COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Ward v. Cariboo (Regional District),* 2021 BCCA 423

Date: 20211029
Docket: CA47712

Between:

Bawnie Elizabeth Ward and David John Ward

Respondents
(Plaintiffs)

And

Cariboo Regional District

Appellant
(Defendant)

Before: The Honourable Mr. Justice Willcock
(In Chambers)

On appeal from: An order of the Supreme Court of British Columbia, dated July 30, 2021 (*Ward v. Cariboo Regional District*, 2021 BCSC 1495, Vancouver Docket S172428).

Oral Reasons for Judgment

Counsel for the Appellant (appeared via videoconference October 29, 2021):	A. Howden-Duke J. Lauwers
Counsel for the Respondents (appeared via videoconference October 29, 2021):	H.L. Jones J. Fitzpatrick, Articled Student
Place and Date of Hearing:	Vancouver, British Columbia October 26, 2021
Place and Date of Judgment:	Vancouver, British Columbia October 29, 2021

Summary:

The appellant applies for a stay of orders for injunctive relief made after the appellant had caused a nuisance and trespassed upon the respondents' land by

allowing it to be flooded with raw sewage. The appellant was ordered to conduct testing for the continued presence of contaminants and, depending upon the results, to remediate the contamination. The appellant was also ordered to build a gravity overflow system as a precaution against further floods. Held: Application allowed in part. The appeal of the order to conduct tests had no apparent merit, complying with the testing order would not cause irreparable harm and the balance of convenience did not favour the granting of a stay of that order. The appeal of the order to construct a gravity overflow system had some merit, compliance could cause irreparable harm and the balance of convenience favoured the granting of a stay of that order.

WILLCOCK J.A.:

Introduction

[1] The appellant applies for a stay of execution of orders made on July 30, 2021, at the conclusion of trial, for reasons indexed at 2021 BCSC 1495.

Background

[2] The claim arises from flooding of the respondents' land and family home (the "Property") with about 50,000 gallons of raw sewage in 2015 (the "2015 Flood") and a smaller but still substantial amount of sewage in 2020 (the "2020 Flood"), when a sewer line operated by the defendant, the Cariboo Regional District (the "District"), backed up and overflowed.

[3] In amended pleadings filed in September 2020, the District admitted liability in negligence, trespass, and nuisance for the 2015 Flood. It admitted the 2015 Flood occurred due to its failure to restore the backup diesel pump in a lift station. The District also admitted liability for a continuing nuisance and trespass but only up to August 21, 2015. Its position was that while the sewage was not removed from the Property, decontamination by sunlight over the 60 days following the flood removed contamination. The trial therefore proceeded on the basis that a noxious substance had been put on the respondents' Property and had not been removed but that its noxious properties had naturally abated.

[4] Insofar as the 2020 Flood was concerned, the trial judge found the intrusion onto the respondents' land was direct, the interference with the land was physical, and the interference was negligent. The claim in trespass and nuisance were, therefore, also made out in relation to that flood.

[5] The principal issue at trial was whether and, if so, to what extent, the nuisance and trespass continued. The appellant argued that the judge should not draw an inference that, since sewage was deposited onto the Property in 2015 and was not removed, the Property remained contaminated by the sewage that had been left there. The trial judge accepted the appellant's statement of the law that his conclusions must be based upon inferences from positive, proved facts and not mere speculation or conjecture. However, at para. 81, he noted:

> [81] ... I emphasize that my conclusions on continuing trespass are not based upon speculation or conjecture, but rather upon an array of evidence adduced at trial, which includes (but is certainly not limited to) the fact that the CRD never cleaned up the sewage in 2015. Specifically, in addition to the fact that the CRD took no steps to remove the sewage in 2015, I have considered and weighed the following additional evidence in reaching my conclusions on continuing trespass: ...

What followed was a review of the evidence of the continuing presence of contaminants. That included "the direct and circumstantial positive evidence adduced at trial which the Wards alleged supported their argument that sewage and resulting contamination remained on the Property": at para. 129.

[6] He placed some reliance upon the presence of contaminants noted by an expert called by the District. He noted as follows:

> [136] Mr. Robert Brown was called as a witness by the CRD and was qualified as an expert ... Mr. Brown prepared three reports dated May 15, 2019 (the "First Report"), October 17, 2019 (the "Second Report") and August 7, 2020 (the "Third Report").
>
> …
>
> [138] Mr. Brown found in the First Report that soil and surface water results indicated exceedances in the soil samples of applicable BC Contaminated Sites regulation standards for molybdenum, uranium and chloride (the "Exceedances").

