not required to give Mr. MacKay formal notice of the Village Berm's removal. When Mr. MacKay learned of it, he voiced his concern immediately. He was initially told, in response to that voiced concern, by the Village's Chief Administrative Officer ("CAO"), that the Village intended to replace it with a properly engineered berm, but this was retracted once the CAO learned that there was no Village property in the area that required protection by such a berm. He had been mistaken.
- [31] As it has in previous years, the Village will have the ability to perform temporary emergency works to protect property in the Cache Creek floodplain, including the MacKay Property, if property is endangered by high creek flows in the 2020 (or any other) freshet.
- [32] Mr. MacKay hired Jamie Stirling, a geomorphologist, to provide expert opinion and reporting relating to flooding and erosion of Cache Creek on the MacKay and Campsite Properties. Mr. Stirling prepared three reports dated August 31, 2019, December 11, 2019, and January 3, 2020.
- [33] In the first report, Mr. Stirling was asked to provide an opinion on five questions:
1. What was the historic topographical configuration of Mr. MacKay's property and the adjacent campground property and the historic exposure of such properties to flooding and erosion hazards from Cache Creek?
 2. How, if at all, has the configuration of such properties changed in recent years?
 3. What are the consequences of any such changes in terms of flow patterns in Cache Creek and flooding and erosion hazard to Mr. MacKay's property?
 4. If it is found that any such changes have caused flooding and erosion damage to Mr. MacKay's property and will likely continue to do so, if no protective mitigation measures are taken, what measures would you recommend to Mr. MacKay to remediate his property and to preclude further flooding and erosion damage in the future?
 5. What would be the costs of such measures and the likely timeframe for their completion?
- [34] In respect of Question 3, Mr. Stirling opined that replacing the culverts with a bridge and installing the upstream campground berm increased the flood depth and extent of the flooding the MacKay Property. The berm and the bridge diverted water away from the right floodplain of the Campsite Property and onto the MacKay Property. He further opined that if the culverts had not been replaced with the bridge and the upstream campsite berm was not constructed, then a channel evulsion would likely have occurred onto the right floodplain through the campsites during either the 2017 or 2018 floods, and this evulsed channel would likely have entered back into the main channel downstream of the MacKay trailer home: (first report, pages 22 and 23).
- [35] Mr. Stirling discussed a few mitigation options at pages 23-26 of his report and their costs. I have reviewed all of those options and can summarize that he opined that the most feasible and least-disruptive option would be to engineer a creek realignment and permanent

erosion protection along the realigned stretch. He suggests increasing channel capacity in proximity to the MacKay trailer home by widening and deepening the creek to the north, along the elevated right bank of the Campsite Property where there is no infrastructure and, at the same time, re-designing the channel to straighten out the two 90-degree bends that are present there. He says that armouring of the left outer bank near the home would also be required. In addition to the approximately \$45,000 feasibility study that would first have to be performed, Mr. Stirling estimates that this option would cost an additional \$200,000. He says this cost includes the required engineering and environmental assessments, as well as the effort to acquire the necessary permits and approvals from the regulatory agencies. Mr. Stirling further opines that actual construction would likely take between six weeks and three months, and notes that all in-stream work would need to occur during low flow periods and during the fisheries work window, which he opines is typically in August and September.

- [36] After his first report, Mr. Stirling was asked for his opinion on the likely consequences of the removal of the Village Berm "given that all the freshet flood water that formally spread across the floodplain now occupied by the campsite is now carried by the mainstream channel in which the Village berm was placed." Mr. Stirling provided this opinion in his second report dated December 6, 2019. In short, he opined that if the 2020 freshet is of similar magnitude to 2017 and 2018, it is likely that the MacKay trailer home will be destroyed and a new channel will form through the MacKay Property. At page 109, he wrote:

As part of the removal project the left bank has been over-excavated immediately upstream of the upstream end of the remaining portion of the Village Berm and there is not a smooth transition from the exposed bank to the armoured bank. The over-excavated bank is 1 to 1.5 m in land from the remaining portion of the Village Berm and high flows will be directed to this point. This will likely cause the remaining portion of the Village Berm to be outflanked resulting in flooding and erosion behind the Berm. The stump from a cut tree leaning into the Creek has formed a log jam along the right bank on the Campground Property. This jam is directing flows toward the highly vulnerable left bank at the sharp bend. This jam will further increase the flood and erosion hazard on the MacKay Property.

