
CANADA / JUDGMENT

Wood v. Langley (Township)

2015 BCSC 1020

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Supreme Court of British Columbia

DECIDED

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2015 BCSC 1020 Wood v. Langley (Township)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wood v. Langley (Township),

2015 BCSC 1020

Date: 20150615

Docket: S062551

Registry: Vancouver

Between:

Murray Douglas Wood

Claimant

And

The Corporation of the Township of Langley

Respondent

Before: The Honourable Mr. Justice Williams

Reasons for Judgment

Counsel for the Claimant:

S.G. Price

D.L. Nundal

Counsel for the Respondent:

V.J. Pahl

J.A. Bank

Place and Date of Trial:

Vancouver, B.C.

June 23 - 27, 30, July 2, 3, 2014

Place and Date of Judgment:

Vancouver, B.C.

June 15, 2015

- [1] This is a claim in nuisance against the Corporation of the Township of Langley (the "Township") for drainage runoff said to flow from Township property onto the plaintiff's property. The plaintiff seeks both damages and an injunction requiring the Township to take immediate and effective action to stop the flow of water onto his property.

Overview and Positions of the Parties

- [2] The plaintiff owns a 3.67-acre parcel of land at the northwest corner of 66th Avenue and 203rd Street in the Township of Langley (the "Plaintiff's Property"). Uphill and to its immediate north is property owned by the Township. Uphill and to the north of that is a townhouse development developed by Solterra Development Corporation ("Solterra").
- [3] In October 2002, the Township approved the development of 68 townhomes by Solterra on property adjacent to and north of the Plaintiff's Property (the "Solterra Property"). Approval was subject to Solterra constructing a greenway along the southern portion of the Solterra Property and transferring title to the greenway system to the Township. This occurred in October 2002, and the Township dedicated the 0.75 acre parcel of land as a park (the "Township Property"). The Township Property, which runs over a gas right of way (the "Gas Right of Way"), separates the Plaintiff's Property and the Solterra Property. It has an asphalt walkway (the "Asphalt Walkway") along its entire length with grass and landscaping on either side.
- [4] The thrust of the plaintiff's claim is that since October 2003, the Township has created a nuisance by allowing drainage runoff to flow from its property onto and across the Plaintiff's Property. Specifically, he says that prior to September 2003, there was a watercourse, between one and three feet deep, that ran through what is now the Solterra Property and drained both the Solterra and Township properties to the north of the Plaintiff's Property. He alleges the Township permitted Solterra to fill in the watercourse without ensuring any effective or proper drainage. As a consequence, he says drainage runoff from the Township Property has periodically flooded his property. Despite repeated requests for relief by the plaintiff, the Township has taken no reasonable or effective abatement measures.

- [5] The plaintiff says that since 2003, there has been an ongoing serious and unreasonable interference with his enjoyment and employment of his land, and that there has been damage to the land in the form of significant areas of pooling or standing water.
- [6] The Township responds that the surface ponding water of which the plaintiff complains is a natural and pre-existing feature of the Plaintiff's Property given its location at the toe of a slope, its proximity to the water table, and the fact that it consists of impermeable soil that allows water to pond at the surface. The Township says that the plaintiff has failed to establish that water is flowing onto his property from the Township Property or that any such additional flow is greater than it was in the past. Moreover, it says any additional water that may have flowed onto the Plaintiff's Property is so minor as not to constitute a substantial interference with the plaintiff's use or enjoyment of his property. The Township maintains that its use of its property when assessed in all the relevant circumstances is not unreasonable.

Review of the Evidence

- [7] Each side called three witnesses. The plaintiff gave evidence, as did his engineering expert, Derek Ashford, and a former tenant of his property, Corliss Maguire. The Township called a rebuttal expert, Karen Savage, as well as the project manager for the Solterra project, Stephen O'Neill, and the Township employee who reviewed and accepted the site services plans for the Solterra Property development, David Anderson.
- [8] Although I have carefully considered the evidence of these witnesses, I do not propose to summarize it all and will only relate the salient aspects as they bear upon the issues to be determined.

Murray Wood

- [9] The plaintiff testified that he has been involved in the building business all his life. He described himself as a builder, investor, property investor, and property manager. He testified as follows.
- [10] The Plaintiff's Property was purchased by the plaintiff in 1999 for holding and rental purposes with future development in mind. His 3.67-acre lot was part of a larger seven acre parcel divided by a pipeline. He purchased the southern half, and had a lease and right of first refusal with respect to the northern half, which later became the Solterra and Township Properties. The plaintiff declined to exercise his right of first refusal in relation to the northern property, having concluded that building on it was not feasible since Township officials told him that the creek running through it had to be protected.
- [11] In 1999, the Plaintiff's Property was relatively flat and dry with no creeks, swamps or wet spots other than a small manmade fish pond. While he initially testified in his direct examination that the property was completely dry, he conceded in cross-examination that the property had "some" water prior to the Solterra Property development. There are two

houses on the property, with civic addresses 20257 and 20263 - 66th Avenue, and four sheds. I will refer to the houses as "20257" and "20263" respectively. Since purchasing the property, the plaintiff has and continues to rent both houses. His ultimate goal is to develop the site.