[7] The trial judge gave detailed reasons for his conclusion that these "exceedances" were evidence of the continued presence of contamination that grounded the finding of continuing trespass and nuisance.

[8] Non-pecuniary damages were awarded for loss of use and enjoyment of the Property. The trial judge held:

> [316] In this case, there is no question on the evidence that the Wards have suffered a material loss of use and enjoyment of the Property. This included the following:

- The Wards' basement was flooded and rendered uninhabitable after both the 2015 Flood and the 2020 Flood, requiring lengthy restorations and resulting in the destruction of furniture and personal possessions;
- Since the 2015 Flood, the Wards have been unable to enjoy approximately 2/3 of their Property, consisting of the Pasture, due to the presence of sewage contamination;
- The Wards have been unable to use the Pasture and Ponds for the grazing and drinking needs of their farm animals, resulting in Ms. Ward having to get rid of most of the animals by 2016; and
- The Wards have had to live with the smell of both the 2015 and 2020 Floods. After the 2015 Flood the smell was so extreme that Ms. Henri could smell it for a month from her neighbouring property. Ms. Henri, Ms. Bastien and the Wards also testified that, depending upon the weather and the humidity, the smell continued to exist between 2015 and 2020.

[317] However, the worst impact of the flooding has been on Ms. Ward's mental health. Both Wards testified that Ms. Ward's pre-existing PTSD has been significantly worsened by the flooding events and the failure of the CRD to clean up the Property. She has been forced to give up her animals, which she testified were a form of treatment for her. She has been suicidal and has required treatment and counselling, and she tied this directly to the flooding in her testimony. Both Wards testified that this has caused a strain on the Wards' family and marriage.

[9] Further, he granted injunctive relief with a view toward addressing the continuing torts. The injunctions required the District to take a series of steps, set out as bullet points in para. 313 of the reasons, and to be responsible for all the costs of doing so. The first three steps (at bullet points 1–3), which call for a plan for testing for contamination and execution of that plan, are mandatory:

[313] … [An] injunctive order shall issue as follows:

- The CRD shall retain an engineering firm with contaminated site investigation and remediation expertise (but not Mr. Brown or his firm), and the choice of the firm shall be subject to prior consultation with, and approval by, the Wards.
- If the parties are unable to agree upon a suitable consulting firm, they shall have leave to return to Court for the purposes of having the Court select the consultant. I will remain seized of this matter for that purpose.
- The consultant shall prepare a plan (the "Testing Plan") to test for the following contaminants on Property, and any other contaminants that the consultant deems to be attributable to sewage from the 2015 Flood or the 2020 Flood (the "Contaminants"):
    - Pathogens (e-coli, fecal coliform, enterococci);

- Nutrients (ammonia, nitrate, nitrite, total phosphorus);
- Ions (chloride, fluoride and sulphate);
- Metals;
- PAHs (benzo(a)pyrene);
- Phenols;
- Nonylphenols;
- Phthalates; and
- Debris, including plastics and measurable concentrations of pharmaceuticals.

...

[10] The subsequent steps set out in para. 313 of the reasons (at bullet points 4–7), which call for a remediation plan and execution of that plan, are conditional:

> • To the extent that Contaminants are identified on the Property in accordance with the Testing Plan that are not otherwise reasonably attributable to background local conditions (in accordance with *EMA* Protocol 4), the consultant shall prepare a plan for their removal or treatment (the "Remediation Plan"). The Remediation Plan shall be designed to ensure that the Property is safe thereafter, in accordance with all applicable Provincial standards, for reasonable use by humans and animals.
>
> • The Remediation Plan shall also be designed to ensure that the soil and vegetation on the Property are returned, over a reasonable period of time, to a condition which approximates the pre-2015 condition. If the pre-2015 condition cannot be ascertained with sufficient precision, then the Remediation Plan shall ensure that the soil and vegetation is restored to a condition that is comparable to the soil and vegetation on neighboring properties, taking into account normal regional conditions and reasonable variations.
>
> • For clarity, the purpose of the Remediation Plan shall not be to ensure that the Property is restored to perfect or pristine condition. Rather, the purpose of the Remediation Plan shall be to ensure that the Property is restored to the condition it would have been in but for the 2015 Flood and the 2020 Flood.
>
> • The Testing Plan and the Remediation Plan shall both be fully compliant with the British Columbia *Contaminated Sites Regulation* and the *EMA*, and any other British Columbia policies or protocols that the consulting firm reasonably deems should apply to sewage contamination.
>
> ...
>
> [Emphasis added.]

