

CANADA / JUDGMENT

MacKay v. Brookside Campsite Inc.

2021 BCSC 1304

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1304 MacKay v. Brookside Campsite Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

MacKay v. Brookside Campsite Inc.,

2021 BCSC 1304

Date: 20210705

Docket: S57370

Registry: Kamloops

Between:

Robert John MacKay

Plaintiff

And

Brookside Campsite Inc., Marissa Michelle Ferguson,

Dana Hal Hendricks, and Village of Cache Creek

Defendants

And

Brookside Campsite Inc., Marissa Michelle Ferguson, and

Dana Hal Hendricks

Third Parties

Corrected Judgment: Appendix A of this judgment was corrected on July 28, 2021

Before: The Honourable Mr Justice Crerar

Reasons for Judgment

Counsel for the Plaintiff Robert MacKay

Self-represented

Ian Knapp (January 5, 2021 only)

Counsel for the Defendants and Third Parties Brookside Campsite Inc., Marissa Michelle Ferguson, and Dana Hal Hendricks

Alexander Farber

Christine Stewart

Counsel for the Defendant

Village of Cache Creek

Jeremy M. Poole

Naomi J. Krueger

Counsel for Her Majesty the Queen in right of the Province of British Columbia

Micah Weintraub

(written submissions only)

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I. Introduction

[1] In most years, Cache Creek, the eponym for the historic Cariboo Wagon Road village, flows and remains in a defined channel.[1]

[2] In years of unusually high freshet -- that is, stronger flow from snow melt or heavy rain, usually in the spring -- however, its churning waters threaten to overflow onto a historic floodplain. What liability, if any, is visited on the upstream property owner who takes remedial measures to protect the property from those overflowing waters, while the downstream floodplain neighbour suffers flood damage?

- [3] It is uncontroversial that the neighbouring properties of both the plaintiff, Mr MacKay, and the defendant, Brookside Campsite Inc., are located on what would naturally and historically have been a floodplain of Cache Creek.
- [4] Mr MacKay argues that through berms, fill, and channel redirection, the defendants have built upon the actions of the predecessor owners of the property, obliterating the natural floodplain path of Cache Creek over that property. The redirection of the creek channel thus focuses its erosive and destructive power on Mr MacKay's property, instead of allowing it to safely diffuse itself over the Brookside property. He seeks an injunction, special damages of \$237,831, general damages of \$900,000, unspecified punitive damages, and an order that the defendants pay for extensive re-alignment of and modifications to the channel and banks of Cache Creek.
- [5] The defendants claim that Brookside was entitled to repel flood waters from its lands, and that Mr MacKay should have himself erected berms or taken other steps to protect his property from the force of the creek in freshet flood. They deny any redirection of natural creek channels. They argue that whatever might have been the status of the Brookside property as a floodplain channel is historic and academic: it has not served that role since 1980, when the campground was put in by owners unrelated to Brookside.

II. Facts

A. The expert witnesses

- [6] The Court had the benefit of three expert reports.
- [7] Mr Jamie Stirling is a geomorphologist called by Mr MacKay. He provided a primary August 2019 report. He also provided a supplementary December 2019 report focusing on the removal of the 2017/2018 emergency Village berm on the MacKay property; this second report is rendered partly redundant by the new 2020 Village berm built immediately upstream of the MacKay property.
- [8] Dr Robert Millar is a hydrotechnical engineer and professor of civil engineering at the University of British Columbia, called by Brookside. He provided an October 2020 report replying to the two Stirling reports.
- [9] Both of these witnesses provided credible and careful opinions on the history, topography, hydrology, and risks with respect to the properties in question. At the end of the day, their opinions did not significantly differ. Except where noted, the Court accepts their evidence generally.

B. The creek, the properties, and the parties

- [10] Approximately 20 kilometres in length, Cache Creek rises in the Arrowstone Hills and runs southwest to its confluence with the Bonaparte River at the Village of Cache Creek. The Arrowstone Hills, including the Cache Creek headwaters, suffered considerable damage during the Elephant Hill wildfire, one of the largest in the province's history, in summer 2017.[2]
- [11] The two properties in question are located about one-half kilometre east of the Village of Cache Creek, on the north side of the Trans-Canada Highway. The creek runs roughly parallel to the highway, flowing from the east to the west. The land slopes down from the east to the west, and also from the north to the south. Appendix "A" to these reasons provides a map of the area, along with terms for specific features and locations.
- [12] Brookside owns a campground for recreational vehicles and tents. Since 2017, the defendants Dana Hendricks and Marissa Ferguson, husband and wife, have owned Brookside, and have operated the campground. From 2012 to 2017, the campground was owned by Mr Hendricks's mother Ms French, through a separate corporation.
- [13] The campground is roughly rectangular in shape, running about 600 metres parallel to the highway. There are approximately 90 recreational vehicle ("RV") sites, as well as a swimming pool, play area, and maintenance and other buildings. The RV sites are focused on the east half of the property, divided by four gravel lanes.
- [14] The campground access road runs north from the highway at the east boundary of the property. Before this litigation, it appears that everyone believed the access road to run entirely over Brookside property, demarcating its eastern boundary, along with a line of weeping willows along its east edge. A March 2018 survey by Underhill Surveyors, commissioned by the plaintiff for the purposes of this litigation, and provided to the Village during the April 2018 freshet, however, revealed that the north half of the road, to the north of the site of the culverts (now the clear span bridge) (as discussed below), is located on Village property owned by the Village of Cache Creek, on a long thin triangle abutting the northeast corner of the Brookside property (the "Village triangle"). The southern half of the access road, where it meets the highway, is on Brookside land.
- [15] The access road continues through the campground and slopes upwards and northwards onto a plateau. To the northwest, the plateau contains a new housing development; to the northeast, the plateau is rough and undeveloped, except for some gravel road tracks.
- [16] Before the April 2017 freshet flood, the access road itself served as a slightly raised berm. As set out below, after those floods, in December 2017, the road was replaced and heightened, and a metre-high roadside berm erected along the east side of the road, separating the road from what will be referred to below as the "ditch".

- [17] The main channel of Cache Creek flows generally east to west through the southern third of the Brookside property. At present, it flows from the east under a clear span bridge on the access road. Until the 2018 freshet floods, the creek passed through two culverts under the access road, in the same future location as the bridge, albeit occupying a smaller footprint. That state ended when the 2018 freshet floods eroded the access road and the foundation of the culverts, sending them floating down the creek.
- [18] The creek then flows approximately 50 metres west before meandering southwest. A tenting area for the campground at times occupied this concave area (the "tent bulge"). The creek then makes a sharp right turn (northwest) (the "MacKay turn"). It then meanders between the north edge of the MacKay property and the south edge of the Brookside property in such a way as to make a rough rounded "M" shape. The creek's path after the "M" is immaterial to this dispute, but it continues to flow west with a few more bends en route to the village and its union with the Bonaparte River.
- [19] In the southeast corner of the Brookside property, on the south bank, between the creek and the highway, Mr Hendricks and his wife live in a house on a hill overlooking the access road.
- [20] To the southwest, between the creek and the highway, also on the south bank, is the property of the plaintiff Mr MacKay. The MacKay property is cradled south of the "M" bend, at the sharp north turn. Mr MacKay does not own all of that portion of the south bank of the creek, however: the east quarter portion is owned by Brookside. This area is the site of the emergency berms erected by the defendant Village during the 2017, 2018 and 2020 floods.
- [21] Mr MacKay lives in a long trailer running east-west, with its east side close to both the creek and the Brookside property line. At the material times, his property also contained a log cabin (approximately 100 years old), as well as a well house and a workshop, which was later removed.
- [22] Mr MacKay gains access to his property via an east-west gravel road that enters the highway at the same point as the Brookside access road, and runs parallel to the highway.

C. The east property: the ditch and the hockey stick channels

- [23] The forested, somewhat swampy, area to the east of the campground is the main site of controversy in this litigation. That property is owned by the present mayor of the Village, who is not a party to this litigation. The eastern property slopes westward down towards the Brookside access road. The predominant Cache Creek channel runs east to west along the south edge of the east property, exiting the property at the site of the (former) culverts and the (present) clear span bridge.
- [24] The east property contains several lower-lying areas, or semi-channels of sorts, through which, from time to time, water will flow south or southwest, joining the main creek channel just before it hits the Brookside property at the culvert/clear span bridge site. The first -- the "ditch" -- runs immediately to the east of the Brookside access road, running

mostly beside the roadside berm. The second is just to the east and upslope of the ditch: a straight channel that runs about 50 metres northeast to southwest roughly parallel to the ditch, before joining the ditch just north of the bridge site, and then immediately discharging any contents into the main creek channel. At its forested northeast end, it runs east to west, creating the aerial appearance of a "candy cane" or "hockey stick", to which it was referred at trial. Dr Millar observed that the straightness of the hockey stick path indicates that it is artificial rather than natural.

- [25] It is unknown exactly when the hockey stick channel was excavated. Mr Hendricks denied ever working in that area. It is possible that the channel is seen on the 1980 aerial photograph, but not likely on earlier photographs: as discussed below, it was likely excavated around this time. An early iteration of the ditch was likely also created around this time, with the creation of the campground access road.
- [26] To complete the picture, drone footage taken during times of high flow reveal at least two other channels flowing westward downslope into the hockey stick channel, and thence into the main creek channel. These other streamlets play no particular role in this case, except as confirmation that water flows downward, through many means, in the area east of the campground property, at times of heavy flow.
- [27] Mr MacKay asserts that the ditch and hockey stick areas, as well as generally the land to the east of the berm, are semi-permanent channels through which water flows for most of the year, albeit in small quantities outside of the freshet. For his part, Mr Hendricks claims that the ditch and the hockey stick, and the area generally, should not be called channels at all. He says that they are only filled with water during times of freshet flood, when water inundates the entire area. The ditch and the hockey stick are not channels per se, but are simply lower-lying areas that fill up with water first during flood. Dr Millar believes that any water within them would usually be groundwater rather than channeled water.
- [28] The truth appears to lie somewhere between these two views. Photographs and video reveal water in both the ditch and the hockey stick areas, as well as smaller channels in the area, outside of the spring freshet period. For example, a photograph of the ditch in October 2017 showed it containing some, albeit minimal, water that may or may not have been flowing south. Videos of the area in flood show water vigorously flowing in both the ditch and the hockey stick. The more important determination with respect to these channels, however, is that they are not natural creek channels, historic or present: their straight shape indicates that they were deliberately excavated, likely around 1980. Further, importantly, they are located not on Brookside or Village property, but entirely on the property to the east.