- [12] The plaintiff described the pre-development water flows on the Solterra Property in considerable detail, explaining that he regularly visited the property since he had a lease interest in it and also rented a house there. He testified that two branches of a creek came together like a "Y" and flowed off the hill from the northwest in a southeasterly direction into a marsh on the property. , He also testified spring water flowed in a similar manner. From there, the water continued to flow southeasterly in a watercourse that was between one to three-feet deep and ran the full length of the southern edge of the site into a ditch on 203rd Street. The watercourse varied depending on the time of year. It was a channel full of water when it rained but could disappear in July and August. The plaintiff testified this watercourse effectively drained all of the Solterra Property and kept his own property dry.
- [13] In the course of trial, much was made of the difference between the terms "watercourse" and "ditch". While both of those terms may be used in these reasons, no special significance attaches to that use for the purpose of this judgement.
- [14] The plaintiff testified that his problems arose when Solterra filled in the watercourse as part of its development of the Solterra Property in 2002 and 2003. Matters initially seemed fine since there were no apparent problems with water, and the plaintiff assumed Solterra had a plan in place to deal with water management.
- [15] The Solterra Property development entailed substantial site work including the importation of fill material to raise and level the area where the residential construction would occur. As well, to the immediate south of the development, the Township Property's lineal parkway was constructed over the Gas Right of Way. That involved raising the elevation somewhat - approx. 200 mm, as I understand, which is slightly less than 8 inches -- and then installing the Asphalt Walkway with lawn grass and landscaping on either side of that walkway.
- [16] Prior to that time, the plaintiff says his property did not flood from either the Solterra or Township Properties. Since that time, however, he claims that his property has been soaked with ponding water and surface water during times of rainfall.
- [17] The first flooding incident occurred on October 16, 2003, when the Solterra Property development was well underway. It was a very rainy day, and the plaintiff described how water 1-2 inches deep began to "sheet flow" across the grass and Asphalt Walkway on the Township Property. Both rental houses on his property were flooded. He described a "lake of water" in the crawlspace access in 20257 which required pumping and vacuuming. The plaintiff also detailed how the drywall and trim in 20263 were wet and the carpet required vacuuming and drying.

- [18] The plaintiff notified the Township about the flooding. He says that the following day someone from the Township arrived at his property with a backhoe and began to dig a course for the water along the border of his property and the Township Property to try to alter the course of the flow. They also excavated two channels across the Plaintiff's Property's driveway, one north-south and the other east-west, which had the effect of directing the water towards the two houses.
- [19] The plaintiff testified that the residences on his property flooded a second time in early November the same year, though he only knew what his tenants at the time told him about it.
- [20] The plaintiff testified that since these initial floods in late 2003, his property floods every time there is a continuous moderate to light rainfall, or a major downpour. The last flooding incident he observed was in March 2014. With the passage of time, the extent of the flooding has worsened.
- [21] In an effort to address the flooding, the plaintiff hired a contractor, Mr. Quecheck, to install a catch basin and connect it to a drain on his property. While this collected some of the water and helped somewhat, it was not able to manage all of the water coming onto the property. The plaintiff testified that he also undertook work himself to prevent further flooding, including grading, shoveling, draining, and using logs to divert rainfall. He said that despite his efforts, the drainage facilities on his property were often overcome from the water pouring off the Township Property. Moreover, he said, every storm changes his property, making it impossible to prevent flood waters from damaging it.
- [22] The plaintiff testified that Solterra, at the behest of the Township, attempted to abate the nuisance of the water and the damage it caused by constructing a French drain (a narrow gravel-filled ditch) and installing boards and gravel. However, these abatement attempts have failed since water continues to accumulate on the Plaintiff's Property during times of heavy rainfall and during the wet seasons.
- [23] The plaintiff testified that the impact of the flooding on his enjoyment and use of his property has been substantial. There is structural damage to 20257 and the storage building behind 20263, and the floors in 20263 are tilting as a result of the continuous assault of water. He said that overall, his lands are unusable in various ways, reducing the income-earning potential of the residences and increasing the tenant turnover at each house. He said that the back and side yards are so saturated with water that they are now less useful as agricultural or recreational land.

Corliss Maguire

- [24] Corliss Maguire was a tenant at 20263 on the Plaintiff's Property from early 2003 to the summer of 2004.

- [25] Ms. Maguire testified that the drainage ditches along 203rd Street were filled in either that summer or autumn. She said that in October 2003 during a significant rainfall, water came down the hill to the house and flooded the field to the east and the basement of the house, causing a sump pump to activate. The house flooded again in November 2003. There were no further flooding events at the house after that, though there were also no heavy rain events on par with those in October and November either.

Derek Ashford

- [26] Derek Ashford was qualified as an expert in civil engineering with a speciality in hydrology. He prepared a written report dated April 6, 2014 that was tendered as evidence at trial. An earlier 2008 report that he prepared for an Environmental Appeal Board hearing is also in evidence but I have not referred to it as it is largely an earlier version of the 2014 report.
- [27] Mr. Ashford's report addressed a number of issues, the first of which is the pre-development drainage pattern of the plaintiff's and surrounding properties. In forming his opinion, Mr. Ashford conducted site visits and also reviewed several exhibits which show the contours, spot heights, and elevation of the lands prior to development. They include a survey plan prepared by land surveyors Isaak, Osman & Associates, and two plans prepared by Civic Consultants for the Solterra Property development, one regarding storm water management and the other, onsite grading.
- [28] According to Mr. Ashford, prior to the earthworks associated with the development of the Solterra Property, the land was undisturbed. The northern 2/3 of the site was a slope of about 3.50% to 3.75% in gradient which met a flatter area of 2% gradient in the lower 1/3 of the property. There was a watercourse with an east-west orientation wholly within the Solterra Property. It started in a marsh on the property and flowed in a southeasterly direction towards 203rd Street where it drained into a ditch. Midway through the property, another watercourse with a north-south orientation joined the first watercourse just downstream of the marsh area. There was, in addition, a third watercourse that entered the marsh on its west end. Mr. Ashford had been informed by the plaintiff that there had formerly been springs at the bottom of the hillside that fed into the east-west watercourse.
- [29] Mr. Ashford stated that according to the contour lines on the various plans, the elevation of the marsh area along the south of the original Solterra Property matches those at the north side of the Plaintiff's Property where, Mr. Ashford was advised by the plaintiff, no fill has been placed or removed. As well, the new pathway along the Township Property has been raised 0.2 metres above the original grade.