[11] A schedule for compliance was prescribed (at bullet points 8–10 and 12):

- The Testing Plan shall be finalized by no later than October 1, 2021, unless otherwise agreed between the parties, and shall be subject to approval of the Wards before it is adopted and implemented.
- All testing under the Testing Plan shall be completed no later than December 15, 2021, unless otherwise agreed between the parties.
- The Remediation Plan shall be finalized by no later than February 15, 2022, unless otherwise agreed between the parties, and shall be subject to approval of the Wards before it is adopted and implemented.

...

- The Remediation Plan shall be implemented and all remediation and restoration work shall be completed no later than August 15, 2022, unless the parties agree otherwise.

...

[Emphasis added.]

[12] A process for addressing disputes with respect to the injunction was prescribed (at bullet point 11):

- If the parties are unable to agree upon either the Testing Plan or the Remediation Plan, they shall have leave to return to Court to have any specific issues in dispute resolved. I will remain seized of this matter for that purpose.

...

[13] Finally, a method of certifying the work was prescribed (at bullet point 13):

- Upon implementation of the Remediation Plan and completion of all remediation work, the consultant shall prepare and provide a report and certification to the CRD and the Wards certifying that the Contaminants attributable to the 2015 Flood and the 2020 Flood have been removed in a manner, and to a level and standard, that is compliant with the *EMA* and all applicable British Columbia regulatory standards and that the soil and vegetation have been reasonably restored as set out above. This certification must be supported by final testing results which are fully compliant with the BC *Contaminated Sites Regulation* and the *EMA*, and any other provincial policies or protocols that apply to sewage contamination testing.

[14] The following additional orders, set out in para. 314 of the reasons, were made:

> [1.] The Known Manhole and the Unknown Manhole shall be fully repaired and restored by the CRD to a grade that ensures proper operation and prevents against future sinkage. The Known Manhole and the Unknown Manhole shall be restored to a standard which ensures that water or effluent cannot in future enter or exit the

manholes from the side, or between the risers, which shall be properly sealed.

[2.] The CRD shall remove the current Backflow Preventer in the Home and shall install two functional backflow preventers both inside and outside the Home in locations in relation to the Sewer Line that best protect the Home from future flooding events. The CRD shall enter into an agreement with the Wards for the purpose of enabling the CRD to continue to maintain the new backflow preventers.

[3.] The CRD shall install a gravity overflow system with a 100,000 litre storage capacity and a high level alarm system on the Property, as recommended by Mr. Bamsey in his email to Mr. Minchau on April 6, 2015, or similar systems with comparable functionality.

[4.] The CRD shall repair the sinkholes along the Sewer Line on the Property, and ensure that the driveway is level in those locations.

[5.] The CRD shall inspect the Sewer Line on the Property and shall repair any identified deficiencies, including deficiencies associated with the sinkholes and bubbling, and shall ensure that the Sewer Line is fully operational and without defect. The CRD shall provide the Wards with any relevant videos, testing results and reports arising from the Sewer Line inspection and repair work.

[6.] The CRD shall inspect and test the Lift Station Ditch and confirm whether and to what extent it drains onto the Property. If it does drain onto the Property in whole or in part, the CRD shall effect the necessary alterations and repairs to ensure that it no longer drains onto the Property. The CRD shall provide the Wards with any relevant videos, testing results and reports arising from the Lift Station Ditch inspection and repair work.

[7.] All the foregoing repairs and installations shall be completed no later than November 1, 2021, unless otherwise agreed between the parties.

[8.] To the extent that a dispute arises between the parties with respect to the nature, extent or reasonable cost of the above repairs and/or installations, or if any of the injunctive orders granted are determined by either party to be practically impossible or clearly unreasonable to implement, I will remain seized of this matter for the purpose of resolving any such dispute.

[9.] All costs and expenses arising from, and associated with, the above orders shall be borne exclusively by the CRD.