The MacKay Trailer Home is now only 7.5 m from the top of the excavated left bank and the property fence is only 1.8 m from the top of the bank just upstream of the remaining portion of the Village Berm where the bank was over-excavated. The removal of the Village Berm and left bank armouring through this tight bend has left the MacKay Property and the structures on the site, including the MacKay Trailer Home, highly vulnerable to flooding and erosion hazards. When this removal is combined with the channel and floodplain works carried out upstream by the Campground, the MacKay Property is considered extremely vulnerable to flooding and erosion hazards.

Hence, the probability of the left floodplain, the MacKay Property and Home being inundated with floodwaters is considered extremely high.

- [37] Mr. Stirling attached his conceptual design for a protective berm and bank armouring to replace the berm removed by the Village at Exhibit C to his first affidavit before me. He explains in his affidavit that his conceptual design was driven by:
6. a number of hydraulic deficiencies in the present stream bed alignment. The present alignment of Cache Creek in proximity to the MacKay Trailer Home and MacKay Shop leaves the MacKay Property and structures at very high risk to flooding and erosion. The sharp bends (near 90 degrees), adjacent to the Home and the Shop as well as the bend across from the Old Homestead building, promote bank erosion on the outer bank of the bends and unfavourable hydraulic conditions. The proposed channel realignment partially straightens all three bends with the most straightening occurring at the bend across from the Home where the risk of flooding, erosion and avulsions is considered the highest. The straighter channel improves hydraulic conditions and decreases the potential for flooding, erosion and avulsions. The proposed left bank berm will protect the MacKay Property and the Home and Shop from flooding. The opposing right bank had to be moved in order to straighten the channel and to allow sufficient width for the expected quantity and velocity of flow.
- [38] On December 13, 2019, Mr. MacKay filed the application before the court. Shortly thereafter, Mr. Stirling prepared a third report dated January 3, 2020, where he advanced his conceptual design to include actual design drawings for what he proposed to provide flood and erosion protection for the eastern portion of the MacKay Property.
- [39] There seems to be no dispute that the order sought by the plaintiff in this application seeks to make "changes in and about a stream" and falls within the Province's regulatory jurisdiction under the WSA and the Regulations. Section 11(2) of the WSA provides that changes in and about a stream may only be made in accordance with:
- a) the terms and conditions of a change approval;
 - b) the Regulations;
 - c) the terms and conditions or an authorization; or
 - d) an order.
- [40] The changes to Cache Creek sought by Mr. MacKay may only be made by submitting an application in accordance with s. 12 of the WSA and upon the issuance of a change approval by a decision-maker. As a designated decision-maker in such cases, Ms. Meldrum helpfully summarized the process involved for seeking to make changes in and about a stream in her affidavit. At paragraphs 10-13 and 19-33, Ms. Meldrum deposes:
10. Persons proposing to make changes in and about a stream must submit their notification (if it's an authorized change under s. 39(1)) or application for a change approval under s. 11 (1) of WSA to FrontCounter BC.

