IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lloyd v. Johnson,*
2024 BCSC 355

Date: 20240229
Docket: S232418
Registry: Vancouver

Between:

David Aleth Lloyd, Michael David Lloyd and Joanne Mary Lloyd
Plaintiffs

And

Darren James Johnson, Karen Arlene Johnson, Kyle Johnson and Dyna Contracting Management Ltd.
Defendants

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiffs:	S.J. Evans M. Hanuman, Articled Student
Counsel for the Defendants Darren James Johnson and Karen Arlene Johnson:	D. Moseley
Place and Date of Trial/Hearing:	Vancouver, B.C. November 28–29, 2023
Place and Date of Judgment:	Vancouver, B.C. February 29, 2024

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Introduction

[1] This action concerns a drainage dispute between adjoining property owners and arising from two properties in Langley. The plaintiffs, Michael David Lloyd and Joanne Lloyd (collectively, the "Lloyds), and David Aleth Lloyd, and the three individual defendants, Darren James Johnson, Karen Arlene Johnson (collectively, the "Johnsons"), and their son, Kyle Johnson, are neighbours. Where appropriate, I will refer to the parties by their first names without meaning any disrespect.

[2] The relationship between the Lloyds and the Johnsons has been fraught with conflict. This is the second time the Lloyds have sued the Johnsons over issues arising from their adjoining properties. The first action was with respect to an access road into both properties.

[3] In these reasons I will refer to the properties as the "Lloyd Property" and the "Johnson Property".

[4] Prior to 2004, the Lloyd Property was at a higher elevation than the Johnson Property. As a result, the Lloyd Property drained into and through the Johnson Property through a series of swales and ditches which the Lloyds say were watercourses. The then owner of the Johnson Property obtained a soil deposit permit from the Township of Langley (the "Permit" and the "Township"), pursuant to which fill was added to the Johnson Property thereby increasing its elevation. According to the Lloyds, the fill also eliminated the watercourses.

[5] It was a condition of the Permit that the addition of the fill not affect the drainage of neighbouring properties.

[6] The parties disagree about the interpretation of this provision of the Permit. The Lloyds and their experts interpret it to mean that the addition of fill was not to affect the historical pattern of drainage from the Lloyd Property onto and through the Johnson Property. The Johnsons interpret it to mean that the addition of fill was not to result in drainage from the Johnson Property onto the Lloyd Property or onto other adjoining lands. That disagreement is at the heart of this dispute.

[7] In order to comply with the condition of the Permit, and to preserve the historical north-south drainage path, the Lloyds and the then-owner of the Johnson Property, installed drainage pipes to take surface water from the Lloyd Property through the Johnson Property, terminating in a municipal drainage ditch. The parties disagree about whether the installed drainage system was inspected and approved by the Township.

[8] According to the Lloyds, since the Johnsons purchased the property, the Johnsons have constructed buildings and paved large areas of it, thereby affecting their own drainage.

[9] In 2015, the Johnsons complained that drainage from the Lloyd Property flooded the basements of their home and Kyle's home and demanded that the Lloyds stop draining into and onto their property.

[10] Beginning in 2020, the Johnsons began blocking the Lloyds' drainage entirely, first through the use of a plug and then by the installation of a shut-off valve (the "Shut-off Valve") on the drainage pipe. The Lloyds say that the use of the plug, and the closure of the Shut-off Valve, has resulted in repeated seasonal flooding of the Lloyd Property as there is nowhere for drainage to go and no practical alternative drainage option exists. The Lloyds say they have suffered, and continue to suffer, irreparable harm as a result of this repeated flooding.

[11] In their notice of application, the Lloyds seek a mandatory injunction requiring the Johnsons to permanently leave the Shut-off Valve in an open position, and certain other enforcement relief, until judgment in this action.

[12] The Johnsons take the position that the Lloyds do not have the right to offload drainage from their property to the Johnson Property.

[13] According to the Johnsons' expert, the surface water drainage from the Lloyd property has increased by about 400 percent since 1999. The Johnsons say that they are not required to receive the increased drainage from the Lloyd Property and

that the increased drainage has caused them damage, loss, and harm, that is likely to continue, if they are required to open the Shut-off Valve.