The Appeal

[15] A notice of appeal was filed on August 30, 2021. The appellant seeks to set aside the trial judge's orders with respect to:

a. His finding that the Property remains contaminated by the 2015 and 2020 Floods and the injunctive relief ordered at paragraph 313;

b. Liability of the defendant, the District, for the 2020 Flood; and

c. The injunctive relief ordered at para. 314 at bullet points 3, 4, 5, 6, 7, and 9.

[16] It is unclear from the pleadings whether there is an appeal of the assessment of general and special damages, which were clearly assessed on the basis that there was a continuing tort. I understand damages under that head have been paid, and there is no application to stay the awards for general and special damages.

[17] The appellant appeals the orders granting all injunctive relief described in para. 313 of the judgment, and bullet points 3, 4, 5, 6, 7, and 9 of para. 314. The stay is sought in relation to all of para. 313, but only in relation to bullet points 3 and 7 of para. 314, the provisions which, when read together, call for the installation of a gravity overflow system and a high level alarm system on the Property by November 1, 2021.

The Appellant's Position

[18] The appellant says its appeal has merit; compliance with the injunction orders will cause it to suffer irreparable harm; and the balance of convenience favours the granting of a stay pending the hearing of the appeal.

Merits

[19] The appellant proposes to advance two grounds of appeal. First, it says the testing and remediation orders are founded upon a conclusion that is not grounded in the evidence: that the respondents' Property continued to be adversely affected by the presence of sewage after August 21, 2015. It will contend the trial judge reversed the onus of proof by rejecting the argument it had followed the advice or recommendations of the Ministry of Agriculture and Ministry of the Environment following the 2015 Flood because the plaintiffs called no expert evidence suggesting that approach was inappropriate.

[20] It says the trial judge wrongly concluded the evidence of "exceedances" was "arguably sufficient on its own to conclude … that there was a continuing trespass": at para. 149. Further, it says the trial judge erred in accepting the respondents' own lay evidence with respect to changes in the Property as evidence of continuing contamination.

[21] Second, the appellant says the order for the installation of a gravity overflow system and a high level alarm system ought not to have been made because that relief was not sought by the respondents, and the claim was not properly addressed at trial.

Irreparable Harm

[22] The District says if it is compelled to take the steps mandated by the injunction it will have to pay testing costs that may amount to $112,000 before its appeal is heard, and that if it is successful it will not be able to recoup those costs.

[23] It argues it will suffer irreparable harm if the respondents obtain better evidence of contamination as a result of the testing.

[24] It argues it will suffer further irreparable harm if it is obliged to pay for a remediation program (which may cost $1,000,000 if 10,000 sq/m of soil has to be removed and replaced with fill) before the appeal is heard because it will not be able to recover those costs from the respondents.

[25] Last, it argues the cost of a gravity overflow system may amount to approximately $200,000, and that cost (which will be borne by ratepayers in the Wildwood Sewer System) will not be recoverable in the event the appeal succeeds.

Balance of Convenience

[26] The appellant says little may be done to advance remediation over the winter or in the early spring, and that the respondents will not suffer any significant harm as a result of a stay order if the appeal proceeds efficiently.

The Respondents' Position

Non-Compliance

[27] The respondents say the appellant has neither hired a consulting firm nor finalized the testing plan that should have been ready by October 1, 2021. They say the appellant was in violation of the court order at the time it filed the notice of motion for this application on October 4, 2021, and it is now evident that the appellant has no plan to comply with the remedial orders to be completed by

November 1, 2021, including the completion of the installation of the gravity overflow system.

[28] The respondents say such conduct is contemptuous and should not be tolerated, particularly of government: citing, among other cases, *Carey v. Laiken*, 2015 SCC 17 at para. 58; and *Larkin v. Glase*, 2009 BCCA 321.

[29] It submits the Court should refuse to entertain the application for a stay until such time as the violations have been remedied.

Merits

[30] The respondents say the appeal is without merit. The appellant admitted negligence, trespass, and nuisance for the 2015 Flood. It sought to impose an arbitrary date to end its liability, despite failing to follow its own protocols, failing to follow government directions, and relying on an unsupported theory of remediation. They say the trial judge addressed the issue of burden of proof and correctly stated the law. The judge reviewed the evidence in detail. He found the expert evidence alone proved continued contamination, and that there was also substantial circumstantial evidence to support that conclusion.

[31] The respondents say the order granting injunctive relief regarding testing and remediation indicates that only the extent, not the existence of contamination on the site, remained undetermined at the conclusion of trial.