11. The following information, outlined in ss. 4 and 38(2)(b) of the Regulation, must be included with the submission to FrontCounter BC:
 - (a) the full name of the applicant and a mailing address, a telephone number and, if available, an email address at which the applicant or the applicant's agent may be contacted;
 - (b) the official name of the stream in respect of which the changes in and about a stream are proposed, or, if there is no official name, a location description of the stream;
 - (c) a location description of the place on the stream at which the changes in and about the stream are proposed to occur and, if available, the street address of that location;
 - (d) a location description of the land or undertaking, if any, to which the change approval is to be appurtenant;
 - (e) an accurate labelled drawing, to scale, showing all the following:
 - (i) the location and boundaries of the appurtenancy and the location within the appurtenancy where the water is to be used;
 - (ii) the approximate location of the proposed works;
 - (iii) the boundaries of any land that is likely to be physically affected by the proposed works;
 - (iv) if the water source is an aquifer, streams and other water bodies, whether natural or otherwise, other wells that are diverting water from the aquifer and other water features in the area shown in the drawing, if known to the applicant;
 - (v) if the water source is a stream, the location of the stream and the direction of flow.
 - (f) the proposed start and finish dates for making the changes in and about the stream and constructing any proposed works;
 - (g) a description of the activities and works to be constructed in relation to the proposed changes in and about the stream and that may affect the stream;
 - (h) if the land described in paragraph (c) or (d) is owned by a person other than the applicant, the written consent of the land owner to the use of the person's land for any works or construction of any works;
 - (i) if the land described in paragraph (c) or (d) is Crown land, proof of the applicant's authority to occupy the Crown land, proof that an application for a disposition of the Crown land has been made or the applicant's request for a permit in relation to that Crown land;
 - (j) if the proposed changes in and about the stream will be carried out, or proposed works related to the change in and about the stream will be constructed, by a person other than the applicant, the person's name, professional affiliation, if any, and a mailing address and telephone number at which the person may be contacted.

12. After a notification or application is submitted, staff at FrontCounter BC review the information to make sure it is complete. If more information is required, staff will contact the proponent.
13. In the Thompson-Okanagan Region, our practice is to briefly review proposed changes in a weekly referral meeting. The meetings typically include at least one habitat officer and one water officer. The purpose of these meetings is to confirm that files are complete and to ensure that they are appropriately streamed and assigned.
19. As noted above, changes which are not authorized changes under s. 39(1) of the Regulation may only be made in accordance with a change approval.
20. A \$250 fee is prescribed for an application for a change approval by s. 2 and Table 4 of the Water Sustainability Fees, Rentals and Charges Tariff Regulation BC. Reg. 37/2016. This fee must be paid at the time of submitting the application to FrontCounter BC.
21. Once an application is determined to be complete, it is assigned a file number and moved to adjudication by a decision maker under s. 11 of WSA.
22. Each application for a change approval is adjudicated by a decision maker on its individual merits.
23. In addition to the information contained in the application requirements, under Section 12 of WSA, the decision maker may require engineered drawings, reports, assessments, management plans, surveys, or other information in support of the application.
24. The decision maker must consider other water users in the area when adjudicating an application. Precedence in water rights is based on the principle "First in Time, First in Right" and raking of uses, established by s. 22 of WSA.
25. Under s. 13 of WSA, the decision maker must direct the applicant to give notice to persons whose rights the decision maker considers are likely to be detrimentally affected if the application is granted. Alternatively, the decision maker may give this notice.
26. Persons having notice of an application for a change approval have a right to object to the proposed change and the decision maker must make a decision in respect of any objections.
27. Typically, the decision maker sends letters of referral to agencies who may have overlapping jurisdiction or an interest in the decision. This includes but is not limited to consultation with Indigenous groups, Fisheries and Oceans Canada ("DFO"), other provincial government agencies (e.g. Ministry of Transportation and Infrastructure, Ministry of Environment) and local or regional governments.
28. DFO has their own checklist for projects near water to determine if the project requires DFO review. Depending on the complexity of the application and the habitat values at stake, the decision maker may ask applicants for proof of compliance with DFO requirements.

29. Once responses and comments have been received and relevant documents reviewed, the decision maker can make a decision in accordance with Section 14 of WSA.
30. If the decision maker decides to grant all or part of the application for a change approval, the applicant becomes an approval holder and must abide by all the terms and conditions outlined in the change approval in carrying out the approved work. The scope of work may change through the adjudication process or remain the same as originally applied for.
31. In addition to the requirements of the change approval, the approval holder is reminded that it is their responsibility to abide by all applicable laws including, but not limited to: the Land Act (Provincial), the Wildlife Act (Provincial), the Heritage Conservation Act (Provincial), the Species at Risk Act (Federal), and the Fisheries Act (Federal).
32. A summary of the process for change approvals is publicly available at the following web address: <https://portal.nrs.gov.bc/web/client/./change-approval-for-work-in-and-about-a-stream>.