- [30] Mr. Ashford thus deduced that prior to any development, at least 85% of the area of the Solterra Property produced storm water that flowed to the east in the watercourse and off the lands. The balance of the storm water (about 15% of the Solterra Property) would have flowed to the lands to the south of the Solterra Property, being the Plaintiff's Property. Any storm water flows that reached the Plaintiff's Property would have flowed overland southwards to 66th Avenue.
- [31] According to Mr. Ashford, it is generally accepted good engineering practice followed by most municipalities to require a developer to deal with storm drainage from within his property, such that overland flows onto another property are eliminated.
- [32] In terms of the effect of the re-grading of the Solterra Property and the filling in of the watercourses during the townhouse development, Mr. Ashford stated the following. On the basis of the proposed design of the storm drainage system on the Solterra Property, which he assumed was followed during construction, most or all of the surface storm water from roofs, roads, and other impermeable or semi-permeable areas of the property is collected into storm sewer pipes and directed to the southeast corner of the property where the internal storm sewer connects to a main storm sewer on 203rd Street.
- [33] Mr. Ashford attended the Solterra Property in March 2008 during a rainfall event. The internal storm drains within the Solterra Property were working and he did not observe any meaningful escape of surface water. However, on the Township Property there was what he described as a significant escape of surfacing ground water at the interface of the landscaping on the north side of the Plaintiff's Property and the Asphalt Walkway. He attached photos which he described as showing reddish stains on the asphalt in the area of the escaping water flows caused by prior water flows at the same locations.
- [34] Mr. Ashford attended the area again in February 2014, after a period of heavy, though not unusually heavy, rain. He again witnessed the same escapes of groundwater from the Township Property onto the Plaintiff's Property. Downstream of the groundwater escape, the water ponded against the garden beds on the Township Property and escaped downhill onto the Plaintiff's Property.
- [35] During both those visits Mr. Ashford said he witnessed storm water flows generated from the west side gutter of 203rd Street travel over the gravel boulevard fills and enter the Plaintiff's Property. The flows continued overland through the Plaintiff's Property to the north-side ditch on 66th Avenue.
- [36] Mr. Ashford then expressed the following opinion:

Prior to the townhome development on the Solterra Lands groundwater that surfaced as springs in the hillside or channel banks would have been intercepted by the pre-development east-west watercourse shown in Appendix "H" and would have collected storm/ground water and would have drained that storm/groundwater eastwards in that watercourse to a ditch on the west side of 203rd Street. Typically none of the groundwater, or surface water, reaching that watercourse

would have flowed onto the Wood Lands [the plaintiff's property]. It is possible that a small amount of overland flow could have flowed towards the Wood Lands if the surface of the area between the east-west watercourse on the pre-development Solterra Lands and the TOL Parkland [the Township Property] became saturated as a result of prolonged heavy rain and that water in whole or part escaped, however in this situation the volumes would be quite small.

With post-townhome development the groundwater previously picked up by the west to east watercourse on the Solterra Lands would be picked up by the foundation drains (if constructed) and if not continue to remain buried any flows would follow a line of least resistance that would allow it to escape (as it now does) as surfacing groundwater on the TOL Parkland at the interface of the landscaping and the asphalt that has been placed as a footpath surfacing along the TOL Parkland. Because there is evidence (see photographs attached in Appendix "J") that groundwater is escaping past the building footing drains installed for the development on the Solterra Lands and they are clearly not intercepting all the groundwater flows. This means that the townhome development has caused some of the groundwater, which was previously collected as surface stormwater to be forced to stay as groundwater until it has travelled southwards to the TOL Parkland or additionally further south to the Wood Lands, where it surfaces. It should be noted that to accommodate the construction of the TOL Parkland asphalt walkway the walkway area appears to have been raised about 200mm and groundwater could therefore travel under the TOL Parkland's walkway asphalt.

The walkway constructed on TOL Parkland appears not to be drained causing surface waters to collect and flow onto the Wood Lands. It would have been a prudent design for the designers of the improvements on the TOL Parkland to slope the walkway asphalt downhill towards the north thereby trapping any surface water, as well as escaping ground waters, collect them and conduct them offsite. As it exists the slope of the walkway asphalt is downhill southwards and directs the escaping surface waters onto the Wood Lands to the south.

The escape of this groundwater is of a significant quantity that it has caused overland flows southwards through the Wood Lands. The flows reaching the Wood Lands has opened new flow channels and/or ponding and/or caused flooding. The effect is to have caused the Wood Lands to become more saturated or inundated with water than prior to the Solterra development that now exists on the Solterra Lands and the walkway and other improvement works now constructed on the TOL Parkland.

[37] He elaborated his view that although the impermeable surfaces on the Solterra Property intercept the vast majority of rainwater and direct it into storm water sewers, rainwater that that has fallen on permeable areas of the property uphill of the Solterra Property and soaked into the ground becomes groundwater that surfaces onto the Township Property or further south onto the Plaintiff's Property. Mr. Ashford acknowledged that he saw no direct evidence of water surfacing on the Plaintiff's Property, such as springs or water bubbling out of the ground, but said that the configuration of the slopes and flatter areas made that a potential reality. The groundwater was not formerly a problem because it was intercepted by the east-west watercourse. Mr. Ashford expressed the opinion that by intercepting the surface waters

and the surfacing groundwater, the Township could have collected this water and directed it to 203rd Street. The additional volume of escaping storm water from the Township Property is overwhelming the drainage systems on the Plaintiff's Property, thus causing it to flood.