[32] They say replacement of the gravity overflow system was a recommendation of the appellant's own engineer. Insofar as the insufficiency of the evidence with respect to this claim is concerned, the respondents say:

> 31. The trial judge remains seized to address issues associated with the nature, extent or reasonable cost of the gravity overflow system and it is submitted that returning to the trial court is the appropriate remedy for the concerns expressed herein by the Appellant.

Irreparable Harm

Generally

[33] The respondents say there is insufficient evidence of irreparable harm. The evidence of the cost of compliance is set out in unsigned correspondence, and is only an estimate of the cost the respondents themselves would have to spend to

effect the orders. They contend the appellant has personnel, trucks and the ability to do the work which would reduce cost, and the District has not provided a cost estimate.

[34] Further, they say, there is no evidence the cost of the work ordered is not covered by insurance, or that it could not be paid out of surplus funds or a capital works fund.

Inspection

[35] The respondents say the submission that the testing could bolster the respondents' position is irrelevant, as it has nothing to do with irreparable harm arising from the granting of or refusal to grant a stay.

Remediation

[36] They argue the largest component of the estimate of the cost of compliance is disposal of contaminated materials. If there is such contamination on the Property that remains as a result of the sewage flooding, the appellant should be disposing of this material. If, as contended by the appellant, there is none, this cost will be minimal or none.

Gravity Overflow System

[37] The respondents say the gravity overflow system was recommended by the appellant's own engineers as being an appropriate measure in the circumstances, and money spent on that equipment would not be spent without justification. The District will own the equipment and will benefit from an improvement in its system, whether or not it succeeds on appeal.

Balance of Convenience

[38] The respondents say the Court should consider the harm they will suffer as a result of delay (*A Lawyer v. The Law Society of British Columbia*, 2021 BCCA 284 at para. 92; *Melcer Estate v. Boxer*, 2020 BCCA 380 at para. 65). They say they have been denied beneficial use of their land for over six years. Delaying testing of the Property until after the appeal may significantly delay their ability to use and enjoy their land, and will compound their anxiety and distress.

[39] They say the Court should bear in mind that the trial judge found the appellant to have failed to take measures required to protect their Property for years.

[40] They note it is open to the appellant to have the trial judge adjudicate upon the reasonableness of the proposed remediation plan, and there is no certainty with respect to the costs that may be imposed by compliance with that order (or that any costs will be imposed).

Response

[41] In response to the argument that non-compliance with the orders should preclude it from being heard, the District says in the two months provided by the court to retain an expert and devise an inspection plan, it has had difficulty coordinating its position with its insurer. That was necessary because the appeal had to be commenced on appropriate instructions before the stay application could proceed. It says, in the meantime, it tried to retain environmental consultants without success, and it has not intentionally defied the injunction order. It says it tried to bring on the stay application before the first deadline for compliance in late September. It says the application was brought on soon after October 1 (the first deadline imposed by the trial judge), and the delay caused no prejudice.

[42] It says it paid the damages assessed, and completed other measures called for by the judgment which were not appealed. It says this, unlike the cases relied upon by the respondents, did not display flagrant disregard for the judicial process.

Analysis

Non-Compliance

[43] As Justice Chiasson noted in *Larkin*, this Court has the discretion to permit an appeal to proceed or to refuse to do so in the face of non-compliance with an order. A court must have regard to the particular circumstances of the alleged contempt and its effect on the proper administration of justice. In my view, while the District ought to have applied more promptly for a stay, its conduct as a whole, including payment of the damages and the completion of some repair work, coupled with its attempts (although late) to locate a qualified expert do not speak to contempt. Given the strong public interest in the determination of appeals on

their merits, I am prepared to hear the application and adjudicate upon it on the merits.

Merits of the Appeal

[44] The threshold for finding there is a serious question to be tried is a low one: *Western Forest Products Inc. v. Capital Regional District*, 2009 BCCA 80 (Chambers) at para. 22, quoting *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at 337–8. The case must be "arguable": *Canadian Resort Development Corp. v. Swaneset Bay Resort Ltd.* (1998), 50 B.C.L.R. (3d) 55 (C.A.) at para. 2. That standard constrains my assessment of the merits of the proposed appeal, but still calls for some weighing of the argument advanced, even at this preliminary stage. I recognize that I am not in a position to assess the appeal as it may finally be fully articulated. My assessment of the merits is founded entirely upon the argument set out in the applicant's memorandum of argument and the oral submissions, the factums not having been filed, and my review of those materials in light of the reasons for judgment of the trial judge.