[14] The Johnsons say that installing the Shut-off Valve was a reasonable step to protect their property from flooding. Their position is that the Lloyds are the authors of their own misfortune, developing a complex, but inadequate, stormwater system which attempts to transfer the flood risk from the Lloyd Property to the Johnson Property without a right to do so and in breach of the Township's standards. Further, they say that the Lloyd Property floods even with the Shut-off Valve open.

[15] The Johnsons oppose the injunction relief sought and apply for a summary dismissal of the action.

[16] At the hearing, I advised the parties that, in my view, this dispute is not suitable for summary dismissal. The issues are too complex. The parties have retained experts who have produced a total of five reports and the reports conflict. The parties have sworn to different versions of the facts. There will be a need for historical evidence about the approval process for the Permit and discussions with the Township, to which neither the Lloyds or the Johnsons were a party. Three agencies were involved in the issuance of the Permit and, presumably, have relevant files. There may be a need to add a previous owner of the Johnson Property as a party. Complete disclosure, including possible disclosure from third parties, and examinations for discovery will be necessary.

[17] As a result, these reasons deal only with the Lloyds' injunction application.

The Properties and Ownership

The Lloyd Property

[18] Michael and Joanne are married and live in their home on the Lloyd Property. The third plaintiff, David, is Michael's father. He is registered on title to the Lloyd Property but does not live there.

[19] The Lloyd Property is located at 7710 232nd Street, Langley, BC. It is approximately 7.8 hectares and is located on the east side of 232nd Street between Highway 1 and Rawlinson Crescent. It is bounded on the east by the CN Rail ("CNR") line and by rural residential/agricultural properties on the north, west, and south.

[20] The Lloyds reside in a house on the west side of the Lloyd Property (the "Lloyd Residence"). The east side of the Lloyd Property features a pond (the "Lloyd Pond"), a Christmas tree farm (the "Tree Farm"), and septic tanks and a septic field that serve the Lloyd Property and two neighbouring properties (collectively, the "Septic System").

[21] The Lloyd Property is within the Agricultural Land Reserve ("ALR").

The Johnson Property

[22] Darren and Karen are married. The Johnsons, together with Gordon and Laura Schlechtleitner (collectively, the "Schlechtleitners"), purchased the Johnson Property on about January 21, 2005.

[23] The Schlechtleitners lived on the Johnson Property from June 2005 until 2011, when they transferred sole title to the Johnsons. The Johnsons moved onto the property with their family in about September 2005. They built and live in a home on the property, and Kyle and his family live in another home that was built by the Schlechtleitners. It does not appear that Kyle is an owner of the Johnson Property although, at one point, Darren said that he was.

[24] The Johnson Property is located at 7684 232nd Street, Langley, BC. It is approximately 5.4 hectares and is located on the east side of 232nd Street between Highway 1 and Rawlinson Crescent. It is bounded on the east by the CNR line and by rural residential/agricultural properties on the north, west, and south.

[25] The entrance to the Johnson Property is from the west, off 232nd Street via an access road (the "Access Road") that runs from 232nd Street and crosses over lands

owned by Ballan Investments Ltd. and lands owned by Sergio Balducci, William Stark, and Cynthia Stark. The Lloyd and Johnson properties share a property line.

[26] On the first 1.29 hectares of the Johnson Property, there are two homes, a detached garage, and a barn/office/storage building. The Johnsons say that the remaining 4.11 hectares are used for hay farming. The Johnson Property is also in the ALR.

[27] The Lloyds disagree with the Johnsons' description of the use of their property. In his Affidavit #2, Michael says that the Johnson Property is the main location of Cantera Management Group, a large construction company with many employees/contractors, equipment, trucks, containers, and trailers. He says that, at times, 40–50 vehicles come and go from the Johnson Property during the day. Michael says that the third defendant, Dyna Contracting Management Ltd., also operates out of the Johnson Property. It is a land preparation/excavation-type business. Heavy equipment and dump trucks are regularly at the Jonson Property.