A true, printed copy of this webpage is attached to my affidavit as Exhibit "C".

Appeals

33. Persons whose rights are affected by decisions under WSA, including change approval decisions, may appeal to the Environmental Appeal Board ("EAB"). The cost of an appeal to the EAB is \$25.
- [41] Ms. Meldrum also discussed the timing of works that are approved and how that timing is dependent on the Least Risk Fish Timing Window ("LRFTW"), a period of time when in-stream works are seen to pose the lowest risk to habitat values (July 22 and October 31 in the area in the case at bar). To perform works outside of the LRFTW, which is what the plaintiff's application contemplates, a qualified environmental professional would need to provide a formal request for a variance to a habitat officer, including a site-specific rationale and additional mitigation and isolation measures for the proposed works. Whether to grant a variance from the LRFTW is a matter within the discretion of the habitat officer. Without that variance being granted, the works must be completed within the applicable LRFTW.
- [42] About ten days before the hearing of this application, Mr. MacKay, with the limited consent of Brookside to do so, submitted an application for a change approval under the WSA to FrontCounter BC, requesting authorization for the works recommended by Mr. Stirling.
- [43] This litigation is scheduled for trial this fall.

ANALYSIS

- [44] Mr. MacKay seeks an order compelling the Village and Brookside, or Brookside only, to construct or effect the construction of major changes to Cache Creek - a creek realignment and permanent erosion protection works along the realigned stretch - in accordance with Mr. Stirling's drawings and recommendations. Specifically, Mr. MacKay seeks the following order:
2. That the Village and Campsite, prior to April 10, 2020, construct or effect the construction of the berm on the left bank of Cache Creek depicted in the design drawings of Stirling Geoscience Ltd. dated December 10, 2019 and attached as exhibit "C" to the affidavit of Jamie Stirling and such construction drawings as may be prepared by Stirling Geoscience Ltd. in accordance with such design drawings.
- [45] Mr. MacKay argues that construction of those works, that is the works recommended by Mr. Stirling, would restore the status quo that had been in existence prior to the Village Berm removal and protect his property from destruction in the 2020 freshet. He submits that requiring Brookside and the Village to pay for these works would be just and equitable, because they are the parties who acted in concert to remove the Village Berm, an act that caused this application to be necessary. Alternatively, Mr. MacKay says that Brookside alone should pay for it, because Brookside was the party that caused the increased water to exceed the capacity of the creek and caused the Village Berm to be removed by the Village.

Has the Plaintiff Established a Strong Prima Facie Case?

- [46] In *CBC*, the Supreme Court of Canada considered various descriptions of a "strong prima facie case" in the jurisprudence and clarified that it means the applicant must show a "strong likelihood on the law and the evidence presented that at trial the applicant will be ultimately successful in proving the allegations set out in the originating notice": para. 18.
- [47] In order to make an assessment under this branch of the test, the Court made it clear in *CBC* that an application judge is required to undertake an extensive review of the merits of the plaintiff's case:
- [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR-MacDonald* test is not whether there is a serious issue to be tried, but rather whether the applicant has shown a strong prima facie case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the status quo, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially

severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action in favour of the plaintiff, further demand what the Court described in RJR-MacDonald as "extensive review of the merits" at the interlocutory stage.