D. The properties pre-1980

- [29] One of Mr Stirling's specialties and methodologies is the examination of historic aerial maps to discern possible or likely stream channels. He reviewed and annotated six aerial photographs of the area from 1948 to when the campground was developed in 1980. Based

partly on those images, he concludes that before 1980, both the now-MacKay and now-Brookside properties were both in the Cache Creek floodplain, and at risk of flooding and erosion hazards. That said, riparian and flood activity was more common on the future Brookside site, with Mr Stirling identifying multiple channels over that property. In contrast, the northern boundary of the present MacKay property likely represented the southern creek boundary consistently from 1924 to 1980.

- [30] With respect to the area east of the present campground, Mr Stirling concluded, based on the aerial photographs, that between 1948 and 1959, the predominant creek channel was to the north of its present location, hitting the Village triangle mid-way along the hypotenuse. In 1965, the north channel continues, but the present dominant south channel is now clearly visible. From 1969 until 1991, one may also discern a smaller middle channel between the north and south channels. In the 2000 and 2004 photographs, the north and middle channels are no longer seen (although this could be attributable to the more extensive foliage in those particular photographs, obscuring views of channels).
- [31] It was Dr Millar's opinion, based upon a review of the photographs and a site inspection, that there was no identifiable, well-defined north, middle, or south channels that had persisted over time. He stated that the floodplain area (including the future MacKay, Brookside, and east properties) is a dynamic fluvial environment in which bank erosion, sediment transport and deposition and channel migration are highly active during flood flows, presently and historically. Historically, the main channel alignment has shifted over time, occupying different locations on the floodplain. Further, presently, there exist no identifiable north or middle channel on or upstream (east) of the campground. Mr Stirling eventually agreed with these general propositions. The Court also agrees with Dr Millar's analysis. Specifically, no natural north channel presently exists, either on the east property or on the campground itself, and such a channel, if it ever existed for a prolonged and consistent period, is a historic footnote.
- [32] Further, Mr Stirling's aerial photographs, while useful, are not definitive. Between the limited resolution, the inconsistent shading, and the dark foliage (none of which are of course Mr Stirling's fault), it is very possible that a south channel (the present main Cache Creek channel) existed, possibly as the dominant channel, well before 1980.

E. 1980: the diversions and the campground

- [33] The future Brookside property began to be used as a campground in some capacity around 1974. The 1980 aerial photograph shows individual campsite pads, as well as a new maintenance building. The 1986 aerial photograph shows the four gravel lanes presently dividing the camp sites.
- [34] The campground access road was put in around 1980. Mr Stirling notes that the road itself, raised above the surrounding land, served as a precursor to the roadside berm, a central feature in this litigation.

- [35] In March 1980, the then-owner of the future Brookside campground property applied to the provincial Ministry of the Environment for permission to clean out the original creek channel. He explained that during spring runoff, the creek would form three small streams. The owner stated that his works would allow the creek to run freely.
- [36] On April 2, 1980 the Province approved various works to assist in reducing the flood hazard to the new campground area. The Province approved a relocation of approximately 500 feet of the creek channel, into its present dominant south channel, smoothing out sharp bends. While the plan attached to the proposal is not clear, it would appear that the result of the diversion was to eliminate the northern channel to the east, along with side channels that formerly flowed over what would become the campground property. The approval also included the installation of an 80 inch-diameter culvert under the campground access road, at the location presently occupied by the clear span bridge (the "1980 works").
- [37] It would also appear, based upon the various 1980s aerial photographs, that some form of the ditch and the hockey stick were possibly excavated, or at least in existence around this time. Again, these artificial channels or pathways directed water to the southwest towards the main creek channel rather than directly west towards the campground.
- [38] The 1980 works did not, of course, forestall all flood risks. A 1982 letter from the Province cautions against permanent development on the eventual campground property. The regional district manager noted that, "over bank flooding and channel relocation can be expected periodically." The letter also noted that occasional obstruction of drainage structures and the natural channel should be expected, and that failure of upstream drainage structures could jeopardize drainage structures and buildings downstream in the village.
- [39] In 1989, the then-owner of the campground expanded the commercial use of the property as a campground. He installed a footbridge, wading pool, and other improvements.

F. 1980-2012 campground floods

- [40] Mr Fuglesveit, the owner of the campground from 1994 to 2012, confirmed that around 2000, the campground access road culvert (then a single culvert) was unable to keep up with a heavy westward flow of the creek water, which rose over the road and into a small portion of the campground, before returning to the main creek channel.
- [41] He reported that between 2000 and 2008, the year when Mr MacKay arrived, the creek did not flood either property.

G. The arrival of the primary litigants

- [42] Mr MacKay purchased his property in June 2008, and took possession in July. A previous owner of the MacKay property had erected a wooden retaining wall to protect it from erosion or flooding or both. The remnants of that retaining wall, now partly collapsed, are visible in several of the photographs and videos. The remnants serve as a warning, if one was needed, that protection may be necessary against erosion or flooding by the creek.
- [43] In 2012, Ms French, through her company, purchased the campground. She lived on the property, along with her son, the defendant Mr Hendricks. In 2017, as stated, Mr Hendricks and his wife purchased the campground through Brookside.

H. The 2013 flood

- [44] The spring 2013 freshet again proved too great for the culvert under the access road, causing it to pool and then flow over the road into the campground.
- [45] Mr MacKay's property did not experience flooding during the 2013 flood, or at any time between 2008 and 2017.
- [46] In anticipation of the 2014 spring freshet, Brookside obtained approval to install a second, smaller, overflow culvert under the access road, and did so.
- [47] Mr MacKay complained to the provincial Ministry of Forests, Lands and Natural Resource Operations ("FLNRO"[3]) about the proposed installation of the second culvert. Specifically, he argued that the single culvert and raised access roadway served as a form of dam, protecting his downstream property. He argued that the additional culvert, coupled with the removal of the campground from the floodplain, would increase the creek flow capacity and thereby threaten his property.
- [48] The Ministry official, in response, commented that the additional culvert would not adversely affect Mr MacKay's property. In fact, it would lessen the risk of the creek overtopping the access road in times of extreme runoff. More importantly, the additional culvert would lessen the risk of a washout of the access road, "resulting in the rapid release of any water ponded upstream of the embankment. A rapid release of the stored water would probably result in considerable damage to both the campsite, your property and sites downstream through the Village." The official noted that the ideal configuration would in fact be a clear span bridge, which bridge would eventually be installed five years later.

I. The 2017 flood

- [49] The 2017 freshet hit from May 4th to 11th. The flow reached its peak on May 5th.

- [50] The flood caused considerable damage not only to the two properties in question, but throughout the Cache Creek area. It claimed the life of Cache Creek Fire Chief Clayton Cassidy, who is thought to have been swept downstream by the current while he was coordinating relief efforts in the early morning of May 5th. His truck, still running, was found deserted beside the creek, just downstream of the MacKay property. He was last seen alive on the Brookside property.
- [51] Water flowed downslope westwards to the campground property, not only in the main creek channel, but also across the forested marshy area to the east. Specifically, water flowed down the ditch and the hockey stick down to the main creek channel, as shown in Mr MacKay's May 5th footage. The combined water then flowed towards the culverts. The water soon filled the culverts to capacity. The water began pooling and rising immediately east of the Brookside access road. The water then spilled over the road. It started flowing through the campground. The floodwater dragged gravel from the surface of the road onto the campground. Mr Hendricks told campers to leave the campground; most did.
- [52] On May 4th and the morning of May 5th, Mr MacKay's property experienced no flooding. Looking across the main channel of the creek, however, he could see the overflow water generally coursing across the campground. The water flowed south and west. Most of the water re-entered the creek upstream from the MacKay property, but some entered opposite the MacKay property.
- [53] Video taken on the morning of May 5th shows floodwater cascading over the south edge of the campground near the tent bulge into the creek opposite the east side of the MacKay property. Despite the extensive campground flooding, the MacKay property remained more or less dry.
- [54] The Village exercised its emergency relief powers under the Emergency Program Act, RSBC 1996, c 111, s 8. Keir Gervais, the Village Chief Administrative Officer, provided riprap (that is, large rocks and small boulders) to line the right side of the access road north of the culverts. Mr Hendricks himself also placed four or five 500-pound concrete blocks. The combined effect of the riprap and concrete blocks provided some shielding for the campground from the flood. That said, Mr Hendricks claims that the majority of the water flowed through the cracks between these temporary shields. I agree: the video evidence confirms the futility of the exercise.
- [55] Video taken on May 5th dramatically shows water, tumbling brown, churning towards and at the culvert site. It flows from the direction of the ditch, hockey stick, and, predominantly, from the increasingly widening main creek channel. As the water increases, it is more and more artificial to distinguish water coming from the northern artificial channels: there is simply water everywhere east of the culvert and access road, in one big pool. At the east, upstream side of the road, the water level rises higher and higher in the mouths of the culverts. At the downstream side of the campground road, the culverts violently discharge the churning water. Water is seen flowing over the campground in the background. As the

pressure increases on the ever-filling culverts, the flow over the campground increases. It is clear that the roadway and insufficient culverts are acting as a cork, under increasing pressure from the increasing flood, and backing up the water flow.

- [56] On May 5th, Mr Gervais was about one kilometre downstream from the two properties, assisting in flood relief efforts. He suddenly saw an "incredible surge" of water thunder down the creek. The water surge included a "considerable amount of woody debris. It didn't make sense." Mr Gervais described this, with discretion, as a "Holy s-h-i-t moment." [4]
- [57] Alarmed, he immediately drove up the highway, upstream, to find the cause. He discovered it on the Brookside access road. He saw Mr Hendricks with his excavator, just north of the culverts. A channel had been opened just north of the culverts: the pooled water, along with the overflow from the main stream, was coursing through the opened channel. Mr Gervais described it as "an incredible amount of water."
- [58] Suddenly, the MacKay property started to suffer extensive flooding. Conversely, looking across the main creek channel, Mr MacKay noted that the water had stopped flowing over the campground. This moment clearly caused Mr MacKay great indignation.
- [59] Mr Gervais determined that it would be appropriate to provide emergency riprap to protect the MacKay property. He consulted an engineer, and then directed a contractor retained by the Village to erect an emergency berm. The berm was placed just upstream of the MacKay property, starting at the MacKay turn, and running south-to-north along the creek, along the east/right leg of the "M". The berm was in fact constructed on the Brookside portion of the south bank, albeit for Mr MacKay's benefit. The Village continued to extend and reinforce the temporary berm through the end of the flood period: around May 11th. The Village provided a total of eight loads of riprap to shore up and protect the MacKay property. [5]
- [60] A video filmed towards the end of the freshet, on May 10th, at the site of the culvert, shows water flowing in an orderly manner through the new excavated channel. Several large tree trunks and other detritus are trapped just below the campground road. The freshet complete, there was now almost no flow from the ditch or hockey stick channels or the low ground to the north; almost all of the water now came from the main creek channel.