[28] Attached to Michael's Affidavit #2 is a copy of Karen's application to the Township to permit the outdoor storage of scaffolding on a small portion of the Johnson Property. Township staff prepared a September 25, 2023 report to the Mayor and Council indicating that outdoor storage of scaffolding is not considered a farm use by the Agricultural Land Commission (the "ALC"). According to Michael's affidavit, Council rejected the application.

The Access Road Dispute

[29] In the Johnsons' written submissions on this application, 18 paragraphs refer to an access road dispute involving the Lloyds and the Johnsons and other neighbours (the "Access Road Dispute"). The Access Road Dispute is the subject of another action.

[30] The Access Road Dispute was the primary subject of Darren's Affidavit #2. The submissions suggest that information about the Access Road Dispute was included for two purposes. The first was to provide some of the history of the

relationship between the parties and to establish “the unlikelihood that the Johnsons would consent, agree, or acquiesce to the Lloyds offloading drainage from their property onto the Johnson Property”. The second was to indicate the “unreasonable positions and litigious nature of the Lloyds”.

[31] The pleadings and affidavits filed in the Access Road Dispute are not relevant to this action and were unnecessarily included. The Lloyds do not suggest that they had an agreement with the Johnsons pursuant to which the Johnson Property receives drainage from the Lloyd Property. Rather, they say that the Lloyd Property historically and naturally drained through the Johnson Property and that it was the addition of fill to the Johnson Property that altered the natural drainage. The Lloyds say that the drainage system was installed to comply with a condition of the Permit.

[32] The Lloyds say that agreements and drainage arrangements were in place before the Johnsons bought the property and that it is the Johnsons’ inappropriate installation of a plug, and closure of the Shut-off Valve, that has resulted in the flooding of the Lloyd Property.

[33] Further, the Johnsons’ belief that the Lloyds are unreasonable and litigious is not relevant to the issues before me. I will not consider the Access Road Dispute further.

Drainage on the Properties

[34] In August 2000, when the Lloyds bought the Lloyd Property, and until fill was added to the Johnson Property (as discussed below), surface water runoff on the Lloyd Property naturally drained, for the full length of the property line of the Lloyd Property, to the then-undeveloped Johnson Property. The main flow of runoff was channelled into ditches/swales oriented from north to south.

[35] The Johnson Property slopes downwards from west to east. The majority of the accumulated surface drainage flows into a pond on the far east side of the Johnson Property (the “Johnson Pond”). The homes on the Johnson Property have

sumps that discharge perimeter basement drainage to the Johnson Pond as the primary storm drainage for the Johnson Property.

The Application to Place Fill

[36] In 1998, the Balduccis, who then owned the undeveloped Johnson Property, applied, pursuant to the *Soil Conservation Act*, R.S.B.C. 1996, c. 434, to the ALC and the Township, to place fill on the Johnson Property and on a neighbouring property to the west (the "Application").

[37] The ALC and the then Ministry of Agriculture, Fisheries and Food (the "Ministry") reviewed the Application. On November 12, 1998, Janine Nyvall, the Ministry's Water Management Engineer, wrote to the Balduccis to advise them of their drainage options. Ms. Nyvall suggested, among other things, that the Balduccis install an interceptor ditch to the north of the area to be drained to intercept water from higher elevations.

[38] On April 21, 1999, the ALC informed the Township that it approved the Application subject to a number of conditions, including that drainage was to be controlled by ditches, drains or intercepts as suggested in the Ministry's November 12, 1998 letter.

[39] Following the ALC's approval, pursuant to Township of Langley, Bylaw No. 2871, *Township of Langley Soil and Other Material Deposit Regulation Bylaw* (1993) (as amended) (the "Bylaw"), the Township issued the Balduccis a one-year Soil Deposit Permit #SO 0216 (the "Permit"). The exact date the Permit was issued is not entirely clear. The Permit authorized the addition up to 20,000 cubic metres of fill at the Johnson Property. The Permit was conditional on certain terms, including that:

a) The deposit of fill must not, in any way, interfere with the above or below ground drainage pattern of adjoining lands and must not cause the ground water table to rise on adjoining lands so as to cause flooding or malfunctioning of any sewage disposal system. Groundwater and surface run

off must not drain into adjoining lands at greater rates after commencement than prior to the commencement of fill operations; and

b) All fill must be deposited in full compliance with the conditions as stipulated in the ALC's April 21, 1999 letter.