[Emphasis added]

- [48] It is for this reason that I have undertaken the extensive review that I have, and taken the time to outline the factual background in the detail that I have.
- [49] In his second Amended Notice of Claim of January 2020, Mr. MacKay articulates his cause of action against all three defendants as a claim in nuisance. Through those amendments, he also pleads and particularizes a claim in negligence as against the Province only.
- [50] With respect to his nuisance claims, Mr. MacKay pleads and argues that he is entitled to the use of his land free from unreasonable interference by water directed onto his land by artificial works on adjacent land, including alterations to the floodplain, side channels, and main channel of the creek. He argues that he has a strong prima facie case against all defendants in nuisance, but primarily against Brookside for diverting surface and stream water from the Campsite Property onto the MacKay Property. He says that by taking the various positive steps that it did, Brookside interfered with the previously existing pattern of run-off, and caused the surface water to run from its land in such a manner as to change materially the velocity and direction of its flow and thus to cause injury to him. His pleadings assert that the Village and Province authorized, created, continued, and/or adopted the nuisance by allowing it to continue and failing to take reasonable steps to bring the nuisance to an end.
- [51] In oral submissions, Mr. MacKay's counsel also made reference to negligence on the part of Brookside and the Village, citing "the tendency of recent decisions is to assimilate nuisance and negligence: *Trans Mountain Pipeline Company Limited v. Nicola Valley Sawmills Limited* (1975), 62 D.L.R. (3d) 279 (BCSC) at pp. 300-301. He argues that the evidence shows that Brookside created a situation of foreseeable harm to Mr. MacKay by (a) placing a dike transverse to a floodplain, thereby diverting flood water to the main stem of the creek; (b) widening the main channel of the stream by removing culverts and installing a clear-span bridge; (c) widening the channel between the bridge and the plaintiff's land; (d) extensively armouring the right bank of the channel; and (e) causing the removal of a portion of the protective berm on the left bank adjacent to the plaintiff's land.
- [52] Mr. MacKay also argues that he has a strong prima facie case against the Village, as it was involved in three of those steps ((a), (b) and (e)).
- [53] As there is no claim in negligence pled against the Village and Brookside, their responses understandably addressed only nuisance. As the parties' focus in this application was squarely on nuisance, so too will be the court's.

- [54] A nuisance consists of "an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable": *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para. 18.
- [55] The test for nuisance has two parts. The first component of the test requires that the interference complained of be substantial in nature. A substantial interference is an injury to the plaintiff's property interest that is more than a slight annoyance or trifling interference. To constitute a nuisance, the defendant's conduct must "substantially alter the nature of the claimant's property itself or interfere to an extent with the actual use being made of the property": *Antrim* at para. 22.
- [56] If the interference is found to be "substantial", the court must consider whether it is "unreasonable" in all of the circumstances. In assessing reasonableness, the court must balance various factors, including the severity and duration of the interference, the character of the area, the utility of the defendant's conduct, and the sensitivity of the plaintiff: *Antrim* at para. 40. The distinction ultimately is between "interferences that constitute the 'give and take' expected of everyone and interferences that impose a disproportionate burden on individuals": *Antrim* at para. 39.
- [57] Generally, uphill owners are not liable in nuisance for the natural flow of water from their property. However, an owner who takes positive steps to change the direction and velocity of the natural flow of water from their property may be held liable in nuisance where that flow causes substantial and unreasonable interference with another party's property: *Trans Mountain* at 299-300.
- [58] This issue will be the primary issue, at least as it has been argued here, at trial. Brookside argues that nothing it did changed the natural flow of water from their property that caused substantial and unreasonable interference with Mr. MacKay's property. Brookside and the Village point to case law that supports a property owner's right to construct works, to repel water that has escaped a watercourse away from his own property and back into that watercourse (*Gerrard v. Crowe*, [1921] 1 A.C. 395 (UK JCPC) for example). They point to evidence that could support a finding at trial that none of the steps they took diverted the course of the creek, diverted surface and stream water from the Campsite Property onto the MacKay Property and/or interfered with the previously-existing pattern of run-off. Rather, they say those steps simply returned floodwaters from the significant 25 and 50-year run-off events in 2017 and 2018 that had escaped the existing and natural watercourse (the main stem of the creek). In other words, they say they were placing surface water back into the natural watercourse from whence it came. Any of their emergency responses to the significant and unusual freshets did not change the natural flow of water. They kept the water in its original channel, which the law allows.
- [59] Of course, these significant factual issues cannot be decided in this forum. Were this a case where the lower threshold applied, I would have no hesitation concluding the plaintiff has demonstrated a serious issue to be tried against Brookside and the Village. But here, I have