J. The 2017 post-flood Brookside works

- [61] In autumn 2017, Mr Hendricks started work on replacing the culverted road with a clear span bridge, to allow the main creek channel to flow unimpeded, and to avoid the pooling and back-up of water seen in the 2017 floods. This project was not solely his impetus: it was strongly recommended by officials such as Sarah Simon, of FLNRO. On December 13, 2017, she warned Mr Hendricks that "water pooling behind a non-engineered structure [i.e. the access road and culverts] could result in a much worse flood event if it were to fail." On January 30, 2018, she stated that if the clear span bridge is not in place in time for the freshet, he should "remove a section of the berm to prevent water from pooling," in advance of the freshet rather than during. For the bridge project, Brookside retained engineer Emily

Cheung, whose views on the risks of pooling, and the desirability of the clear span bridge, matched those of Ms Simon. Unfortunately, for all of the parties, Brookside was unable to erect the clear span bridge before the 2018 freshet flood hit.

- [62] Mr Hendricks's predominant work in preparation for the 2018 freshet was the raising of the Brookside access road, and the erection of a berm, approximately a metre high, separating the access road from the area referred to as the ditch (the "roadside berm"). The roadside berm started just north of the culvert (now bridge) site and ran about 60 metres towards the north end of the campground.
- [63] Mr Hendricks gathered cobble and gravel from the west part of his property, and used these materials primarily to construct the berm. Many of the willows running alongside the road were buried at the base by the berm.
- [64] Mr Hendricks then used an excavator to clean out debris from the ditch area. He says that this debris primarily consisted of branches and wood from the willow trees, along with other foliage. He also removed some of the riprap, gravel, and other berm materials that had fallen into the ditch in the 2017 flood and after. He concedes that during this work he may have removed a few inches of soil from the base of the ditch, but that that was not his intent or focus. To paraphrase his words, if "he had intended to dig a ditch, he would have dug a ditch". He denies ever digging a ditch in the upstream marshy area east of the road.
- [65] I am satisfied from the testimony, coupled with the abundant photographs and videos, that Mr Hendricks's digging, if it removed soil or rocks that would naturally exist in that channel, did so minimally, and not to such an extent as to constitute changes to a stream as contemplated either in the case law or the Water Sustainability Act, SBC 2014, c 15 (the "WSA"). In any case, as set out above, the ditch was not a natural water course, but rather just that: an artificial ditch or an area of depressions that largely pre-existed the roadside berm.
- [66] Both Mr Gervais, for the Village, and Ms Simon, for FNLRO, visited the Brookside property around the time the roadside berm was constructed.
- [67] With respect to FNLRO, there is no evidence that it objected to the berm as an interference with a stream, or was otherwise an unpermitted work under the WSA or otherwise.
- [68] With respect to the Village, at the time, both Mr Hendricks and the Village understood the berm to be built entirely on Brookside property. Mr Gervais thus reasonably did not believe that he had any jurisdiction over the roadside berm. It was built right beside the Brookside access road, along the intuitive border demarcations provided by the ditch and line of willow trees. The March 2018 Underhill survey revealed, however, that most if not all of the roadside berm is constructed on the Village triangle rather than the Brookside side of the property line.

- [69] For his part, Mr MacKay repeatedly demanded to Brookside, FLNRO, and the Village that the roadside berm be removed. He commissioned the March 2018 Underhill survey. He provided that survey to the Village on April 26th, after the start of the 2018 flood, and after the start of this litigation in January 2018.
- [70] Mr MacKay made other complaints about Brookside. In November 2017, Mr Hendricks did creekside work on a now-removed foot bridge just west of the culverts. He obtained approval from the federal government but not the provincial government, under the mistaken belief that federal authorization for the works would be sufficient. Mr MacKay complained to the provincial FLNRO. As a result, Mr Hendricks received a warning, but not a violation ticket.
- [71] Mr MacKay points to this warning as an example of Mr Hendricks performing unauthorized work on the creek bed, regardless of its effect on downstream neighbours. I find that no such general inference can be drawn and, specifically, that nothing in the November creekside works for which the warning ticket was issued caused harm, or increased the risk of harm, to the MacKay property. Mr MacKay himself does not argue that the footbridge works for which the warning was issued had any bearing on the flood risk faced by either party. The warning has no bearing on this dispute.

K. Preparations for the 2018 freshet

- [72] The 2017 floods, combined with the Elephant Hill fire, combined with forecasts of a heavy snowpack and a hot summer, placed the Village and its inhabitants on alert in anticipation for the 2018 freshet. In January 2018, the Village mayor wrote to all homeowners, warning of likely flooding, and encouraging preparation. The Village obtained emergency funds from the Province, and in April held "sandbag bees", filling an arena with free emergency sandbags for citizens to take back to their properties.
- [73] Mr MacKay received some of these sandbags. He erected a wall of sandbags, supported by sloped gravel fill, against the edge of his property, tied into the existing 2017 MacKay Village berm.
- [74] For his part, Mr Hendricks spent the winter and early spring monitoring the high snowfall levels and weather, and preparing for a heavy spring freshet.

L. The 2018 flood

- [75] The 2018 freshet hit from April 25th to around May 10, 2018. The flood reached its peak on April 27th.
- [76] The 2017 flood was generally described as a 20-year event: that is, a flow magnitude that would typically occur every 20 years. In contrast, the April 2018 flood was a 50-year event. As predicted, the heavy snowpack, warm temperatures, and the Elephant Hills fire ravaging of the watershed vegetation and earth, created the proverbial perfect storm.

- [77] On April 25th, Mr Hendricks manned his excavator and moved some additional concrete blocks beside the roadside berm. He also shored up the roadside berm. In general, the roadside berm did its job. Some water seeped through at the base onto the access road, trickling down into the campsite lanes. But the water intrusion and damage to the campground was minimal compared to that in 2017.
- [78] Mr Hendricks also dug an anticipatory relief channel beside and parallel to the two culverts. He sought to relieve the pressure posed by the floodwaters by creating an overflow channel across the access road. In this, he followed Ms Simon's recommendation to proactively avoid pooling, and pressure, and risk of sudden collapse of the road and culverts.
- [79] Videos taken by Mr MacKay of the forested lands to the east of the campground show the main creek channel in full flow. As in 2017, the 2018 videos show, clearly, water flowing southwest towards the main channel through the ditch, the hockey stick, and other side channels. It also shows water coursing over the ground generally in this area. Again, those artificial watercourses enter the main channel just north of the bridge site. That said, the flow from the north side channels is significantly less than the flow from the main creek channel.
- [80] While the early relief channel provided the water with an additional outlet, due to the heavy flow, the collective water again rapidly rose, pooled, and churned in the area east of the culverts. By April 26th to 27th the increased pooling, coupled with the water flowing through the temporary channel across the road, all contributed to the erosion of the road area. Water flowed through Mr Hendricks's relief channel, which widened into a trench. Cracks appeared in the road, and widened. They in turn, were invaded by water, and began to crumble. This erosion, coupled with the continued pooling immediately north of the road, overwhelmed the culverts. Despite Mr Hendricks's efforts to hold onto the large culvert with his excavator grip, the culvert was pushed out the west side of the road into the main creek channel. It then floated down the creek, where it was stopped by a tree or other obstacle, near the tent bulge. The smaller culvert was later similarly pushed out, and floated downstream. Soon, the creek flowed freely through a wide trench where that portion of the access road once stood.
- [81] Video and screenshots taken at the MacKay property on April 26th at around 8 pm show the large dislodged culvert sitting in the creek. The MacKay property, however, was not yet flooded at that point. Video and screenshots taken at the MacKay property at around 5 pm on April 27th still show the MacKay property largely untouched by the waters, despite the initial relief channel, and the eventual collapse of the upstream Brookside access road and culverts. In short, there was no connection between the gradual erosion and collapse of the temporary channel through the road above the culverts, and any damage to the MacKay property.

- [82] During the freshet floods, the water levels would rise during the day, as rising temperatures melted source snow and increased the flow. Each day, the levels would reach their peaks around 8 pm or 9 pm. As the evening temperatures cooled, the levels would again subside. Dr Millar confirmed that this pattern, viewed by Mr Gervais among others, is typical.
- [83] The full force of the flood hit both properties the evening of April 27th. By 8 pm water coursed over most of the MacKay property, flowing up to and around his trailer.
- [84] On April 27th, the Village declared a state of emergency. On April 28th, the Village issued a specific evacuation order to Mr MacKay. By that time, his property was covered with a steady stream of water. Mr MacKay refused to leave. He signed an official form confirming that he declined to evacuate; that document darkly solicits the name of the refusant's doctor, and asks if his dentist has dental records.
- [85] Meanwhile, Mr Hendricks had now set to work with his excavator on the area of the tent bulge, over which water was flooding. A video taken at 10:31 am on April 28th shows him digging. He dug an artificial channel running northeast to southwest, essentially cutting off the main campground and creating a temporary island. The channel benefited both the campground and the MacKay property. It channeled the water and prevented general erosion to the campground. It also directed water away from the main portion of the MacKay property, directing the channeled water mostly past but partly touching the nose of the MacKay property.
- [86] Mr Gervais consulted with an engineer, who expressed concern that Mr MacKay's mobile home could be swept downstream with the flooding. They noted the loss of life in the 2017 flood.
- [87] For his part, Mr MacKay complained that the evacuation order on his property hindered his ability to bring equipment to protect his own property. He further demanded that the Village remove the roadside berm.
- [88] The Village requested additional riprap for emergency berms.
- [89] The Brookside riprap was placed just downstream of the Hendricks residence, in front of the utilities building. The primary focus of the 2018 Brookside riprap was to protect Village and Brookside sewer and water lines running under the campground.
- [90] The Village also added riprap to shore up the existing 2017 MacKay Village berm.
- [91] By May 3rd, the floodwater overtopped the MacKay Village berm. A May 3rd video shows the creek flowing broadly across the creek bed and the MacKay property. It laps against the side of the old cabin, usually several metres away from the creek. Downstream, the MacKay pump building is half slumped into the creek.

[92] Mr MacKay provided a compelling account of the violence of the floodwaters roaring around and shaking his trailer, where he persevered during the remaining days of the 2018 freshet flood.

M. The 2018-2019 works

[93] Following the 2018 freshet, Mr Hendricks again cleared out riprap and vegetal debris from the ditch.