[40] The Permit did not specifically refer to the installation of a drainage system.

[41] The Balduccis did not add fill pursuant to the Permit. The one-year permit was renewed annually.

[42] In May 2021, the Balduccis sold the Johnson Property to Dave Stenberg who assumed their rights and obligations under the Permit. He added the fill and, in addition, excavated sand to create the Johnson Pond.

[43] On a date that is not clear on the record before me, but appears to have been sometime in 2004, Mr. Stenberg confirmed to the Township that the permitted volume of fill had been placed on the Johnson Property. By letter of July 27, 2004, the Township advised Mr. Stenberg that he needed to arrange for an inspection of the completed works, provide the final amount of fill deposited on the Johnson Property, and provide a final lot-grading and drainage plan. It is not clear whether Mr. Stenberg provided the lot-grading and drainage plan to the Township.

[44] The Lloyds say that in or about 2004, to comply with the Permit requirement that drainage of neighbouring properties not be affected by the addition of the fill, Mr. Stenberg installed drainage pipes on the Johnson Property, including:

a) a 16-inch drainage pipe running from the Lloyd Property to the Johnson Pond ("Drainage Pipe D"); and

b) a drainage pipe, 16 inches at inlet and approximately 24 inches at outlet, running from the Johnson Pond to a Township drainage ditch south of the Johnson Property ("Drainage Pipe F").

[45] On the Lloyd Property, Drainage Pipe D was connected to a collection point fed by catch basins and pipes installed by Michael so that water could continue to drain from north to south. The series of pipes and catch basins installed by Mr. Stenberg and Michael on the Lloyd and Johnson Properties constitute the current drainage system (the "Drainage System"). I note that the Johnsons say that the Lloyds have since installed additional catch basins.

[46] In about 2004, Michael, Mr. Stenberg, and Phil Lemay, a Township inspector, attended a joint site inspection for the purposes of inspecting the results of the fill activities and the Drainage System. Mr. Lemay inspected the Drainage System on both properties, from north to south. Michael confirmed for Mr. Lemay that he was satisfied with the Drainage System. He understood that the Drainage System would allow for surface water to continue to drain from the Lloyd Property so that new drainage works on the Lloyd Property would not be required.

[47] On February 20, 2007, by letter, the Township confirmed that the fill project at the Johnson Property was satisfactorily completed. The letter said that Mr. Stenberg would "remain responsible for any adverse effects caused by the placement of the fill upon adjacent lands".

[48] The Johnsons assert that no drainage plan was ever filed with the Township for the Lloyd Property, and Darren says that he believes that the Drainage System was installed without Township approval or without following the usual steps. He suggests that the Township proceeded on a misunderstanding of the nature and extent of the Drainage System on the Lloyd Property.

[49] The Permit was not registered against title to the Johnson Property.

Changes to the Johnson Property

[50] The Lloyds describe changes to the Johnson Property since the Johnsons bought it in 2005, and after the installation of the Drainage System by Mr. Stenberg, including:

a) construction of three detached homes and other buildings;

b) construction of new paved and gravel parking areas and driveways;

c) installation of a backyard swimming pool and equipment room;

d) addition of additional fill; and

e) construction of a berm next to the CNR tracks.

[51] The Johnsons say that there are only two detached homes on the Johnson Property. They also say that when they bought the Johnson Property, Mr. Stenberg did not advise them of any agreement he had with the Lloyds with respect to drainage from the Lloyd Property to the Johnson Property. They were also not advised of any condition placed by the Township or the ALC, or any other municipal or similar authority, that required them to accept drainage from the Lloyd Property.

[52] The Johnsons say that there is no easement, agreement, permit, or obligation that requires them to provide for, or accept, drainage from the Lloyd Property. They submit that the Permit bound Mr. Stenberg, not subsequent owners of the Johnson Property.

The Drainage Dispute

[53] On March 2, 2016, the Johnsons' lawyer wrote to the Lloyds alleging that, during a period of heavy rainfall on February 15, 2016, the Johnson Pond was unable to handle drainage from both the Johnson Property and the Lloyd Property. As a result, the Johnson Pond "overflowed causing a back-up of water and [flooded] the basements of the houses on the Johnson Property". He wrote that the Johnsons did not consent or agree to drainage being directed from the Lloyd Property onto the Johnson Property and requested that the Lloyds abandon their use of the Drainage System.