[45] Having said that, it is my considered opinion that the first ground of appeal has no apparent merit. The appellant says that the finding that the land remained contaminated as a result of the floods (which is, of course, a finding of fact) is a palpable and overriding error (not that it is an inference founded upon an erroneous appreciation of some specific evidence). The error described in the applicant's memorandum of argument is not a misapprehension of the evidence or a palpable mistake, but rather, what is described as "selective" consideration of the evidence and "building a house of cards".

[46] The only specific error alleged in the memorandum of argument is the failure "to address the fact that chloride is not a metal". The reasons refer to chloride at four places. Twice it is described as an ion (and listed separately from metals, as in para. 313 of the judgment reproduced above). In neither of the other references does the judge place particular weight upon the presence of chloride in the soil samples tested or identify it as a metal.

[47] The submissions describe neither a legal error nor an overriding error in the assessment of the evidence, but a differing view with respect to the significance of particular evidence.

[48] The following passage appears in the majority judgment in *Housen v. Nikolaisen,* 2002 SCC 33 at para. 56:

> … [T]he narrowly defined scope of appellate review dictates that a trial judge should not be found to have misapprehended or ignored evidence, or come to the wrong conclusions merely because the appellate court diverges in the inferences it draws from the evidence and chooses to emphasize some portions of the evidence over others. … [W]e are of the view that the trial judge committed no error of law … we are also respectfully of the view that our colleague's re-assessment of the evidence on this issue … is an unjustified interference with the findings of the trial judge, based on a difference of opinion concerning the inferences to be drawn from the evidence and the proper weight to be placed on different portions of the evidence.

[49] In short, in my view, because the memorandum of argument does not suggest that the trial judge in fact misapprehended or ignored evidence (with the exception of the non-reference to the fact chloride is not a metal), it sets out only a basis for coming to a divergent view with respect to the inferences that may be drawn from the evidence and an invitation to emphasize some portions of the evidence over others. In my respectful opinion, it does not describe an arguable appeal in relation to the conclusion that the trespass was continuing.

[50] The criticism of the inference drawn by the trial judge does not grapple with the fundamental problem faced by the District, as identified by the trial judge: that there was an admitted trespass and nuisance that was not addressed by any active measure, that the trespass and nuisance admittedly continued to August 21, 2015, and that there was no evidence called in support of the appellant's theory that the contamination dissipated naturally. There was evidence of contamination (such was admitted) and in the trial judge's view, "no compelling evidence adduced at trial that the Property was decontaminated by sunlight … at any … relevant time."

[51] That evidentiary problem also poses a very significant obstacle to the argument that the judge inappropriately placed a burden of proof upon the appellant. Having put sewage on the respondents' Property and thus directly and physically intruded onto the respondents' land, the District committed a tort that was actionable *per se*. Even if there was a failure to prove the extent of the contamination, that did not preclude a finding that there had been a trespass or nuisance or preclude the trial judge from granting the injunctive relief with a view

toward abating the nuisance. As the trial judge noted at para. 145, when discussing the limited evidence with respect to the presence of molybdenum on the Property: “This, of course, does not assist the CRD under the law of trespass, which is actionable *per se* once an object is found to remain on the Property, regardless of the quantity or extent of the trespass.”

[52] While there is little merit in the first ground of appeal as it is described in the limited material before me and the submissions I have heard, there is more substance to the second ground. In my view, the District has an arguable case that the manner in which the case was framed and presented precluded it from adequately addressing the claim for an injunction requiring it to build a gravity overflow system at a cost of approximately $200,000. The complaint is not fully answered by the assertion that the appellant’s own engineers considered a gravity overflow system to be appropriate or even necessary.

[53] Given that assessment of the merits of the proposed appeal alone, I would not order a stay of the injunction orders described in para. 313 of the reasons.

Irreparable Harm

[54] In any event, for the following reasons, I am of the opinion that while irreparable harm may be occasioned if the order to build the gravity overflow system is not stayed, irreparable harm is unlikely to be occasioned by the refusal to stay the orders described in para. 313 of the reasons for judgment.