[94] As indicated, Brookside had wanted to erect the clear span bridge in advance of the 2018 freshet. On April 12, 2018, he received provincial approval from FLNRO under the WSA, but the bridge could not be installed before the freshet. As it turned out, the bridge was not erected until summer 2018.

[95] In May 2018, the Village and Brookside reached an agreement allowing the bridge supports to be built partly on Village property, as well as providing access for bridge construction. The Village played no role in the approval of the bridge; it only served as a party to the agreement allowing nominal use of its property.

[96] Brookside also carried out work on its creek banks west of the culverts and beside the new bridge: along the bank generally opposite the MacKay property. Brookside, with permits, cut back its own bank by several metres, giving up some of its real estate, and thus widening the main creek channel. It shored up the new creek bed with riprap. This was based on engineering advice that the wider the creek bed, the lower and slower the creek would run, with less attendant damage.

N. 2018-2020: the removal and replacement of the emergency MacKay Village berm

[97] It is provincial policy to require emergency works, such as berms, to be removed after the emergency has passed: Emergency Management B.C. Policy 5.12 ("Construction of Temporary Berms and Dikes"). If the landowner or municipality wishes to keep those works in place, or erect new ones, they must apply afresh to do so under the stringent WSA permit process.

[98] In October 2019, the Village removed the 2017/2018 emergency MacKay Village berm, at the direction of FLNRO.

[99] During the 2020 freshet, the Village installed a new replacement berm. The Village paid the cost. In contrast to the hurriedly-erected 2017/2018 emergency berms, the new berm was designed by an engineering firm. It consists of a concrete barrier core, buttressed by rocks embedded in the ground, and protected creekside by large toe stones. It is located slightly downstream from the former 2017/2018 berm. At its south end, it hooks towards the creek, apparently offering better protection against the direct flow of the creek. The design also permits the creek flow to spread out and slow down, thereby lessening potential damage and erosion. The berm runs the entire length of the northeast side of the MacKay property, armouring the property from the direct flow of the creek.

O. The 2020 flood

- [100] In spring 2020, the freshet was again strong, but not on the scale of 2017 or 2018. Just east of the campground access road, the path of the creek widened. The water jeopardized the supports of the clear span bridge. The Village conducted emergency work on those supports.
- [101] Despite the new berm, Mr MacKay's property suffered some damage. Some water flowed onto his property. Video shows a shallow stream, approximately 1.5 metres wide, flowing across his property.
- [102] On April 20, 2020, the Village once again directed Mr MacKay to evacuate his property. Again he refused. Mr MacKay demanded that the Village deliver some riprap to fortify the berm. He complained that the Village was providing additional riprap to assist and fortify the Brookside roadside berm. Evidence was inconclusive on this point.
- [103] April 21 and 23, 2020 video taken during the spring 2020 freshet reveals that all or most of the water flowing towards the new clear span bridge came from the main creek channel. Little or no water came from the north, either via the ditch or the hockey stick. The roadside berm remained dry throughout the 2020 freshet.

P. Other alleged Brookside works

- [104] Mr MacKay claimed that Mr Hendricks had performed digging and other works to the creek in two locations to the northeast, upslope of the Brookside property.
- [105] He claimed, without precision, that he had seen Mr Hendricks's excavator working in the area of the hockey stick channel around 2013 and other times; he claimed to have taken photographs but no longer had them. When pressed on cross-examination, he conceded that he had not actually seen Mr Hendricks digging out the hockey stick channel, but surmised that work, as he had not noticed the channel before. That said, as set out above, there is evidence that some form of channel existed in the hockey stick area as early as 1980.
- [106] He also cited a distant photograph of vehicle tracks leading down a steep incline to the north turn of the creek, east of the hockey stick; he pointed to a pile of wood, cobble and rocks on the plateau above and to the north of the forested area, and argued that it had been removed, or transported, in relation to the creek, by Mr Hendricks.
- [107] For his part, Mr Hendricks, under oath and risk of perjury, emphatically denied that he or anyone on behalf of Brookside had ever done any work in the area east of the access road and bridge. He noted that the son of the east property neighbour operates a soil recycling business and uses the plateau to sift and recycle soil that he gathers. He noted that it would be nearly impossible for an excavator or any heavy piece of machinery to travel down the steep slope to the north bend of the river. Mr Hendricks proffered that those tracks may have been those of the neighbour's ATV. He also noted that the dense forest would make it

difficult for an excavator or heavy machinery to reach or work in that area, or, for that matter, in the area of the hockey stick channel. Finally, he noted that due to the active controversy with Mr MacKay, and the repeated visits by regulators to his property, and the proximity of the property to the highway, unauthorized work would be highly visible and inadvisable.

[108] On this sparse evidentiary record, Mr MacKay has not convinced the Court that Mr Hendricks did the work alleged in these areas northeast of the Brookside access road. The Court agrees that the topography and vegetation would make it difficult for Mr Hendricks's large excavator to access and work in the areas alleged.

Q. The litigation

[109] Mr MacKay filed his original notice of civil claim on January 26, 2018. At that point, he also named the Province as a defendant. The primary claim against the Province was that it permitted Brookside and the Village to perform their alleged actions, contrary to the WSA, exposing the MacKay property to damage. On July 21, 2020, he filed his third amended notice of civil claim.

[110] In January 2020, in anticipation of potential spring freshet floods, Mr MacKay applied for a mandatory quia timet injunction compelling the defendants to construct a permanent berm to protect his property.

[111] Donegan J declined that order: 2020 BCSC 375. She found that the balance of convenience did not favour the injunction, which would require the defendants to spend hundreds of thousands of dollars in construction and creek realignment, with little prospect of recovery if Mr MacKay's claim failed. The mandatory steps sought by Mr MacKay also had a significant public dimension: the widening and redirection of the creek. The order sought would also circumvent the complicated legislative approval apparatus set out under the WSA.

[112] Donegan J also noted that the claim against the Province, focused on a decisions or actions made 40 years ago, would likely be statute-barred under the ultimate limitation period: Limitation Act, SBC 2012, c 13, s 21.

[113] On July 16, 2020 Mr MacKay accordingly released the Province as a defendant in these proceedings.

III. positions of the parties

A. Mr MacKay

[114] Mr MacKay brings this claim against the defendants primarily in nuisance, and under the related doctrine of Rylands v Fletcher (1868), LR 3 HL 330, aff'g (1866), LR 1 Ex 265 (Ex Ct). Alternatively, he claims in negligence. He also argues that the defendants are liable for all damage and loss resulting from artificial changes to the natural landscape that have

diverted the flow of surface water from the campground and side channels to the main creek channel, and for all changes made by them "in and about the stream," citing the WSA, s 29(4).

- [115] As a basis for all of these claims, Mr MacKay advances an intuitive and sympathetic position, as follows. Historically, the campground was a floodplain. Any water in excess of that flowing in the main south channel would be diffused and absorbed by the campground area, with minimal effects on the MacKay property. While this changed in 1980, with the previous owner's province-approved redirection of the creek, and development of the campground, Brookside continues to benefit from this subjugation of the natural order. Brookside has compounded this subjugation of the natural order through the construction of the roadside berm, and the enhancement of the ditch, both of which prevent the northern channels of the creek from flowing in their natural historic course across the campground site. Under this natural order, the MacKay property, while also lying in the floodplain, was relatively unaffected by floods. This position of safety is exhibited, he says, by the dry MacKay property at the beginning of the May 2017 floods. In his mind, it is only when the rudimentary roadside berm is put in place, then in the form of concrete blocks and riprap, coupled with Mr Hendricks's gouging of a relief channel at the site of the culvert, that the MacKay property suffers flooding. The degree and destructiveness of flooding increases during the 2018 flood, with the erection of the permanent roadside berm.
- [116] In this, Brookside, by its ongoing actions and constructions, has "adopted, continued, expanded, and/or created a continuing nuisance which has caused and continues to cause damage to the plaintiff," to quote the third amended notice of civil claim
- [117] Turning his attention southwards, Mr MacKay also objects to the opening up of the main creek channel through the installation of the clear span bridge. He argues that while the campground access road above the culverts formerly served as a form of dam protecting his downstream property, the main creek bed now flows freely, exposing his property to the full brunt of a flood. In this, he advances a somewhat inconsistent position: he objects to Brookside not reverting the campground back to a floodplain state of nature, yet also objects to returning the main creek channel to more a natural state of free flow under the clear span bridge.
- [118] Mr MacKay's claim against the Village is narrower than that against the Brookside defendants. He argues that the Village is liable for acquiescing to Brookside's roadside berm, located on the Village triangle. His second focus is the emergency berms erected by the Village during the 2017, 2018, and 2020 floods, to protect the MacKay property.

B. The Brookside defendants

- [119] The Brookside defendants argue that they have neither committed a nuisance, nor adopted a previous nuisance. Nor did their actions constitute negligence. They argue that there is no evidence that the 1980 works, or the works undertaken by Mr Hendricks resulted in flooding to the MacKay property.
- [120] They cite authorities confirming that property owners are entitled to protect their properties from flooding, so long as such actions do not increase the direction, volume or velocity of the water.
- [121] They argue that they were entitled to protect their land and repel water from the campground. They argue that Mr MacKay, as well, was entitled to protect his own land from the 2017, 2018, and 2020 floods, all which were foreseeable; he declined to do so.
- [122] Further, they argue that they have acted reasonably in the circumstances, and breached no applicable standard of care to Mr MacKay. Any flooding was the natural result of the extraordinary 20-year and 50-year flood events, rather than any act or omission of the Brookside defendants.

C. The Village

- [123] The Village describes its position as being stuck in a dispute between neighbours. It argues that it has acted as a good faith honest broker. It has assisted both sides with emergency relief works to protect their respective properties.
- [124] The Village was unaware until the March 2018 Underhill survey, after the start of litigation, that the roadside berm was built on the Village triangle. At all material times the Village believed, reasonably and in good faith, what Brookside believed: that the roadside berm was entirely on Brookside property. The Village notes that if it ordered the berm removed, and if the campground flooded, it would likely face the damned-if-you-do position of being sued by Brookside.
- [125] The Village generally aligns with the legal arguments of Brookside with respect to the individual causes of action. Specifically, it says that the Brookside roadside berm, built on the Village triangle, had no effect on the flooding of the MacKay property, which flooding was the result of the extraordinary 2017 and 2018 freshet flows.

IV. Law: natural water damage to neighbours

- [126] The law of watercourses is ancient. The present dispute must be determined based on a jurisprudential interplay between the modern laws of negligence and nuisance, and earlier authorities.