- [38] I pause here to note that while Mr. Ashford states on several occasions that the east-west watercourse would have formerly intercepted the flow of groundwater, at p. 8 of his report he expressed the point as follows:

The Plaintiff advises me that prior to the elimination of the watercourse on the Solterra Lands to accommodate the 68-unit townhome development on the Solterra Lands there had been no escape of stormwater from the pre-development Solterra Lands because the west to east watercourse had intercepted the flows and as this technically makes sense I have the opinion that this is fact.

- [39] Mr. Ashford opined that any civil works checker should have "red-flagged" the filling in of watercourses within the Solterra Property, not only for drainage concerns but environmental concerns as well. The design engineering plans for the development which he reviewed did not recognize the effect of eliminating the watercourses and marsh area. He added that, unusually, given that changes to a stream or watercourse require approval from the Provincial Ministry of the Environment and the federal Department of Fisheries, he was not aware of any such approvals having been given.
- [40] Mr. Ashford stated that by permitting the east-west watercourse to be eliminated and not replicated elsewhere on the Solterra Property, the Township allowed groundwater and some surface water to escape the Solterra Property onto the Township Property and subsequently onto the Plaintiff's Property. The Township could have required the developer to replicate the effects of the east-west watercourse by installing another ditch or curtain drain to intercept both ground and surface water. Mr. Ashford expressed his view that knowing of the existence of the watercourses and the detrimental effect of their removal to the properties of the Township and plaintiff, the Township should have required the drainage issue to be satisfactorily addressed before issuing the formal approvals.
- [41] According to Mr. Ashford, the remedy to the problem is simple: the installation of a French drain the full length of the boundary between the Solterra and Township Properties. It could be constructed on either side of the boundary, though it would require consultation with the owner of the gas pipeline if on the Township side. As well, remedial works to the north part of the walkway on the Township Property would also protect it from escaping water.

Karen Savage

- [42] The Township tendered rebuttal evidence from Karen Savage, who was qualified as an expert in engineering with a focus in hydrology.

- [43] In preparation for her report, Ms. Savage conducted a site visit of the Plaintiff's Property and surrounding areas, and also reviewed numerous documents pertaining to the Plaintiff's Property, including surficial geology maps from the Geological Survey of Canada and historical aerial photographs of the area.
- [44] Ms. Savage visited the Plaintiff's Property on April 30, 2014. The weather was dry and had been for several days. She described the Plaintiff's Property as mostly flat, sloping very gently to the south. The topography of the properties to the north of the Plaintiff's Property sloped moderately steeply southward to just north of the Township Property.
- [45] According to her report, Ms. Savage observed ponded water along the north side of the Plaintiff's Property, immediately south of the Township Property. The water, to a maximum estimated depth of three to four inches, was generally located in the wheel paths of the unpaved driveway on the Plaintiff's Property. Some water had collected in a ditch at the east half of the north property line on the Plaintiff's Property, though it did not appear that the ditch was directed anywhere. Ms. Savage said that the driveway letdown from 203rd Street appeared to direct surface flows onto the northeast portion of the Plaintiff's Property.
- [46] Ms. Savage expressed her opinion that Mr. Ashford had failed to take into account several important factors in arriving at the conclusions in his report:
- a) The nature of the soil on the Plaintiff's Property and surrounding lands would be expected to have low hydraulic conductivity, and there was a naturally high groundwater table perched atop this relatively impermeable soil. As she explained in her cross-examination, the low permeability of the soil means that water does not easily infiltrate which, in turn, promotes ponding.
 - b) The driveway letdown from 203rd Street appeared to be directing surface run-off onto the northeast portion of Plaintiff's Property. However, Ms. Savage conceded upon questioning from the Court that this would have little impact on the total volume of water flowing onto the property.
 - c) The re-contouring of previously effective drainage paths on the Plaintiff's Property potentially had an adverse effect. It appears, based on her interpretation of historical aerial photographs, that aggressive site clearing was carried out immediately before and following the plaintiff's purchase of the property in 1999. This would have negatively impacted the low hydraulic conductivity of soil in a manner that promoted ponding. Moreover, infilling of the pond by the 20257 residence likely compromised an important pre-existing drainage path.
 - d) The 20257 house was built below grade, thus subjecting the supported wood framing to excessive moisture. The house was also 45 years old and near the end of its design life.

David Anderson

- [47] David Anderson is presently employed by the Township as its manager of development engineering. In 2002 and 2003, he was a land development technologist when the Civic Consultants site servicing plans for the Solterra Property development were submitted for review. In that capacity, he was responsible for reviewing those plans to ensure compliance with the Subdivision and Development Servicing Bylaw.
- [48] Mr. Anderson detailed the Township's review process. In brief, site servicing plans are submitted to the Township's planning department by a registered professional engineer. The plans are then distributed to the relevant departments, which include the engineering department and the environmental coordinator. The engineering department reviews plans relating to storm water management, lot grading, roads, water, sanitary, and sewers to ensure compliance with the Subdivision and Development Servicing Bylaw. If the plans comply, the Township accepts them; if not, they are rejected and the engineer is required to amend and resubmit them. Thus, the Township does not approve site service plans in the sense of ensuring that the engineering of the storm water management plan will sufficiently address the drainage requirements of the development. Rather, it relies on the developer's engineers to provide sound designs.
- [49] Mr. Anderson testified that he reviewed the site service plans for the Solterra Property development and had no concerns with them. He had not been advised of any environmental concerns, and the plans otherwise met all the requirements of the bylaw. He reviewed the documents again for the purpose of this litigation and confirmed that he continued to have no concerns and would accept them again if they were resubmitted.