[54] In response, the Lloyds denied responsibility for the Johnsons' basement flooding and explained that the Drainage System was a requirement of the Permit. The Johnsons rejected that they had any obligation to maintain the Drainage System.

[55] On or about April 18, 2016, the Township issued a warning letter to the Johnsons stating that it had come to its attention that the Johnsons had unlawfully deposited soil and/or other material on the Johnson Property and that they might be planning to unlawfully block drainage flowing across the Johnson Property from the Lloyd Property. The Township also advised that:

a) as the owners of the Johnson Property, the Johnsons were responsible for ensuring that the historical and natural drainage patterns and flows in the area surrounding the Johnson Property were maintained;

b) blocking of drainage from the Lloyd Property was not permitted for several reasons, including that it would be a breach of the Permit and it would be a breach of the Bylaw if the Johnsons proceeded without first obtaining written approval from the Township;

c) in order to retain the material originally deposited on the Johnson Property, they would need to retain the Drainage System and controls approved under the Permit;

d) if they did not retain the Drainage System and controls, they might need to remove all of the original material pursuant to a new permit under the Bylaw and deliver a new drainage plan; and

e) if they unlawfully blocked drainage flowing from the Lloyd Property, they would potentially be subject to an enforcement action by the Township and bylaw offence notices containing fines of up to $500 per day.

[56] The Township has taken no further steps with respect to this matter. The Johnsons say that the Township's letter is based on a misunderstanding of the facts and that the Township is now treating this matter as a civil dispute.

[57] The Johnsons say that the existence of Drainage Pipe D was not disclosed to them when they bought the Johnson Property and they did not become aware its existence until years later. The Johnsons say that currently, the Drainage System

consists of six manholes, 18 catch basins, and approximately 2,800 lineal feet of underground piping that catches, collects, and directs drainage from the Lloyd Property to the Johnson Property. The Johnsons assert that the Drainage System, in effect, makes the Johnson Property servient to the Lloyd Property with respect to drainage, without an approved drainage plan, an easement, or an agreement.

[58] If Mr. Stenberg should have disclosed the existence of Drainage Pipe D, or the Drainage System, the Johnsons' dispute is with him. He is not a party to this action.

[59] In any event, the Johnsons describe a number of significant changes to the Lloyd Property since the Johnsons bought the Johnson Property. They say that the Lloyd Property has been transformed from a farmed state to cleared, commercial premises, thereby increasing the drainage from it to the Johnson Property.

The 2020 Flood

[60] Beginning in early November 2020, the Lloyd Property began to flood (the "2020 Flood"). The Lloyds investigated and discovered that the Johnsons had plugged Drainage Pipe D. When asked, the Johnsons refused to unplug Drainage Pipe D. Instead, the Lloyds say that the Johnsons dug a trench on the Johnson Property so that floodwater coming from the Lloyd Property would bypass Drainage Pipe D. According to the Michael's Affidavit #1, the Johnsons also added gravel to a driveway on the Johnson Property (the "Johnson Driveway"), thereby creating a berm which further blocked surface drainage from the Lloyd Property and resulted in additional flooding of the Lloyd Property.

[61] Darren does not dispute that he placed a balloon-type plug at the end of Drainage Pipe D where it drains into the Johnson Pond. The plug was not permanent. He installed it during rain events. In about December 2020, Darren forgot to install it, and Kyle's basement flooded. As a result, he replaced the plug with a Shut-off Valve in about January 2021. Darren says that both the plug and the Shut-off Valve were protective measures to prevent flooding of the two homes on the Johnson Property.

[62] The severity of the 2020 Flood increased throughout November. To mitigate its impact, the Lloyds pumped floodwater approximately 800 feet west to a drainage ditch. This impacted a neighbouring property, resulting in complaints. The Lloyds continued to use pumps from the 2020 flood into the summer of 2021.