[127] The starting point for the analysis is the "common enemy" doctrine confirmed by the Privy Council in *Gerrard v Crowe*, [1921] 1 AC 395, an appeal originating in New Zealand. The Lords confirmed that the defendant landowner could erect a barrier against anticipated flood water, repulsing it back into the river, rather than absorbing flood water; the effect was that water that would otherwise flood the defendant's land stayed in the river, with increased flooding on the plaintiff's land, on the opposite bank. At 397 Viscount Cave confirmed:

The general rule as to the rights of an owner of land on or near a river to protect himself from floods is well settled. In *Farquharson v. Farquharson* (1741) Morison 12779 [] the rule was stated as follows:

It was found lawful for one to build a fence upon his own ground by the side of a river to prevent damage to his ground by the overflow of the river, though thereby a damage should happen to his neighbour by throwing the whole overflow in time of flood upon his ground; but it was found not lawful to use any operation in the alveus.

[128] Applied to the facts before it, the Lords concluded at 400:

In the present case, the defendants neither accumulated water on their own land nor discharged it by active steps on to the plaintiff's land.

[129] Thus under the common enemy doctrine, a property owner is entitled to repel flood waters back into a creek or river, even if it harms the neighbour, so long as the property owner neither accumulates water nor discharges or directs the water onto the neighbour's land, nor interferes with the natural water channel: the alveus.

[130] As a decision of the Privy Council pre-dating the Statute of Westminster, 1931 c 4, *Gerrard* remains binding on this Court and remains good law, unless affected by subsequent statute or jurisprudence: *Bank of Montreal v Canada Mortgage and Housing Corp.*, (1990) 66 DLR (4th) 664 (BCCA). The doctrine has been endorsed and applied in more recent cases: *Meier v Franklin (Rural Municipality)*, [1927] 2 DLR 294 (MBCA); *Woolner v Dyck*, [1950] 4 DLR 745 (ONCA), *Lynds v Runge*, 2002 BCSC 1579 at para 14; as well as the leading British Columbia case of *Trans Mountain Pipeline Company Limited v Nicola Valley Sawmills Limited* (1975), 62 DLR (3d) 279 (BCSC). It has also been endorsed more recently in *Arscott & ors v The Coal Authority & anr*, [2004] EWCA 892 at para 4.

[131] In *Woolner*, the defendant was held liable for "rais[ing] the level of the surface water flowing naturally over to such an extent as to cast it on the adjacent land of the plaintiff which otherwise would not have received any of it.": at 748. Laidlaw JA contrasts the impermissible actions of the liable defendant before him with actions generally permissible to a landowner, at 748-749:

This is not a case in which the defendant has merely kept water from coming on to his lands by an obstruction forcing it back on to the lands of an upper proprietor from whence it came. Nor is it a case of a defendant taking means to protect himself from a danger common to him and the

plaintiff. There was no danger to the plaintiff from surface water until the defendant caused it by works done by him on his own land. It is a case of a landowner putting buildings, dikes and embankments on his lands and thereby causing surface water to collect there and then to flow on to his neighbour's lands in a manner in which it would not go but for such works. In such a case, the one who has collected the water and caused it to flow on to his neighbour's land is liable for damages resulting therefrom.

[emphasis added]

[132] Accordingly, an upslope owner is generally entitled to protect his or her property from water. The upslope owner is generally not liable for water naturally flowing from their property. To be liable, generally, the upslope owner must take positive steps that cause a change in the direction, volume, or velocity of the natural flow of water that interferes with another party's property: *Jorgensen v Kamloops (City)*, [6] 2020 BCSC 864; *Trans Mountain Pipeline* at 299-300; *Suncourt Homes Ltd. v Cloutier*, 2019 BCSC 2258 at para 90.

[133] A common scenario where courts find liability arises where the upslope defendant has pooled or trapped the water, thus redirecting or unleashing the water and harming the downslope or downstream neighbour: *Loring v Brightwood Golf & Country Club* (1974), 117 DLR (3d) 278 (NSSC (AD)); *Trans Mountain Pipeline*; *Messenger v Miller* (1918), 52 NSR 142 (SC (AD)); *Woolner*; and the classic case of *Rylands v Fletcher*, where water escaped from a reservoir. *Loring* cites approvingly *Clerk & Lindell on Torts*, 13th ed., at 1489:

A person who accumulates water is bound to keep it from doing damage at his peril. The manner in which the water is accumulated is immaterial, whether it is collected in a reservoir, a pipe, a canal, a drain, or a mound of earth the person collecting it is liable for its escape without any proof of negligence being necessary.

[134] *Trans Mountain Pipeline* is the main case relied upon by the plaintiff.[7] The complicated facts of that case differ considerably from those of the present. A précis follows. In 1953, the plaintiff installed a section of its pipeline along the top of a broad hillside gully. In 1969 and 1970, the defendant installed a "veritable network" of logging roads upslope of the plaintiff's pipeline. It then clear cut the timber in the upslope area. Spring rains hit, flowing down the denuded hillside. The trails channeled significant water down to a dirt bank, itself bulldozed into creation during the defendant's logging and road works, where it stopped and pooled, near the pipeline. The pool saturated the neighbouring soil. That soil supporting and surrounding the pipeline, gave way. The pipeline buckled and cracked. Oil escaped, causing considerable damage.

[135] *Verchere J* found the defendant liable in both negligence and nuisance. While the upslope defendant was not generally obliged to take proactive steps to ensure that the run-off did not injure the downslope plaintiff, the defendant was liable for creating a foreseeable risk to the plaintiff, in channeling the spring runoff water down towards the pipeline via its deforestation and roads:

The situation that prevails here, in my view, is that by positive steps the defendant 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 the plaintiff by the wash-out of its pipeline. In addition, in my view of the evidence, the defendant was negligent in that after having created the situation that caused the material changes to which I have just referred, it then failed to take the comparatively simple steps that would have avoided the unfortunate consequences of the situation it had created. Accordingly, it seems to me that the claim can properly be maintained nuisance. [at 300]

[136] I turn to the most germane case where the Court found no liability. In the facts leading to Jorgensen, a storm and resulting flood sent water, mud, rocks, and other debris down a natural gully, damaging the property of the downslope plaintiffs. Those plaintiffs sued their upslope neighbours. Four years before the flood, the pipeline defendants had installed a rock French drain[8] across their right of way at the point where it intersects the gully. The plaintiffs alleged that the erection of the French drain caused or exacerbated the flood and its damages. As here, they framed their claim in negligence, nuisance, and the rule in *Rylands v Fletcher*.

[137] Norell J reviewed the expert reports presented by each party, and concluded that the French drain made no difference: the floods caused by the severe storm would have flowed down the gully and damaged the plaintiff's property regardless. While the French drain altered the flow of the floodwaters, it did not change the ultimate direction or velocity or consequences of the flood waters:

[100] After the installation of the French drain, water exited at the lower side of the right of way in the same volume as it did prior to the installation of the French drain. While water may have travelled in a different channel within the right of way (through the French drain, as opposed to a surficial flow), soon after the water exited the right of way and started its approximately 250-metre descent to the plaintiffs' properties, the water was of the same volume, pressure and velocity as it was prior to the installation of the French drain. While I agree with the plaintiffs that the course of water within the right of way was altered, I do not agree that the French drain affected the flow of water down the single channel; as Mr. Coles stated, "water does not have that kind of memory". Once the water exited the French drain, the water flowed as it always naturally did. The French drain did not retain water.

V. Discussion and decision

A. Introduction

[138] Given the different strains of legal authorities, and the complexity and span of facts in this case, and the application of certain key findings to each of the causes of action, these reasons will start at a high elevation, first considering the plaintiff's arguments at a general level. These reasons will then consider the overall liability of the Village. These reasons will then turn and consider the individual causes of action in which the plaintiff frames his claim.

B. The "new normal" state of the campground

[139] The third amended notice of civil claim, para 3:3, pleads that "[t]he Defendants are jointly and severally liable for loss and damage caused by altering the natural flow of water on and to the campground and causing its convergence in the main stem of the Stream upstream of the Plaintiff's land."

[140] Much of Mr MacKay's argument focuses on Brookside returning the campground to its floodplain state of nature. He was unable to provide to the Court any authority for the proposition that Brookside is obliged to reverse historic anti-flood works and revert to a floodplain, apart from asserting that it adopted a nuisance in the form of the 1980 works that directed the side channels to what is now the main creek channel.

[141] Nor were the other parties, when pressed, able to find authority on this point. This is understandable. Almost all Canadian settlements are located near water bodies; many residential, commercial, agricultural, and industrial sites are built on or beside floodplains. As a general proposition, the plaintiff's position would require reversal of countless historic flood-alleviation works, to force landowners formerly subject to flooding to re-absorb water flow for the benefit of neighbouring and downstream properties; it would potentially impose significant liability on later landowners for historic works, if the neighbouring and downstream properties suffer flood damage. No subsequent owner or potential purchaser could be confident that any given past construction, from an excavated channel to a stone retaining wall, could continue to offer flood protection, and not attract a damages award.

[142] I agree with the defendants that the 1980 provincial approval to redirect the creek side-channels and close off the northern and western channels flowing towards the campground created, to use the useful phrase employed by Mr Poole for the Village, a "new normal" on which the 1980 and subsequent campground owners could rely, and which subsequent neighbouring owners could and should consider when deciding to purchase and in deciding what uses to make of their lands, and in deciding whether to protect those lands themselves.[9] While the campground may have remained vulnerable to flooding during unusually high flows, the property ceased to host a permanent or shifting channel or channels by 1980. This principle is especially true where, as here, the changes occurred years before either neighbour arrived, and where the particulars of the underlying changes are obscured in the mists of time.