Stephen O'Neill

- [50] Stephen O'Neill was a project manager for Solterra in 2003-2004.
- [51] Mr. O'Neill became involved with the Solterra Property development in the spring of 2003. By that time, the development permit had already been issued and the land had been stripped in preparation for construction. Consequently, he had not observed any watercourse on the property prior to this land stripping.
- [52] Mr. O'Neill testified that the drainage systems on the Solterra Property development captured all surface water through perimeter tiles, area drains, street catch basins and patio drains, and then piped it to the Township's main storm sewer system on 203rd Street. Thus, his opinion was that the water coming onto the Township Property was groundwater.
- [53] Mr. O'Neill testified that he visited the Plaintiff's Property in the fall of 2003 to determine the best way to address any water egress after receiving a complaint from the plaintiff. He described examining the situation and observing water flowing across the Township Property and draining to points on the Plaintiff's Property, specifically, water flowing in a swale, toward a catch basin. He said that he noted several old drainage features on the Plaintiff's Property that indicated to him that the property had previously had to deal with

overland flow. As well, he described observing two culverts, about 50 meters apart, running perpendicular to and under the back driveway. He said they appeared to be old drainage features whose purpose was to channel water under the driveway toward a catch basin to the south. However, when he observed them, they appeared plugged on the south end and water had gathered north of the driveway as a result.

- [54] In response to the plaintiff's complaints, Mr. O'Neill wrote the plaintiff in January 2004, proposing to install a French drain (a narrow gravel-filled ditch) at the base of the sloped gardens on the Township's Property where water was flowing out of the ground. This would intercept the groundwater before it flowed over the Asphalt Walkway and onto the Plaintiff's Property. The trench would flow eastwards towards 203rd Street and be drained by a six foot pipe at the eastern end. However, because the Township Property rose up to 203rd Street, the drain would have to cross over the gas line to the Plaintiff's Property for the last 30 feet. Mr. O'Neill also proposed installing a French drain on the Plaintiff's Property along the southern edge of the Township Property to replace the ditch that was formerly there and get rid of the ponding water where it was occurring at two locations along the property line. The work was to be done at Solterra's expense.
- [55] The plaintiff rejected the proposal. In a February 2004 letter to Solterra, he indicated that the drainage problem required the re-installation of an interceptor drainage collection system along the north side of the Township Property to replace the former watercourse.
- [56] Mr. O'Neill responded to the plaintiff by letter, outlining what he saw to be the logical faults with his proposal and to reaffirm what Solterra was offering to do. He did not receive a response to the letter.
- [57] In March or April 2004, Solterra installed a French drain near the northern edge of the Township Property, at the toe of the slope where the groundwater flowed above ground. The drain was connected to the Solterra Property development's storm water system, which then directed all water flows to 203rd Street. Mr. O'Neill testified this was precisely the "interceptor drainage collection system" the plaintiff had previously argued was necessary to solve the drainage problem. Solterra also raised the grade of the southern edge of the Township Property and installed boards there to dam any water flowing south and to allow it to percolate slowly into the ground.
- [58] Mr. O'Neill said that after the French drain was installed, he monitored both the Township Property and the Plaintiff's Property, and was satisfied that the system was draining the Township Property of any escaping groundwater before it reached the Plaintiff's Property.
- [59] Mr. O'Neill did not receive any further complaints or correspondence from the plaintiff.
- [60] In their closing submissions, both parties urged the Court to draw adverse inferences against the other side for failure to call certain witnesses and adduce certain evidence.

[61] That is not a measure that should be too readily taken, and I decline to do so in this case. I found nothing so egregious in the manner either party conducted the case to warrant doing so. Ultimately, the outcome of this litigation will be determined on the evidence that was called, bearing in mind the onus of proof. Where there were deficiencies or shortcomings in the evidence, that will bear upon the findings I make.

Governing Legal Principles

[62] A nuisance is an interference with the claimant's use or enjoyment of land that is both substantial and unreasonable. Unlike negligence, nuisance does not focus on the defendant's conduct; rather, the focus is on the harm suffered. Thus, whether the interference is the result of intentional, negligent or non-faulty conduct is of no consequence so long as the harm can be characterized as a nuisance: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 77.

[63] The interference with the plaintiff's property rights may be in the nature of physical damage to the land or it may take the form of substantial interference with the plaintiff's use or enjoyment of his or her land: *Smith v. Inco Ltd.*, 2011 ONCA 628 at para. 43.

[64] Justice Cromwell, writing for the Court in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, explained the two elements of a claim in nuisance at para. 19:

The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. This two-part approach found favour with this Court in its most recent discussion of private nuisance and was adopted by the Court of Appeal in this case, at para. 80 [Emphasis in original. Citations omitted.]

[65] As Cromwell J. explained, a substantial interference is one that is non-trivial and amounts to more than a slight annoyance or trifling interference. To justify compensation, however, the non-trivial interference must also be unreasonable. The reasonableness of the interference must be assessed in light of all the relevant circumstances, which may include such considerations as the severity of the interference; the character of the neighbourhood; the sensitivity of the claimant; the frequency and duration of the interference; and, the utility of the defendant's conduct: *Antrim Truck Centre* at para. 26. Ultimately, the focus of the balancing exercise is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation: *Antrim Truck Centre* at para. 25.