difficulty finding that the plaintiff has met the higher threshold of a strong prima facie case. While there is evidence and authorities that could potentially support the plaintiff's position, there is also evidence and authorities that support the positions of Brookside and the Village. In these circumstances, I cannot conclude that there is a strong likelihood on the law and evidence presented that the plaintiff will be ultimately successful in proving the allegations.

- [60] The plaintiff's focus in this application was primarily on the conduct of Brookside and the Village, but to the extent that this injunction affects the Province's interests, which it does, the strength of his case against the Province should also be considered.
- [61] I agree with the positions taken by the Province in its Application Response that the evidence adduced on this application falls short of establishing a strong prima facie case against it.
- [62] On the evidence, the Province appears to have done nothing which directly impacted the MacKay Property. Liability in nuisance does not extend to the Province as regulator: *Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581 at paras. 377-380.
- [63] As well, the only decision taken by the Province occurred 40 years ago. An attack on this decision could be seen to be barred by the ultimate limitation period: *Limitation Act*, S.B.C. 2012, c. 13, s. 21. The other conduct complained of by the plaintiff appears to have been authorized by the Regulations. As the Province argues, the decision of the Legislature to authorize certain types of works under the Regulations is not justiciable in a civil action.
- [64] Finally, as the Province submits, it may well be successful in arguing at trial that because the Regulations are aimed at regulating public water resources in the public interest, they do not give rise to private law duties in negligence: *Rain Coast Water Corp. v. British Columbia*, 2016 BCSC 845 at paras. 115-120.

Has the Plaintiff Established Irreparable Harm?

- [65] In *RJR-MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Court described the second factor as "deciding whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm". The Court held:
- [58] At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.
- [59] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision (*R.L. Crain Inc. v. Hendry* (1988), 48 D.L.R. (4th) 228 (Sask. Q.B.)); where one party will suffer permanent

market loss or irrevocable damage to its business reputation (American Cyanamid, *supra*); or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined (MacMillan Bloedel Ltd. v. Mullin, [1985] 3 W.W.R. 577 (B.C.C.A.)). The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration (Hubbard v. Pitt, [1976] Q.B. 142 (C.A.)).

- [66] In Vancouver Aquarium Marine Science Centre v. Charbonneau, 2017 BCCA 395, the Court held:
- [60] there surely must be a foundation, beyond mere speculation, that irreparable harm will result. Interlocutory injunctive relief pending the trial of the issues is a significant remedy, and should be invoked only when the test in RJR-MacDonald is satisfied on a sound evidentiary foundation.
- [67] In Canivate Growing v Brazier, 2019 BCSC 899, the court held that irreparable harm refers to the nature of the harm suffered, rather than to its magnitude. It is harm that either cannot be quantified in monetary terms or cannot be cured: para. 63.
- [68] In CBC, the Court also emphasized that this second stage of irreparable harm analysis only applies to the harm that might be suffered by the injunction applicant and not any harm that might be suffered by the respondent, should the relief sought be granted. This factor (that is harm that might be suffered by the application respondent) should the relief sought be granted, is more appropriately dealt with in the third part of the analysis, the balance of convenience.
- [69] Here, the plaintiff submits that without the Village Berm or a replacement berm, the 2020 freshet will, in all probability, flow straight into his home and likely bisect his property, after first clearing it of all buildings and possessions. He says the destruction of one's home is irreparable harm.
- [70] As a general proposition, I agree that destruction of one's home constitutes irreparable harm. However, in this case, the evidence from Mr. Stirling is that the 2017 and 2018 freshets were extraordinary 25 and 50-year events. He opines that if the 2020 freshet is of similar magnitude and no protective measures are in place, Mr. MacKay's home will be destroyed and a new channel will form in his property. Whether the 2020 freshet will be of similar magnitude is entirely speculative. Even if it did occur and Mr. MacKay did not take mitigative measures himself, it is reasonable to expect that the Village will act, as it has in the past, to protect flood-prone property, such as Mr. MacKay's.
- [71] Even with those emergency protections in place, should all of those things actually come to fruition and a loss were to occur, then damages for loss to and impairment of property between now and the time of trial would be recoverable if Mr. MacKay is able to establish liability against one or more of the defendants at trial, just as damages for loss to and impairment of property in 2017 and 2018 would also be recoverable.