- [143] The closest factual antecedent to this new normal principle, albeit in support of a plaintiff rather than a defendant, is found in *Loring*, where the defendant's removal of a stone wall redirected the water flow. The Court recognized that while the stone barrier was not part of the natural topography, it had become part of the landscape, which the defendant's neighbours could reasonably expect to continue: at 168. The removal of the shifting stream channels over the future campground property, its termination as a general floodplain, and the erection of anti-flood and redirection works around 1980, had changed the landscape well before the arrival of the neighbouring litigants.
- [144] Similarly, in *Lynds*, the arrival of beavers both before and after the litigants' purchase of their properties created the new landscape: the beaver dams on the defendant's property regularly caused flooding on the plaintiff's property. McKinnon J noted, as here, the significant consequences, particularly in Canada, of the plaintiff's proposition becoming precedent:
- [49] To accede to the plaintiffs' claims would, with all due respect, create great havoc in a country like Canada where beaver abound. A developer, eyeing some swampy land bordering either private or Crown land, could enforce an expensive and burdensome duty upon such an owner with no benefit whatever to that owner.
- [145] Accordingly, the Court declined the remedy sought: enjoining the defendants to remove the dams and prevent the flooding:
- [52] the plaintiffs chose to rely upon some notion of "duty" resting upon an uncooperative neighbour. In my respectful view, there is no present obligation upon a landowner in Canada to alter a watercourse from its present and longstanding state in order that an adjacent landowner may make use of lands that are subject to historical seasonal flooding.
- [10]
- [146] It may be that the provincial authorizations issued in 1980 would not be issued today, due to environmental concerns, as well as the risks posed to occupants of a former floodplain. It may also be that had Mr MacKay lived on his property in 1980, and had catastrophic floods occurred in 1981, he would have a direct cause of action against the original campground developer notwithstanding the provincial authorizations. But Mr MacKay did not arrive until 27 years after the 1980 authorizations and alterations, and the Brookside parties did not arrive until 37 years after those changes, with multiple property owners in between each. As a general principle, Brookside does not bear liability for the continued treatment of the campground as a campground, as opposed to reverting it to its long-vanished natural floodplain state. Its historic status as a floodplain is of no legal moment today.
- [147] This similarly addresses the plaintiff's argument that the defendants have adopted a nuisance. In such cases, the nuisance generally flows from a specific introduced foreign interference, that itself is the cause of the damage, placed on the property of the tortious occupier. For example, in *Sedleigh-Denfield v O'Callaghan*, [1940] AC 880 (HL), a trespasser had placed a culvert on the defendant's property, which the defendant continued to use and

enjoy, in draining his own fields. The culvert grate became blocked with leaves, which the defendant failed to clear. During a heavy rainstorm, the water overflowed directly onto the plaintiff's property. Instead of using the culvert, the defendant could and should have removed it, or at least maintained and cleaned it to avoid harming his neighbour. Such a scenario differs considerably from the historic realignment of the topography, both on and off the campground property, about which Mr MacKay complains.

C. Limitation Act

[148] As set out above, in her 2020 decision declining to issue an injunction, Donegan J noted that that the claim against the Province would likely be statute-barred under the ultimate limitation period set by the Limitation Act.

[149] The Limitation Act also informs the principle that the defendants are not obliged to reverse time and permit the creek to reclaim the property as a floodplain. The 1980 works were a matter of public record from that date. The primary acts converting the campground from a floodplain occurred 38 years before this litigation. Under the 2012 Limitation Act, s 21, the 15-year ultimate limitation clock begins to run the day "after the day on which the act or omission on which the claim is based took place." The core of the plaintiff's complaints are thus likely statute-barred. The more recent alleged acts, such as the works relating to the roadside berm, and the emergency MacKay Village berm, of course, occurred just before or even after the filing of the claim, and would not be statute-barred.

D. The location of the 1980 works

[150] The third significant difficulty with the plaintiff's case is that the bulk of the 1980 works benefiting the campground property by re-channeling the creek to its present main channel in the south, are not in fact located on the Brookside property, but, rather, on the property to the east. These channels include the hockey stick channel and, to a lesser extent, the ditch. It appears likely that the 1980 works included several other re-channeling efforts upstream and upslope. Mr MacKay may be reasonably aggrieved that Brookside benefits from these historic changes. But Brookside is not obliged to reverse those changes, just as it is not obliged to revert the campground to its state of nature. Indeed, insofar as the rechanneling works are located on another person's property, Brookside would be unable to reverse those changes, even if it wished to.

E. Have the defendants tortiously directed the water?

[151] The common enemy doctrine and authorities surveyed above confirm that the Brookside, like Mr MacKay, are entitled to protect its property from the flooding creek. That entitlement is subject to jurisprudential prohibitions canvassed in the legal section, above.

- [152] The defendant owner may not repel or channel the water directly onto a neighbouring property. Gerrard disallows "throwing the whole overflow in time of flood upon his ground": at 400. Messenger at 149-150, cited in Loring at 174, confirms that "a person cannot by artificial means gather water on his property and throw it upon his neighbour's land" [emphasis added]. In Loring, the blockage of the defendant's drain caused surface water to flow directly onto the plaintiffs' property and into their basement.
- [153] Brookside has not repelled or channeled its water directly onto the MacKay property. Instead, the water has flowed back into the naturally-flowing main creek channel.
- [154] Nor have the Brookside defendants pooled the water before redirecting it or releasing it, as in Loring, Rylands v Fletcher, Trans Mountain Pipeline, Messenger, and Woolner.
- [155] Nor have the Brookside defendants interfered with an alveus, or established watercourse, for several reasons. First, a floodplain does not generally constitute a watercourse or an alveus, at common law or under the WSA: Smoluk and British Columbia (Assistant Water Manager), 2020 CarswellBC 1290 (BC Enviro App Bd) at paras 45-46, 51-52; Arscott at para 32. Nor do low-lying depressions that occasionally contain or carry water: Hiebert v Jochum, 2002 MBQB 170 at paras 23-24, leave to appeal ref'd 2003 MBCA 15. Second, I accept the evidence of Dr Millar that the floodplain channels to the east of the Brookside property were ever-shifting. Third, if there ever was a semi-permanent north channel, it has not existed since 1980. Fourth, insofar as the hockey stick channel may be a current manifestation of the north channel, it is an artificial channel rather than a natural watercourse. Finally, in his closing submissions, Mr MacKay appeared to accept that the water to the east of the berm is "surface water", and the "former course of a flood stream" rather than an existing natural watercourse.
- [156] Nor have the Brookside defendants by their works directed the flood waters to increase in volume or velocity and risk of flooding. The same amount of water would have descended upon the floodplain, generally, in times of heavy freshet. This stands in contrast to another case relied upon by the plaintiff, Kerlenmar Holdings Ltd v Matsqui (District of), (1991), 81 DLR (4th) 334 (BCCA), where the municipal defendant's urbanisation works, including a concentrated drainage system, directed surface water downslope specifically towards the plaintiff, increasing the frequency and risk of flooding. It also contrasts with Loring, where the removal of a long-established stone wall directed the water to the pooling site and thence to the plaintiffs, who would not have otherwise been flooded. It particularly stands in contrast to the dramatic channelling and pooling in Trans Mountain Pipeline.
- [157] The plaintiff vigorously argues that the Brookside roadside berm repels floodwaters, directs them southward towards the main creek channel, and thereby increases the creek's volume and velocity, and risk of flooding. As persuasive as that argument seems at first blush, it is not borne out by the evidence, for several reasons.

- [158] First, the roadside berm is not a diversion berm, directing either a watercourse or surface water: that role is primarily played by the ditch and hockey stick, located off the Brookside property, to the east of the berm. Mr MacKay's drone footage, taken from above those water channels during heavy flow, show them largely directing water back towards the main creek channel, with minimal water near the roadside berm.
- [159] Second, the evidence indicates that flooding is not a zero-sum game, such that protecting the campground must correspondingly flood the MacKay property.
- [160] In this regard, the most compelling piece of evidence is found in the report of Mr Stirling, provided by the plaintiff himself. That report appends a series of computer-generated graphics of the area in question, showing water inundation levels based on flooding events of differing volumes, with and without the roadside berm.
- [161] One set models the comparative effect of a 50-year-flood event, with and without the berm. Strikingly, under this model, the MacKay property receives almost identical flooding, in both depth and surface area, regardless of the existence of the berm. The 200-year-flood event model indicates the same. Those models do indicate that the berm largely protects the campground from flooding. But they also indicate that the roadside berm has no effect on the whether or not the MacKay property is flooded.
- [162] Again, this is consistent with Mr MacKay's own videos. While those videos show water travelling alongside the berm, in the ditch, it is a lesser volume, and a lesser velocity and pressure, compared to the water flowing down the hockey stick channel. It is a proverbial drop in the bucket, at a sclerotic rate, compared to the unrelentingly rising water coursing down the main creek channel.
- [163] The main determinant of whether the campground suffers flooding is not the existence of the roadside berm. The main factor is whether the main creek channel is partially dammed by the campground road and the two culverts, allowing inadequate passage for floodwater, creating pooling, backing up, and pressure. Presently, thanks to the clear span bridge advocated by the Province, the campground no longer floods: the main creek channel flows smoothly westwards, in an approximation of its natural path and flow. Thus in 2018, despite the greater 50-year flood flow, the campground did not flood: not because of the newly-erected roadside berm but rather because of the relief channel excavated across the road by Mr Hendricks at an early stage of the freshet. This stands in contrast to 2017, where the inadequate capacity of the two culverts, and the pooling and backing up of the water, was the primary culprit for the campground flooding.[11]
- [164] These observations also apply to flooding on the MacKay property. The MacKay property flooded in both 2017 (with only the minimalist and porous emergency berm), and 2018 (after erection of the Brookside roadside berm). It is true that in 2017 the MacKay property started to flood after the sudden release of the pooled water to the east of the culverts; again, the road was acting as a form of dam against the rising floodwaters to the east, delaying the inevitable arrival of those waters downstream at the MacKay property. In 2018,

however, Mr Hendricks excavated his early relief channel. Notwithstanding that channel, and notwithstanding the considerably more heavy 2018 flow and the widened relief channel occasioned by the erosion of the access road and the loss of the culverts, the MacKay property did not immediately flood. Again, video shows the dislodged culvert in the creek beside the MacKay property, with no signs of flooding. The MacKay property only flooded the evening of April 27th -- a day later -- when the freshet flows in the creek reached their first peak. In other words, the flooding was caused by the natural increase in flow occasioned by that 50-year flood event, rather than any actions of the defendants. Were a clear span bridge or an early relief channel been in place in 2017, the MacKay property would have exhibited the same slow flooding process as seen in 2018, rather than the sudden 2017 flooding on his property corresponding to the cessation of flooding on the Brookside property, that so clearly vexed Mr MacKay.

[165] A final compelling piece of evidence is the state of the berm during the 2020 freshet. By that point, the culverted road was replaced with the clear span bridge, eliminating the pooling. The roadside berm remained dry.

[166] In summary, the main source for the plaintiff's complaints has been the natural occurrence of the extraordinary flooding events in 2017, 2018, and to a lesser extent, 2020. Regardless of the actions of the defendants, and regardless of the actions of the antecedent owners of the campground, the unprotected MacKay property would have flooded in any case, lying as it does, as recognized by both experts, and all parties, on a floodplain.

F. Liability of the Village

[167] While his third amended notice of civil claim blankets the same allegations against the Village as it does against the Brookside defendants, Mr MacKay's claims against the Village focus on three areas. First, in replacing the emergency 2017/2018 MacKay Village berm with the engineered 2020 MacKay Village berm. Second, in permitting the roadside berm on the Village triangle, and providing emergency materials during the flood that were later used by Mr Hendricks for the berm. Third, in agreeing to the erection of the clear span bridge partially on its property.