[63] As a further result of the 2020 Flood, vehicles travelling to and from the Tree Farm could not use the designated road and had to drive across a portion of the Lloyds' lawn, resulting in damage. Eventually, in 2021, the Lloyds constructed a new access road to the Tree Farm due to the flooding.

[64] The 2020 Flood caused the water level in the Lloyd Pond to rise approximately two metres from its historical elevation, inundating trees at the Tree Farm and resulting in a loss of approximately 33 trees.

[65] Finally, the Lloyds say that the 2020 Flood damaged the Septic System.

The 2021 Flood

[66] Efforts were made to try and resolve the drainage dispute, and, on or about August 12, 2021, Kyle emailed his father-in-law advising that the Johnsons had unblocked Drainage Pipe D for good. In turn, his father-in-law told a mutual friend of his and the Lloyds, who was assisting in trying to resolve the drainage dispute. At the time, based on an email they were copied on from Darren, the Lloyds understood that Kyle was an owner of the Johnson Property. Relying on what they had been told about Drainage Pipe D being unblocked, the Lloyds put their pumps and hoses away. As a result, the Lloyds were unprepared for the next flood.

[67] It is not clear whether the Johnsons ever opened the Shut-off Valve as Kyle said. In any event, it was closed in November 2021. Beginning on or about November 14, 2021, the Lloyd Property began to flood (the "2021 Flood"), and the Lloyds were unprepared. Floodwater on some areas of the Lloyd Property rose to almost knee level, substantially above the level of the Lloyds' septic tank lids, thereby compromising the Septic System.

The 2022 Flood

[68] On or about October 25, 2022, the Lloyds became aware that the Johnsons had, again, closed the Shut-off Valve. Beginning on about that day, as a result of the closure, the Lloyd Property began to flood (the “2022 Flood”). The 2022 Flood rendered the entrance to the Lloyd Property impassable.

[69] By December 27, 2022, the Lloyds’ septic tanks had been submerged underwater for more than 24 hours, and the septic tank pump had to be manually switched off to prevent it from burning out beyond design limits. The pump was kept offline for more than 48 hours, and the Lloyds added an additional pump to bring the flood level on the Lloyd Property to below the Septic System. The Lloyds were unable to use their toilets, bathe, or cook in their home.

[70] On or about December 30, 2022, the Johnsons opened the Shut-off Valve, and the 2022 Flood gradually subsided.

Impact of the 2020, 2021, and 2022 Floods on the Lloyds

[71] According to the affidavits filed by each of the Lloyds, the repeated flooding of the Lloyd Property detrimentally affected them resulting in:

a) unsafe conditions;

b) lost sleep, missed work, and a compromised ability to fulfill work duties due to lack of sleep;

c) feelings of depression, anxiety, anger, helplessness, humiliation, and frustration;

d) inability to use the bathroom, bathe, or make food at home during periods where the Septic System needed to be shut off due to flooding;

e) inability to leave the Lloyd Property unattended while the pumps are on, or take winter vacations when flooding is likely to occur;

f) added strain on their marriage;

g) an inability to market and sell the Lloyd Property; and

h) additional costs, including for purchasing and replacing pumps and hoses and legal and consultant fees.

[72] Currently, the Lloyds use four pumps to mitigate the flooding of the Lloyd Residence. The main pump is in the catch basin near the Lloyd Residence. It triggers on and off automatically. The other three pumps are manually turned on and off. If the first pump becomes overwhelmed, Michael turns on the other three. In a heavy rain event, with the Shut-Off Valve closed, the four pumps become overwhelmed, and Michael needs to shut off the Septic System.

[73] In addition, the Lloyds have two pumps at the east end of the Lloyd Property, pumping out of the Lloyd Pond. Each of those pumps requires 800 feet of hoses, many of which have been replaced due to damage.

Drainage Investigations

[74] In 2020, the Lloyds retained hydrogeologist, Kathy Tixier, with Active Earth Engineering Ltd., to review the current and historical drainage on the Lloyd Property and the Johnson Property, and to recommend potential drainage options. She prepared a November 13, 2020 Preliminary Hydrologic/Drainage Investigation Report ("Active Earth Report #1") in which she opines, among other things, that:

a) historical drainage conditions, prior to the fill activities on the Johnson Property, were characterized by surface runoff and shallow groundwater flow directed from the Lloyd Property onto the Johnson Property;

b) it is unlikely that the addition of gravel fill to the Lloyd Property caused the flooding of the Johnsons' basement in February 2016; and

c) blocking Drainage Pipe D caused flooding of the Lloyd Property and could cause the malfunction of the Septic System.