[55] I give little weight to the respondents’ argument that there is inadequate evidence of the cost of compliance with the injunction orders. There is evidence, it is reasonably reliable, and it is not contradicted. It is not an answer to the evidence proffered to say the District could do the work at less cost by using its own equipment. It is not inaccurate or misleading to use estimates from private contractors to determine what it will cost the District to do the work. It may be more accurate to do so, by obtaining an independent, and presumably unbiased, assessment of costs.

[56] The District says if it is compelled to take the steps mandated by the injunction, it will have to pay testing costs that may amount to $112,000 before its appeal is heard, and that if it is successful it will not be able to recoup those costs. The respondents admit that they cannot afford to test their Property. That is

evidence that they will not be able to repay the investigation costs if required to do so. It is accurate to say that money will be spent and may not be recovered in the event the District is successful on appeal.

[57] In my view, however, the respondents are correct to say that success on appeal is unlikely unless testing demonstrates little or no contamination. The expense incurred in the interval between the trial and the appeal may produce a report that leads to little or no remediation expenses being payable. Considering only the irreparable harm that will result if a stay is not granted, and the appeal ultimately succeeds, it is difficult to see how investigation can cause harm to the appellant. In that event, the expense of testing will have benefited the appellant.

[58] The appellant argues it will suffer irreparable harm if the testing confirms the presence of extensive contamination relating to the sewage flood. In that case, the appellant wishes to bring new evidence on the appeal. That is an argument that it will suffer irreparable harm if the stay is not granted and the appeal fails as a result of new or fresh evidence of the respondents' damages. I have difficulty seeing how, in any circumstance, the emergence of the truth can be characterized as irreparable harm, or how an equitable remedy can be invoked to prevent the result envisioned.

[59] The District argues it will suffer further irreparable harm if it is obliged to pay for an expensive remediation program (which may cost $1,000,000 if 10,000 sq/m of soil is removed and replaced with fill) before the appeal is heard, because it will not be able to recover remediation costs from the respondents. That expense will only be borne in the event the inspection or testing confirms the presence of contamination related to the sewage floods, and a remediation plan is agreed upon or ordered by the trial judge. Whether such an order will be made and, if so, what cost it might entail, are matters of speculation. There is now no order to pay particular remediation expenses. If I were of the opinion that the appeal of the injunction orders had merit, I would, in any event, dismiss the application for a stay of the injunction with respect to remediation, with leave to renew it once the scope of the remedial work required (if any) is determined and the costs are estimated.

[60] Last, the District argues that the cost of a gravity overflow system may amount to approximately $200,000, and that cost (which will be borne by ratepayers in the Wildwood Sewer System) will not be recoverable in the event the

appeal succeeds. Refusing to stay that order, in my view, does expose the District to irreparable harm by requiring it to spend money on what it may consider to be a low-priority project, that it might prefer to spend on a project with higher priority. It is not a sufficient answer to say the District will own the system. If it is possible to avoid erroneously interfering in the setting of municipal spending priorities, the Court should do so.

[61] Last, on this question, I should note that the respondents may suffer irreparable harm as a result of a stay of the orders described in para. 313 of the reasons. In nuisance cases where the nuisance is continuing and an injunction is sought, the damage award will vary depending upon whether an injunction is granted or not. In this case, damages have been assessed on the basis that the nuisance will be abated by August 2022 at the latest. Delay in abatement without reassessment of the damages will cause the respondents to live longer with the nuisance without compensation for the delay: *Rombough v. Crestbrook Timber Ltd.,* (1966), 57 D.L.R. (2d) 49 (B.C.C.A.). As damages may not be revisited, they have been paid, that is a risk of harm that is irreparable.

Balance of Convenience

[62] Last, in my view, the balance of convenience does not favour the granting of a stay of the orders other than the order to build the gravity overflow system.

[63] That conclusion follows from my view that the only certain cost of compliance that the District will avoid as a result of a stay is the estimated $112,000 required to conduct testing that will be of value to all parties. Delaying that testing will set back the whole schedule for remediation, and thereby impose a threat of irreparable harm to the respondents.

Disposition

[64] For those reasons, I would stay only the order requiring the District to install a gravity overflow system with a 100,000 litre storage capacity, and a high level alarm system on the Property, or a system with comparable functionality, by November 1, 2021.

[65] The stay will remain in effect until the hearing of the appeal, or until further order of this Court. Costs of the application will be in the cause.

“The Honourable Mr. Justice Willcock”