[168] The Village argues that the Emergency Program Act, s 18 provides a complete answer to all the claims against it, except with respect to the Brookside roadside berm:

Exemption from civil liability

18 No person, including, without limitation, the minister, the other members of the Executive Council, the director, a local authority, the head of a local authority, a member of a local authority, a volunteer and any other person appointed, authorized or required to carry out measures relating to emergencies or disasters, is liable for any loss, cost, expense, damage or injury to person or property that results from

- (a) the person in good faith doing or omitting to do any act that the person is appointed, authorized or required to do under this Act, unless, in doing or omitting to do the act, the person was grossly negligent, or
- (b) any acts done or omitted to be done by one or more of the persons who were, under this Act, appointed, authorized or required by the person to do the acts, unless in appointing, authorizing or requiring those persons to do the acts, the person was not acting in good faith.

[emphasis added]

[169] I agree. The actions of the Village, particularly Mr Gervais, were reasonable, responsible, appropriate, and in good faith. The actions of the Village and its representatives were, indeed, heroic and generous in the face of the dangerous floods.

[170] As a measure of the reasonableness of the Village's actions, the erection and augmentation of the MacKay emergency berms in 2017, 2018 and 2020 were based on engineering advice, with the 2020 berm specifically built to engineering plans.

[171] The Village was not obliged to provide Mr MacKay with any protective berm at all, let alone the engineered 2020 emergency Village berm about which Mr MacKay now complains. Mr Gervais's testimony on the British Columbia Emergency Response Management System shows that the Village acted reasonably, and indeed, went above and beyond its duty to assist a private land owner during an emergency. That system sets out a hierarchy of priorities during an emergency. Protection of the lives of first responders, as persons who can help others, is paramount. The safety of the public and critical infrastructure follow in priority. Private property is a low priority during the height of an emergency, particularly where an evacuation order has been issued, and individual safety is not at risk. I accept that the Village's erection of the 2017/2018 berm and the 2020 berm with respect to Mr MacKay's private property were reasonable during these times of crisis, particularly in light of the severity of the flooding, and in light of the 2017 loss of life.

[172] Mr MacKay also faults the Village for waiting until the emergencies of the 2017 and 2018 floods before putting in and then augmenting the MacKay Village berms. I accept the Village's evidence that the Province will only fund and authorize such works during an emergency. Village construction of such berms outside of an emergency would have to be funded by the taxpayers of Cache Creek. Further, the Village only has jurisdiction to erect berms, and to work in and around a stream, in times of emergency; outside that period, the Province would require an extensive permit process, including engineering reports, and consideration of the proposed works on other stakeholders and fish habitats.

[173] The Village was also entitled to remove the 2017/2018 emergency berms, and under FLNRO policies was in fact instructed and required to remove them, as set out above.

- [174] Even if the Court accepts Mr MacKay's criticisms of the 2020 MacKay Village Berm, the fact remains that it offers more protection than the Village is obliged to provide, particularly outside of an emergency. Under cross-examination, Mr MacKay acknowledged that temporary berms erected during an active emergency are not intended or expected to be perfect. If Mr MacKay does not consider the present berm sufficient, he is free to follow the lead of his neighbour Brookside, and erect his own anti-flood barrier to protect his own property, situated as it is on a floodplain. As noted by Donegan J in her injunction reasons:
- [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.
- [175] I turn to the Brookside roadside berm built on the Village triangle. The Village itself made no changes to the Village triangle property; the berm was entirely built by Mr Hendricks. Given the reasonable supposition that the roadway was on Brookside property, Mr Hendricks did not seek approval, and the Village did not give approval, for the roadside berm.
- [176] Further, where the nuisance is created without the defendant's knowledge and consent, that defendant is *prima facie* not responsible unless they knew or ought to have known of the nuisance in time to correct it and obviate its effects: *Susan Heyes Inc. v Vancouver (City)*, 2009 BCSC 651 at paras 172-173, *rev'd on other grounds* 2011 BCCA 77, leave to appeal *ref'd* (2011) 428 NR 397n.[12]
- [177] The Village only learned after the start of this litigation that it owned a portion of the campground access road on which the roadside berm was built. There is nothing in the documentation concerning the 1980 works to indicate that the Village owned the Village triangle. It is a small slice of property, isolated between the campground property and the east property, with no apparent utility to the Village. The Village reasonably assumed that it had no jurisdiction over the area outside an emergency: the continued existence of the roadside was a matter between the property owner and the Province, which did not seem to object.

- [178] In fact, Mr MacKay first asserted Village ownership during the 2018 flood, while the Village was busily engaged in significant relief efforts. It was not reasonable to expect the Village to take any steps at that point to investigate the matter further, let alone remove the roadside berm. And, as expanded below, ultimately, the roadside berm has no causative effect on flooding: the Village was accordingly not obliged to remove the roadside berm after discovery of its true location.
- [179] Finally, the primary source of harm and the site of the risk that eventually manifested in harm in 2017 and 2018 was not the area of the roadside berm, but the area of the creek immediately to the east of the two culverts. This portion of the campground access road is entirely on Brookside property.
- [180] I turn to the third area of contention against the Village: the clear span bridge. The Village played no role except permitting a support of the bridge to touch Village property. It played no role in the design or approval of the bridge, which was between Brookside and the Province. Finally, as set out below, the clear span bridge played no causative role, either in nuisance or negligence, with respect to the 2020 flooding.

G. Nuisance / Rylands v Fletcher

1. Law

- [181] 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. In assessing whether the interference is unreasonable, the court may consider all relevant factors, including "its severity, the nature of the neighbourhood, its duration, the sensitivity of the plaintiff": para 40. Where a defendant "public authority has made all reasonable efforts to reduce the impact of its works on neighbouring properties", a court is more inclined to view the inconvenience as a cost of the societal "give and take" expected of everyone": paras 39-40.
- [182] The plaintiff bears the onus of proof that the defendants' actions caused unreasonable interference, leading to the damages: *Jorgenson* at para 86; *Nelson v British Columbia (Environment)*, 2020 BCSC 479 at para 267; *Murray v Langley (Township)*, 2010 BCSC 102 at para 36.
- [183] In *Mineault v Kamloops (City)*, 2017 BCSC 316 at paras 32-62, which concerned water escaping from a lawn irrigation system, Donegan J reviewed the principles of the rule in *Rylands v Fletcher*. At para 38, she set out the four elements:

While the rule has various formulations, the Ontario Court of Appeal in *Smith* at para. 71 and the British Columbia Supreme Court in *John Campbell Law Corp. v. Strata Plan 1350*, 2001 BCSC 1342 at para. 22 framed it as requiring the plaintiff to prove the following elements:

1. The defendant made a "non-natural" or "special" use of his land;

2. The defendant brought onto his land something that was likely to do mischief if it escaped;
3. The substance in question in fact escaped; and
4. Damage was caused to the plaintiff's property as a result of the escape.

2. Discussion and decision

[184] I have set out above the broad framework for why the claims in both nuisance and the rule in *Rylands v Fletcher* must fail.

[185] The Brookside defendants, and by extension, the Village, did not create or adopt a nuisance. None of their actions or constructions constituted an unreasonable interference with the plaintiff's use or enjoyment of his land. The Brookside defendants are not required to absorb flood waters onto their property, at the roadside berm site or generally. Nor are they required to allow the creek to "migrate" (to use Mr Stirling's word) northward, to inundate and erode their bank opposite the MacKay property.[13] With respect to the ditch and hockey stick, those channels are located on the property to the east of the Brookside property. Further, they pre-existed the arrival of both the Brookside defendants and Mr MacKay himself. They were approved by the Province, and be can be considered as part of the existing landscape.

[186] As a general matter, the plaintiff has failed to establish causation. As set out above, while the roadside berm may protect the Brookside property from floods, the berm is not a variable that causes additional flooding on the MacKay property, as Mr Stirling's modelling and the flood videos show. Mr MacKay's property would have been flooded in any case due to the extraordinary 2017, 2018, and 2020 freshet floods. Unfortunately, due to climate change, such extraordinary freshets and resultant floods may become less extraordinary and more ordinary.[14] That said, the resulting flooding cannot be ascribed to the roadside berm.

[187] This point leads into why the *Rylands v Fletcher* claim must also fail. Neither the roadside berm nor the clear span bridge artificially accumulate water in a manner likely to do mischief or cause damage if it escapes; the clear span bridge markedly does the opposite. It is not the roadside berm but the main creek channel and, to a lesser extent, the hockey stick, and, to an even lesser extent, the ditch, that transport the water. Even then, the water is not directed onto the MacKay property but into the creek channel. As indicated below, had the flood water catastrophically and suddenly been released from the pooling east of the culverts, and had that percussive flood directly damage the MacKay property, *Rylands v Fletcher* may have applied; this never, however, occurred.

H. Negligence

[188] In the recent *Waterway Houseboats Ltd. v British Columbia*, 2020 BCCA 378, the Court of Appeal summarises the principles applied to a negligence claim:

- [198] The well known test for negligence requires the plaintiff to demonstrate that (i) the defendant owed them a duty of care; (ii) the defendant's behaviour breached the standard of care; (iii) the plaintiff sustained damage; and (iv) the damage was caused, in fact and in law, by the defendant's breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.
- [189] As it will dispose of this claim, I will start with the fourth part of the negligence test. Jorgensen discusses the principle of causation:
- [79] In *Clements v. Clements*, 2012 SCC 32 at paras. 8-11 [Clements], the Supreme Court of Canada reaffirmed that the test for causation is the "but for" test. The plaintiffs must prove that but for the alleged tortious event, they would not have suffered the damages alleged. This test ensures there is a substantial connection between the alleged tortious event and the damages suffered. The Court in *Clements* also discussed a rare exception to the "but for" test, being recovery on the basis of a "material contribution to risk of injury": at para. 13. That exception is limited to situations "where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it": at paras. 13, 46. That situation is not applicable here, as there are not multiple alleged tortfeasors, and there is evidence on which to be able to determine whether the French drain caused the damages. The usual "but for" test applies to this case.
- [80] More recently, in *Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581 [Waterway], a flooding case, Mr. Justice G.P. Weatherill at para. 383 put the causation question as this: "even if [the defendants] did what the plaintiffs say they should have done, would it have made any difference?" He also summarized the principles of causation at paras. 382-385, drawing upon the reasons in *British Columbia v. Canadian Forest Products Ltd.*, 2018 BCCA 124 and a number of Supreme Court of Canada cases. Of particular note, the cases highlight that "but for" causation does not require scientific certainty. Inferences of causation can be drawn on the basis of common sense. As well, the trier of fact can take into account the relative positions of the parties to adduce evidence on causation. However, the burden remains on the plaintiff to prove causation throughout.[15]
- [190] Here, the analysis parallels that for nuisance: the claim fails, as the defendants did not cause the flood damage. Neither the Brookside defendants, nor, by extension, the Village, created or materially changed the ditch or the hockey stick channel. And, again, the Stirling modelling and the 2017/2018 videos show that the Brookside roadside berm did not cause or materially contribute to any flooding on the MacKay property, which is attributable to the extraordinary 2017 and 2018 freshets: that evidence rebuts the proposition that but for the berm, the plaintiff would not have suffered the damages alleged.