[75] The Lloyds provided a copy of Active Earth Report #1 to the Johnsons, who responded that they would conduct their own investigation.

[76] At the Lloyds' request, Ms. Tixier, with the assistance of Wedler Engineering Inc. ("Wedler"), investigated potential alternative drainage solutions. She prepared a second report, dated June 28, 2021 ("Active Earth Report #2"). In it, Ms. Tixier opines among other things, that:

a) the flooded area of the Lloyd Property is in a topographic depression, with the land surface rising to the east and to the west;

b) any redirection of collected stormwater along the east-west axis would need to be lifted by pumping;

c) an interception swale and a 500 square metre retention pond could be designed to intercept and reroute runoff from storm events, but there appears to be no feasible option for the retained water - other options are infeasible, challenging or prohibited; and

d) Drainage Pipe D should be left unobstructed, "as it remains the most practical and cost-effective solution".

[77] Shortly after receiving the Active Earth Report #2, the Lloyds provided a copy to the Johnsons.

[78] The only alternative drainage solution that has ever been proposed by the Johnsons is to direct drainage from the Lloyd Property to the ditch next to the CNR line.

[79] CN has expressly told the Lloyds that they are not permitted to send any further drainage to the CNR ditch.

[80] After Ms. Tixier became unavailable, the Lloyds retained Wedler to prepare an expert opinion report and a chronology report. The chronology report was prepared by an engineer, Aaron Chen, on August 24, 2023, and the expert opinion

report was prepared by a civil engineer, Jonathan Funk, on September 13, 2023 (the "Wedler Report"). In the Wedler Report, Mr. Funk opines:

a) surface runoff from the Lloyd Property historically drained south across the Johnson Property;

b) alterations to the Lloyd Property since 2004 have had a minimal effect on the Johnson Property's drainage;

c) addition of fill by Mr. Stenberg and by the Johnsons created an embankment that reduced the natural and historic runoff path from the Lloyd Property to the Johnson Property;

d) some surface runoff from the Johnson Property outlets onto the Lloyd Property by way of the Drainage System, meaning that when the Shut-off Valve is closed and the Lloyd Property floods, a portion of the floodwaters will emanate from the Johnson Property;

e) closure of the Shut-off Valve deprived the Lloyd Property of its only remaining continuation of the historical drainage paths and caused the 2020, 2021, and 2022 Floods;

f) if the Shut-off Valve remains closed, flooding on the Lloyd Property will be perpetuated indefinitely;

g) it is highly unlikely that drainage from the Lloyd Property caused or contributed to the Johnsons' basement flooding in February 2016;

h) the Johnsons' flooding was likely caused by issues relating to the addition of impermeable surfaces on the Johnson Property and/or issues with the construction of the Johnsons' basements; and

i) the Drainage System is the only practical drainage path for the Lloyd Property.

[81] In response to the Active Earth Reports #1 and #2, and to the Wedler Report, the Johnsons retained LaCas Consultants Inc. to prepare an expert report (the "LaCas Report"). Brian LaCas, a hydrotechnical engineer, prepared a report on November 16, 2023, in which he opined that:

a) the change in peak runoff from the Lloyd Property onto the Johnson Property from 1999 to 2022 is about 400 percent; and

b) stormwater storage facilities are required to store the difference between pre- and post-development flows, measured from 1999 to 2022, and that stormwater storage facilities should be constructed on the Lloyd Property. He described the Drainage System as "more representative of an urban stormwater system than rural farm drainage using open ditches and ponds" and that the Drainage System does not meet current standards.

[82] Mr. LaCas disagrees with the opinions in the Active Earth Reports #1 and #2 and in the Wedler Report.