- [66] The plaintiff bears the initial onus with respect to proving a substantial interference with his use or enjoyment of his land. Once that is shown, the onus then shifts to the defendant to establish that his use was not unreasonable: *HMTQ v. Salt Spring Ventures Incorporated*, 2012 BCSC 1862, at para. 44.

Discussion

Findings of Fact

- [67] It is helpful at the outset to state as a general proposition that rainwater manifests in different forms. Rainwater that is absorbed into the ground becomes groundwater; it becomes part of the water table that exists under the land's surface. It does not necessarily remain in one place, but can flow under the surface. Rainwater that is not absorbed in this way remains on the surface. It may either run off, following whatever drops in elevation exist in the terrain, or it may lie in pools on the surface. Depending on the state of saturation of the ground, some of the surface water may also permeate the ground and thus become groundwater.
- [68] The key factual issue in this case is whether, and if so, to what extent, additional water has been flowing onto the Plaintiff's Property as a result of the Solterra Property development and the associated Township Property development.
- [69] Accordingly, the state of the Plaintiff's Property prior to the Solterra Property development is an important fact in the analysis.
- [70] The plaintiff's essential position is that it was well-drained and that water accumulation was never a problem. Initially he said that water never accumulated. In cross-examination, he resiled somewhat from that position.
- [71] I am unable to accept the plaintiff's contention that water was never a problem on his property prior to the Solterra Property development. I find that is not an entirely accurate description of the true state of affairs. I say so for a number of reasons.
- [72] The first is that I have concluded that Mr. Wood has to some extent exaggerated the extent of the water problems he has experienced since the Solterra Property was developed. When I consider his testimony in the context of the other evidence he has called with respect to the damage caused by the water, I have real reservations as to whether he has been fully accurate in describing how the condition of his property was dramatically changed after the Solterra Property development.
- [73] For example, the plaintiff testified about frequent flooding of his property - virtually, he said, whenever there was a significant rainfall. That evidence is quite strikingly at odds with the testimony of Ms. Maguire, who rented the house at 20263 from early 2003 until the summer of 2004. She told of two occasions when there was flooding in the basement: once in October and once in November. Each of the floods occurred after heavy, sustained rainfalls. Otherwise, she said that the property around the house was soggy but she did not report

flooding of the house.

- [74] A second factor that has informed my view of the plaintiff's claim is my conclusion that he has a larger agenda. Reference was made at trial to the Township's development plan with respect to a site to the west of the Plaintiff's Property known as the Southwest Gordon Estate Neighbourhood. The development plan includes the relocation of a watercourse called Jeffries Brook. Although the details were not fully made clear at trial, it is apparent that Mr. Wood, whose ultimate objective is seemingly to develop his property, is at odds with the Township over that situation as well. It is my view that the Jeffries Brook situation has no relevance to the plaintiff's nuisance claim, and I have not considered it in these reasons. However, it is clear from the dealings the plaintiff has had with the Township respecting the present claim, as disclosed by his communications with the Township, that he has sought to secure, as a resolution to this matter, a series of benefits that go well beyond a straightforward rectification of his complaint of water incursion from the north. He has an interest in maximizing, indeed, it could be concluded that he has an interest in exaggerating, the extent of water incursion onto his property. Accordingly, I have come to view some of the plaintiff's evidence with a degree of caution.
- [75] As noted, in cross-examination, the plaintiff himself conceded that there were times that water accumulated on his property - he said this was in the driveway.
- [76] I am satisfied that the water table underlying the property was high and that the soil on that site was fairly impermeable; it had, in the words of Ms. Savage, a relatively low hydraulic conductivity. Further, there were drainage mechanisms present on the Plaintiff's Property which indicate that water was a problem to be contended with; some of those drainage mechanisms seem to be of dubious efficacy. There was also, at an earlier time, a pond located in the southeast portion of the 20257 property. It was filled in in approximately 2001. According to Ms. Savage, this infilling likely compromised a pre-existing drainage path, although the plaintiff disputes that the pond had any drainage function. Ms. Savage further opined that significant site work done to the Plaintiff's Property around the same time would have also negatively impacted the soil conductivity of the site, as would the clearing of some of the previously existing vegetation. I accept her evidence on these points, although I assign no significance to the pond.
- [77] Reference was made to two or three catch basins located on the Plaintiff's Property. There is evidence that one of them was installed by an excavation contractor on November 4, 2003. The contractor was present at the site for four hours. The invoice indicates that he dug a swale and installed a catch basin. However, there is nothing in the evidence to indicate that this installation had any meaningful role in providing drainage to the site. Nor is there any evidence as to the date or circumstances of the installation of the other catch basin or catch basins or the resulting effect on drainage of the Plaintiff's Property.