Balance of Convenience

[72] The third factor to be applied in an application for an interlocutory injunction is "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits": *RJR-MacDonald* at para. 62.

[73] In *RJR-MacDonald*, the Court observed that many interlocutory proceedings will be determined at this stage of the analysis. The Court noted that the factors to be considered in assessing the "balance of convenience" are numerous and will vary with each case. The Court cautioned that it would be unwise to attempt to list all of the various matters that may need to be taken into consideration here, let alone to suggest the relative weight that should be attached to them in any given case.

[74] In *Canadian Broadcasting Corp. (CBC) v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 (C.A.), our Court of Appeal identified a number of factors that should be considered in assessing the balance of convenience at p. 102:

the adequacy of damages as a remedy for the applicant if the injunction is not granted, and for the respondent if an injunction is granted; the likelihood that if damages are finally awarded they will be paid; the preservation of contested property; other factors affecting whether harm from the granting or refusal of the injunction would be irreparable; which of the parties has acted to alter the balance of their relationship and so affect the status quo;

[75] Mr. MacKay submits that the balance of convenience lies heavily in his favour here as he is the party who will suffer the greater harm from the granting or refusal of the injunction. If the court does not grant the mandatory injunction, he says he will likely suffer very serious harm through the loss of his home and other possessions, but if it is granted, he says the defendants will suffer no harm at all, other than the interim inconvenience of funding the works recommended by Mr. Stirling. He emphasizes that this application was prompted only by the defendants' conduct (the Village and Brookside) in removing the Village Berm without notice to him. He says this conduct was unreasonable and calculated to injure him. He has paid for Mr. Stirling's works and drawings thus far, but argues he should not be expected to, nor is he able to, incur any further expense. He indicates he is willing to provide an undertaking as to damages.

[76] I find that the balance of convenience does not favour the plaintiff's position here. I should add that I would reach this conclusion even if I found the plaintiff's case met the higher standard of a strong *prima facie* one. I reach this conclusion for a number of reasons.

[77] I have concluded that the plaintiff's claim does not meet the high threshold required here, but I would not characterize it as a weak case either.

[78] I have also concluded that, should the plaintiff's claim ultimately succeed, any loss sustained is capable of being compensable by way of a damage award.