- [191] Similarly, the evidence does not support a conclusion that the lesser 2020 flood damages would not have occurred but for the erection of the clear span bridge. Further, there is no evidence that those works were carried out in breach of any standard of care. Those works were carried out pursuant to provincial authorizations. Again, as concluded above, the effect of both of these works was to minimize the risk of pooling, with the attendant risk of a sudden flood surge release that might cause catastrophic damage downstream.
- [192] Nor does the evidence support a conclusion that there is anything negligent or deficient about the Village's construction or design of the emergency MacKay Village berm that contributed to any damage suffered by the plaintiff. In contrast to the emergency berm hastily erected and augmented during the 2017 and 2018 freshet floods, respectively, the current 2020 MacKay Village berm, is designed and engineered. It protects a wider stretch of the MacKay bank, and is designed to distribute the force of the river over a wider area. While some water did permeate that berm in 2020, an emergency berm is not realistically expected to offer perfect protection.
- [193] Ultimately, my decision on negligence resembles that of Norell J in Jorgensen:
- [116] Based on my findings of fact on causation, the plaintiffs have not proven on a balance of probabilities that the French drain caused or exacerbated damage to their properties. Any damages they unfortunately suffered were a result of the naturally occurring flow of the Flood from a rare storm event and the location of their properties at the foot of the gully, which is a flood corridor. As a result, it is not necessary for me to consider in detail the other elements of the causes of action that they advance. Even if the plaintiffs could establish the other elements of the three causes of action, their failure to establish causation is fatal to their actions.
- [194] Given my conclusion on causation, it is unnecessary to consider the other aspects of the negligence analysis.[16]

I. Water Sustainability Act

- [195] The plaintiff cited in his pleadings but did not argue to any extent that the actions of the defendants breached the statutory obligation under the WSA, s 29(4): "[a] person [authorised to make changes in and about a stream or diverts or uses, including stores, water] is liable to owners of land or premises for damage or loss resulting from the construction, maintenance, use, operation or failure of the person's works." Instead, he referred to it as a statutory confirmation of nuisance.
- [196] Waterway Houseboats reviews that statutory scheme generally, and that provision (or, more precisely, its precursor, Water Act, RSBC 1996, c 483, s 21) and these reasons will not attempt to recite its exhaustive and learned summary.

- [197] In addition to the reasons set out above, the impugned actions of the defendants do not violate s 29(4), on its statutory wording. The construction of the roadside berm was not a "[change] in or about a stream", as defined by s 1. It is not proximate to a "stream", defined as a "natural watercourse," but rather beside the artificial ditch. It is notable that FLNRO representatives inspected the roadside berm and raised no concern about either its safety or statutory compliance.
- [198] The emergency MacKay Village berms are "authorized changes" under s 39(1)(o) of the Water Sustainability Regulation, BC Reg 36/2016. The Village's duty is limited to ensuring that the Village berms do "not pose a significant risk of harm to public safety, the environment, land or other property": s. 41. They do not, and in any case, as set out above, the Village is protected from liability by the Emergency Program Act.
- [199] Nor can the replacement of the culverts with the clear span bridge constitute a violation of the WSA. FLNRO issued formal approvals for the bridge, which Mr Hendricks built on the strong recommendation of FLNRO. The bridge returns the creek to a more natural free flow state. It removes the significant failure hazard to downstream owners such as Mr MacKay posed by the artificial blockage and pooling due to the pre-2018 culverted roadway.

VI. Conclusion

- [200] Mr MacKay once stated during trial, "I think the evidence is clear, I am a pretty persistent fellow when I decide I want to do something" The evidence was manifestly clear on this point. While he has been unsuccessful, the Court sympathises with his position, and commends Mr MacKay for his efforts in conducting this technically-demanding trial for the most part as a self-represented litigant.
- [201] Unless there are facts not presently known to the Court, the defendants are entitled to their costs at Scale B.

VII. Practice postscript

- [202] Although this case turns largely on the geographic configuration of the three properties, no map or plan was presented to the Court until the Court, with some exasperation, demanded one. In the first hours of trial, counsel and the plaintiff made passing reference to no fewer than six different berms, some temporary; as well as three bridges; two access roads; countless channels; and four flooding events. Videos and photographs were shown without any anchor as to date or geography. While the parties had lived this case for three years, for a judge viewing this matter for the first time, it was a chaotic informational inundation that felt akin to the 2017 and 2018 floods combined.
- [203] While the plaintiff was self-represented, there were four counsel in the room. There was no strategic advantage to letting the plaintiff flounder; it was in the interests of all parties to ensure that the Court swiftly gain an understanding of the critical geography of the case.

[204] Just as no trial should start without presenting the court with a chronology or a summary of key facts, whether agreed upon or not, in any case where geography or layout is an issue, be it a nuisance case or a motor vehicle case, counsel should present the court with a map, even a conceptual one, or alternative maps if there can be no agreement, at the first moment of trial.

"Crerar J"

APPENDIX A

- [1] Formerly named the Rivière de la Cache, the name is apparently derived from hidden, or cached, supply and trade goods used by fur traders of either the Hudson's Bay Company or its rival, the North West Company. The cache site has apparently never been found.
- [2] Although the Elephant Hill fire namesake is located south of Cache Creek, the fire stretched from its origin in Ashcroft, and spread north of Highway 99 as far as Green Lake, east of 100 Mile House.
- [3] Pronounced throughout the trial as "Flin-row."
- [4] This was his literal testimony, with carefully hyphenated letters. Mr Gervais presented as a very earnest witness.
- [5] In his pleadings and argument, Mr MacKay referred to the series of berms erected just east of his property by the village as the "Village berms." I will refer to these berms, somewhat clumsily, as the MacKay Village berms or the emergency MacKay Village berms. Mr MacKay describes three separate berms erected during each of the flooding events in 2017, 2018, and 2020. The Village sees the 2018 MacKay Village berm not as a separate berm, but rather the addition of further riprap and materials to the existing 2017 MacKay Village berm.
- [6] In Jorgenson, the shoe was on the other foot, with Trans Mountain Pipeline as the defendant accused of nuisance.
- [7] Apart from its precedential value, the case is remarkable, having as counsel two future Chief Justices of British Columbia: the then-Lance Finch for the plaintiff, and the then-Allan McEachern for the defendant.
- [8] A French drain is a hole or trench filled with rock or gravel. It is also called a dry well. Its purpose is to direct and hold water until it is able to percolate down and be absorbed into the ground. The water flows through the gaps between the rocks. It derives its name not from the country, but rather from the fact that they were popularised by lawyer and Assistant US Treasury Secretary Henry Flagg French (1813-1885).

- [9] Although the phrase has been driven into cliché by the current pandemic, its first recorded use occurred one hundred and three years ago, towards the end of the First World War. In his article "Beware!", in the 1918 National Electric Light Association Bulletin (Volume 5), Henry Wise Wood wrote: "The questions before us, therefore, are, broadly, two: How shall we pass from war to the new normal with the least jar, in the shortest time? In that respect should the new normal be shaped to differ from the old?"
- [10] It is appropriate that these reasons are being finalised, and this most Canadian of cases cited, on Canada Day.
- [11] In fact, the models distort the amount of flooding that would be suffered by the campground. As acknowledged by Mr Stirling, those models are based on water flowing predominantly from the now-extinguished north channel, with no flow in the dominant south channel. As noted by Dr Millar, this would likely overestimate the flow through the campground for the scenarios with no roadside berm, and therefore underestimate the flow on the MacKay property for those two scenarios. I accept Dr Millar's opinion, and the defendants' argument in this regard.
- [12] This nuisance action arose from construction of the Cambie rapid transit line. The City was not aware that its street would be used in manner causing nuisance to businesses along the route, and had no ability to terminate the access agreement and stop construction, after the nuisance became known.
- [13] This assumes that such northward migration and erosion into the campground would occur. Dr Millar opines that "[n]o evidence is presented that the channel would have migrated to the north and away from the MacKay property had the Campground not armoured the right bank or constructed the berm." I agree that given the variables, combined with the potential significant Creek amendments due to the freshet floods, this is a significantly conjectural assumption.
- [14] While outlier temperatures and weather patterns are not a consistent measure of climate change, and while the connection between climate change and the recent Cascadia heat dome is tentative, as these reasons are being finalised, Cache Creek experienced its highest temperature ever recorded: 48.1 degrees Celsius (118.5 degrees Fahrenheit) on June 29, 2021. Down the road, Lytton set the record for hottest temperature ever recorded in Canada (or in Las Vegas, for that matter): 49.5 degrees Celsius (121.1 degrees Fahrenheit), before burning to the ground the next day: Environment Canada, Weather Summaries: https://weather.gc.ca/warnings/weathersummaries_e.html#BC?utm_source=vancouver%20is%20awesome&utm_campaign=vancouver%20is%20awesome&utm_medium=referral (visited 30 June 2021)
- [15] While the appeal was allowed in part, the trial court's recitation of the laws of negligence was affirmed.

[16] Although I have dismissed the claims in negligence and nuisance, had there been a stronger evidentiary foundation, I might have found the Brookside defendants liable in one respect: the hasty excavation of an emergency channel during the 2017 flood, leading to the sudden and powerful release of water and debris trapped behind the overloaded culverts and campground road, and creating in turn a violent downstream surge, described by Mr Gervais as the "Holy s-h-i-t" moment. It was wholly foreseeable that such a sudden release would harm the MacKay property, immediately south of the release point. In effect, the flood surge realised the hazard later described in the 2018 email from Ms Simon of FNLRO, quoted above, where she instructed Mr Hendricks to prevent pooling and pressure on those culverts and the road. No email was necessary, however, to warn Mr Hendricks that cutting a channel at the height of the 2017 flood would serve as a proverbial dam buster. The MacKay property could have suffered percussive damage that would not have occurred but for this sudden release of the churning, pressurized water. There was no evidence at trial, however, that the MacKay property suffered from such percussive damage, as opposed to the general flooding that would have occurred in any case, for which Brookside is not liable: the video and other evidence is silent as to the moment when the surge hit the MacKay property.

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