- [78] Mr. O'Neill testified that he saw two culverts on the Plaintiff's Property. He said that the northern ends of each were visible but that the southern ends were nowhere to be seen. While the plaintiff suggested that this evidence should not be accepted by this Court, I am satisfied, on a balance of probabilities, that they were present. Their presence indicates to me that there was, at some time, a purpose for these culverts, presumably to drain water away. That they were observed by Mr. O'Neill to be in an apparent non-functioning state logically suggests that one element of the Plaintiff's Property's drainage system was not operating.
- [79] In the result, I am unable to accept the plaintiff's assertion that, prior to the Solterra Property development, there were no water problems on the Plaintiff's Property. It is my conclusion, based upon my assessment of the totality of the evidence, that water did accumulate on the Plaintiff's Property at times of substantial rainfall.
- [80] Prior to the Solterra Property development, water -- both surface and groundwater -- from that site and properties north and uphill of the Plaintiff's Property flowed south toward the Plaintiff's Property, which was located at a lower elevation relative to those properties. Indeed, there is no dispute that in general water has historically flowed naturally from the north to the south in the area in question. I will refer to this as the "Uphill Water".
- [81] Before the Solterra Property was prepared for development, a ditch (or watercourse) ran along the north side of the Gas Right of Way. Whether it was man-made or a natural topographic feature is not known. Regardless, it caused the Uphill Water (or a good part of it) to be drained away in an easterly direction, into the municipal ditch on the west side of 203rd Street. This had the effect of preventing a substantial portion of the Uphill Water from entering onto the Plaintiff's Property. As noted, that ditch was filled in when the Solterra Property was prepared for development.
- [82] However, in understanding the overall picture, it is important to keep in mind the comprehensive nature of the Solterra Property development, which covered the entire site with structures, roadways and driveways, and landscaping. The drainage system was engineered so that the vast majority of rainwater that fell onto the site was collected and carried away. As Mr. O'Neill described, and Mr. Ashford accepted, that system captured the surface water through various perimeter tiles, drains and catch basins, and then piped it away to the main storm sewer system on 203rd Street. As a result, the surface water from that site, which would have previously run southwards and presumably into the ditch to be carried away, was captured and taken away by this infrastructure. The substantial increase in impermeable land surface brought about by the Solterra Property development would also have had the effect of reducing to some significant extent the amount of rainfall that would go to ground water.

- [83] The evidence also establishes that the property located north of (and uphill from) the Solterra Property has been developed in a similar way, with the result that water which would originate in that area, and which would otherwise have flowed south and ultimately toward the Plaintiff's Property, is now largely managed in such a way that most of it does not represent the same volume as would have been previously the case.
- [84] In the result, a substantial part of the Uphill Water is managed in that it is carried away by the drainage infrastructures of the two developments located to the north of the Plaintiff's Property.
- [85] One change that has resulted from the development of the Solterra Property and the adjacent Township Property park is that the contour of the land at the boundary between the Township Property and the Plaintiff's Property is different than it was previously. The photographic evidence indicates that, prior to the development, the transition was quite gradual. Although the Plaintiff's Property is lower than the land to north, the boundary between the two was previously not clearly apparent from the topography. One flowed into the other. After the Solterra Property was developed and the Township Property park was completed, there was, as mentioned earlier, some increase in elevation of the developed sites. The boundary between the Plaintiff's Property and the Township Property is now clearly evident by a fairly abrupt change in levels: the Township Property is higher; the Plaintiff's Property at that point is discernibly lower.
- [86] It is also to be noted that the profile of the Township Property, and particularly the Asphalt Walkway, is canted slightly to the south. Accordingly, it seems that when rain falls upon the Township Property, the water that falls on the paved portion runs south, in the direction of the Plaintiff's Property. On either side of the paved path, there is grass and other landscaping. Presumably, some of the water that falls or flows there is absorbed. What isn't absorbed would flow, on the surface, to the south and thus to the Plaintiff's Property.
- [87] A final topographical feature that seems relevant to the discussion is at the northern edge of the Plaintiffs' Property. The photographic evidence indicates that there is a fairly pronounced depression or swale running generally along portions of that "frontier". The result is that the transition between the two properties is much starker than it was previously. A second result is that water accumulates in those depressed areas and appears to simply lie there. There is no means of drainage to carry it away.
- [88] An important part of the plaintiff's case is the evidence of Mr. Ashford. He has undoubtedly worked with great effort to investigate the situation.
- [89] The defendant Township takes quite strenuous issue with the evidence of Mr. Ashford, contending that it is manifestly unreliable and asserting that the witness is simply a "hired gun" and an advocate for the plaintiff. With respect, I am not prepared to adopt that assessment. I am satisfied that Mr. Ashford's research and investigation was honest and diligent. While it is true that he relied in part upon information provided to him by the plaintiff, and there may be reason to have reservations with respect to the accuracy of some

parts of Mr. Wood's description of the circumstances, in my view that does not mean that his evidence is to be rejected in its entirety. It must be examined in the context of the totality of the evidence in this case. I will consider this witness' opinion in that way. I may accept some of his opinions, I may accept none, or I may accept all. However, I do not agree with the submission that it must be attributed no effect.

- [90] Based upon Mr. Ashford's testimony and his report, and the totality of the evidence, I am prepared to accept that the development, both the of Solterra Property and the changes that were made to create the Township park on the Gas Right of Way, have resulted in some increase in the amount of water finding its way to the Plaintiff's Property, as compared to the volumes that were there previously. However, I find the actual extent of the increase - both in terms of the amount of water and frequency of occurrence - to be modest.
- [91] I do not doubt Mr. Ashford's evidence that, on occasion, he saw water flowing south from the Asphalt Walkway onto the Plaintiff's Property. However, I am not able to conclude that the amount of water coming onto the Plaintiff's Property in this fashion is substantially different than the situation as it existed prior to the development of the Solterra Property and the Township's Property.
- [92] The solution that Mr. Ashford proposes is the installation of a French drain along the full length of the boundary between the Solterra and Township Properties, that is, on the uphill side of the park. In his report he sets out in careful detail the technical requirements that would apply. Essentially, the drain would have the effect of intercepting the Uphill Water and carrying it away to the east so that it would not reach the Plaintiff's Property, thus performing the same function as the previously existing ditch.
- [93] It is of some note that Solterra was made aware of the plaintiff's complaints. In letter sent to Mr. Wood in January 2004, Mr. O'Neill responded to Mr. Wood's complaints of water coming onto his property from the north, seeking to engage with him and to find a solution. Specifically, he sent a letter to the plaintiff in January 2004, proposing to construct two French drains, one on either side of the Gas Right of Way.
- [94] The plaintiff declined to agree with that proposal. Mr. Wood's letter in reply made clear he chose not to engage in any collaborative effort to address the water problem. It is my view that this strategy was influenced by the fact that he seemed to have "bigger fish to fry"; I believe he was determined to parlay the situation into maximum benefits for his property and his development aspirations. The solution Mr. O'Neill suggested was not likely to advance the plaintiff's larger agenda.
- [95] Be that as it may, Solterra proceeded to install a French drain near the northern edge of the Township Property. The details of that installation, and whether it meets the specifications set out by Mr. Ashford, are not entirely clear from the evidence, although it appears they did not. It is my understanding of the evidence that the French drain did not extend along the entire length of the Township Property. As well, I have found nothing in the evidence to indicate that it was of the magnitude recommended by Mr. Ashford (750 mm below grade).