- [79] The works Mr. MacKay proposes would involve a very significant expenditure of funds, potentially hundreds of thousands of dollars, the recovery of which would be uncertain if his claim failed. Mr. MacKay has indicated he would provide an undertaking to pay damages, but has adduced no financial evidence to support the validity or reliability of any such undertaking. In fact, to the contrary, he asserts in his application that he has taken the process as far as he financially can and is unable to expend any further funds toward the creation of any protective works beyond what he has spent.
- [80] The works Mr. MacKay seeks to have performed are permanent works, precisely what he will seek as a final order should he be successful at trial. In these circumstances, there is a significant risk that ordering the work sought by Mr. MacKay on an interim basis would lead to permanent works being installed to his benefit, which could end up not being the legal responsibility of any of the defendants, with an inability on the part of the defendants to fully recover the costs of performing that work.
- [81] As the defendants argue, Mr. MacKay has not adduced any evidence as to why he has not taken steps of his own to construct a permanent protective berm or why he would be unable to do so or prevented from doing so. Like Brookside, Mr. MacKay purchased property on a floodplain. He knew it was in a floodplain. His trailer home is located only a few feet away from Cache Creek and he has not taken steps to perform work to protect his land, particularly in those significant freshet years. As Brookside points out, the evidence does not reveal that he has asked Brookside for any accommodation, such as the granting of an easement for him to undertake protective works that he might need. Mr. MacKay is, with this application, really seeking to have others pay for work that he could do on his own.
- [82] Moreover, and importantly in this case, the public interest does not support Mr. MacKay's position. As the Province correctly points out, the works the plaintiff wishes this court to order are major changes to Cache Creek - a creek realignment and permanent erosion protection works along that realigned stretch. Such changes may only be made by applying for a change approval under s. 11 of the WSA and upon a decision granting an approval on terms and conditions the statutory decision makers consider appropriate.
- [83] To grant a mandatory interim injunction compelling Brookside and the Village, or perhaps Brookside alone, to effect the construction of certain specific works in a certain specific timeframe would allow the plaintiff to circumvent the legislative process and thereby enable an abuse of process. The WSA is a mandatory and complete code with respect to the allocation of water rights and authority to make changes to streams and lakes in B.C.: *Hidden Bar Ranch Ltd. v. Arbitrator (Water Act, B.C.)*, [1986] B.C.J. No. 968. To allow this application would be to allow the plaintiff to circumvent that code, including the process and considerations, which are many, that go into a change approval decision.
- [84] The plaintiff's response to this significant issue is to suggest that the application he has just initiated should continue through the proper permitting process with the court simply compelling Brookside and the Village (or Brookside alone), to participate in that process,

and then to compel Brookside and/or the Village to incur any costs that might be required through that process, such as additional studies or reports or other things the decision-maker may require. In my view, this cannot be an appropriate solution. Leaving aside that it suggests relief that was not sought in the application, such an order would be far too uncertain. As the authorities make clear, if a mandatory injunction is ordered, which is an exceptional remedy, a defendant must know exactly, in fact, what he has to do, so that in carrying out an order, he can give his contractors the proper instructions: *Redland Bricks Ltd. v. Morris*, [1969] 2 All E.R. 576 at 580.

- [85] To order a mandatory injunction for the construction of some permanent works that have yet to be determined, with uncertain requirements and uncertain costs cannot be seen as just and equitable in these circumstances.
- [86] I have considered the plaintiff's submission that it was the conduct of Brookside and the Village in removing the Village Berm that altered that status quo and was the impetus for this application. I have considered his argument that Brookside's request to have the Village comply with the policy and the Village's compliance with it were deliberately done without notice to him, as a calculated effort to injure him, and that this should tip the scale in his favour.
- [87] On the evidence adduced, I find I am unable to draw the inference sought by Mr. MacKay here. Notice to Mr. MacKay of the berm's removal was not required but, in any event, the evidence shows that because the Village was unable to remove the rip rap after it had been installed as emergency measures, Brookside applied to the Province for a WSA notification to do so in the event the Village remained unable to comply with the policy. Through that application process, the Province contacted the Village, seeking to have it comply with the proper process of removing the rip rap. The Village did so. The Village CAO explained that the rip rap was there as only temporary bank protection on an emergency basis. As it was not properly engineered or installed, the Village felt there was a strong possibility that the rip rap could become undermined and dislodged, blocking Cache Creek and causing significant damage. It was removed to prevent that from happening, which is a legitimate and very reasonable position to take.
- [88] Even if I were able to draw the inference sought by the plaintiff here (which I am not), it would not be sufficient to tip the balance of convenience scale in his favour in consideration of all of the other factors at play here.
- [89] In the end, I am not persuaded that the balance of convenience militates in favour of granting the injunction sought by the plaintiff. I conclude that it would not be just and equitable to make the orders sought and decline to exercise my discretion to do so, so the application is dismissed.

[DISCUSSION RE COSTS]

[90] THE COURT: I will leave the issue of costs with counsel, with liberty to bring the matter back before the court in consultation with Supreme Court Scheduling.

"S.A. Donegan J."

DONEGAN J.

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