Nevertheless, Mr. O'Neill testified that he monitored both the Township Property and the Plaintiff's Property after the French drain was installed, and that he was satisfied the system was draining the former of any escaping groundwater before it reached the Plaintiff's Property. I accept that evidence, and find that it provides support for my conclusion that the water situation at that location, at that point in time, had been substantially managed by the measures which had been implemented..

- [96] To summarize my conclusion, notwithstanding my finding that the Plaintiff's Property was not, prior to the development of the Solterra Property and Township Property, entirely and always dry, I am satisfied that the plaintiff has proven on a balance of probabilities that, since the development, a modest amount of additional water has flowed onto his property. I am not persuaded, however, that the effects extend to the entire property. Rather, they are principally present at some points on the northern edge of the Plaintiff's Property, essentially adjacent to the Township Property. The situation is exacerbated by the swale or depression that runs along that frontier, resulting in pools of water accumulating and not being drained or carried away.
- [97] Somewhat curiously, in his evidence, the plaintiff contends that, among the measures taken to deal with the problem, he has graded the site. Simply as an observation, it seems to me difficult to accept that measure has been taken in any meaningful way. The low area adjacent to the boundary with the Township Property would appear to be quite starkly at odds with that assertion.

The Plaintiff's Claim of Nuisance

- [98] As noted earlier in the section outlining the relevant legal principles, a nuisance is an interference with the plaintiff's use or enjoyment of land that is both substantial and unreasonable. I turn now to that issue.
- [99] To prove his claim in nuisance, the plaintiff must establish that the act at issue, here the fact of the water coming onto his property, has resulted in a substantial and unreasonable interference with his (Mr. Wood's) use or enjoyment of his property.
- [100] The focus here is on the first aspect, whether the plaintiff has proven that the interference with his property rights is substantial. That is, the interference must be non-trivial, of a magnitude more than trifling or a mere annoyance.
- [101] I am not satisfied that the plaintiff has proven that interference. I say this looking at the question from the perspectives of both physical damage to the land and the plaintiff's use and enjoyment of his property.
- [102] I return to Antrim Truck Centre and the Court's comments about what constitutes a substantial interference at para. 22:

What does this threshold require? In *St. Lawrence Cement*, the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre*, while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance: p. 915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. As *La Forest J.* put it in *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181, actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes", and not claims based "on the prompting of excessive 'delicacy and fastidiousness'": p. 1191. Claims that are clearly of this latter nature do not engage the reasonableness analysis. [Emphasis in original.]

- [103] In my view, the plaintiff has not demonstrated that the pooling water along the northern boundary of his property has either substantially altered the nature of his property or interfered to a non-trivial or significant extent with the actual use being made of the property.
- [104] In so far as the actual use of the Plaintiff's Property is concerned, the evidence indicates that it is principally a holding property. The plaintiff's intention is to rent the two houses that are located there, to have some use of storage sheds located on the property, and ultimately to develop the site. The houses which are located on the property are of an older vintage. I note that the report of Ms. Savage described one of them as having design deficiencies related to its foundation. There is no evidence with respect to the other.
- [105] The evidence is that the houses are rented. The evidence adduced by the plaintiff does not satisfy me that the water situation he alleges has meaningfully impacted his ability to rent the houses, or that the revenue being obtained is reduced, or that the water situation is resulting in expenses of any consequence being incurred on anything other than a very infrequent basis, and those are of a relatively minor magnitude. Specifically, the plaintiff has adduced evidence to demonstrate that there were two episodes while Ms. Corliss was a tenant there. Beyond that, the evidence of costs incurred because of water incursion is modest. It is not such as to enable the Court to conclude that those circumstances are attributable to water incursion for which the defendant was responsible.
- [106] In short, the Plaintiff's Property is a holding property, awaiting development. The consequences arising from the increased water are minor. The frequency and the duration of the interference from the water are of modest magnitude. Finally, as I have indicated earlier, I am not satisfied that whatever consequences have resulted are attributable to the defendant.
- [107] The second aspect of consideration is whether the plaintiff has demonstrated that there was physical damage of sufficient gravity.

[108] From the discussion in Antrim Truck Centre at para. 22, I conclude that, for the plaintiff to establish the necessary physical damage, he must prove a substantial adverse alteration to the property itself.

[109] On the evidence, I am unable to conclude that that has been made out. The water on the Plaintiff's Property is primarily in some low-lying areas, depressions or swales along the northern border. Taking into account both the current and intended use, there is no basis to find that any substantial adverse alteration has been caused.

Conclusion

[110] In summary, the plaintiff has failed to show on a balance of probabilities that the defendant has caused substantial interference with the use or enjoyment of his property so as to constitute nuisance. The plaintiff's claim is dismissed.

"The Honourable Mr. Justice Williams"

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