[83] The Johnsons submit that the LaCas Report should be preferred over the Active Earth Reports #1 and 2 and the Wedler Report because Mr. LaCas is a senior hydrotechnical engineer, with over 38 years of experience, and his main area of expertise is natural hydrological hazard assessment, hydrological and hydraulic modeling, and hydraulic design.

[84] In contrast, the Johnsons submit that Ms. Tixier is a hydrologist who deals with soils/groundwater management, water supply/treatment/conservation, and geological engineering. She is not an expert in drainage and flooding or designs to deal with groundwater. Further, Mr. Funk is a consulting engineer who is also not an expert in drainage or flooding.

[85] In his report, Mr. LaCas says that he used 1999 as the starting point of his analysis of increased drainage from the Lloyd Property as satellite imagery indicates that, at that time, both properties were rural in nature. In my preliminary view, which is not binding on the trial judge, the appropriate time to consider drainage patterns is

when fill was added to the Johnson Property in 2004 or later. To that point, the Johnson Property was swampy and undeveloped. The Lloyd Property had been developed to some extent. It was then that the ALC and the Township considered the Permit application and the impact that granting it could have on adjoining properties. The Permit did not consider the drainage when both properties were rural. However, on this application, it is not possible to assess the expert evidence in the way counsel suggests; cross-examination is required.

The Proceedings

[86] On March 24, 2023, the Lloyds filed a notice of civil claim seeking, among other things, a permanent injunction requiring the Johnsons to remove the Shut-off Valve, an easement over the Johnson Property allowing for maintenance of the Drainage System, and damages.

[87] The Lloyds' claim is based in nuisance, negligence, and proprietary estoppel.

[88] Two responses to civil claim were filed: one on behalf of Darren, Karen, and Kyle Johnson; and the other on behalf of Dyna Contracting Management Ltd.

[89] Examinations for discovery have not yet been conducted. It is not clear that all documentary discovery is complete. Presumably, there are relevant records with the ALC, the Ministry, and the Township. No applications for records in the possession of others have been brought.

[90] Mr. Stenberg has not been added as a third party by the Johnsons, and it does not appear that documentary disclosure has been sought from him. According to Michael, he has made unsuccessful attempts to contact Mr. Stenberg.

[91] In this application, as set out in the introduction, the Lloyds seek a mandatory injunction compelling the Johnsons to open the Shut-off Valve and a prohibitory injunction restraining the Johnsons from otherwise impeding the Lloyd Property from draining to the Johnson Property.

The Injunction Application

[92] In this case, counsel for the Lloyds concedes that what is being sought is a mandatory interlocutory injunction. I agree. As explained in Robert Sharpe's text, *Injunctions and Specific Performance* (Toronto: Canada Law Book, 2019) (loose-leaf updated Nov. 2019, release No. 28) at para. 1.10:

> A mandatory injunction is one which requires the defendant to act positively. A mandatory injunction may be given to remedy past wrongs and require the defendant to undo some wrong he or she has committed. Such orders are restorative in nature, requiring the defendant to take whatever steps are necessary to repair the situation in a manner consistent with the plaintiff's rights ...

[93] In the circumstances of this case, what the Lloyds seek is that the Johnsons undo what they have done by restoring the Shut-off Valve to the open position.

The Test for an Injunction

[94] The parties do not dispute the test for granting an injunction.

[95] The Court's authority to grant an injunction comes from s. 39 of the *Law and Equity Act,* R.S.B.C. 1996, c. 253, R. 10-4 of the *Supreme Court Civil Rules*, and the Court's inherent jurisdiction. Section 39(1) of the *Law and Equity Act* provides:

> 39 (1) An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

[96] As set out in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [*CBC*]; *British Columbia (Attorney General) v. Wale*, 9 B.C.L.R. (2d) 333, 1986 CanLII 171 (C.A.) [*Wale*], aff'd [1991] 1 S.C.R. 62, 1991 CanLII 109; and *RJR Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, 1994 CanLII 117 [*RJR MacDonald*], there are three requirements for granting a mandatory interlocutory injunction:

a) The applicant must demonstrate a strong *prima facie* case that it will succeed at trial.

b) The applicant will suffer irreparable harm if the injunction is not granted.

c) The balance of convenience favours granting the injunction.

[97] The *RJR MacDonald* Test is not applied rigidly or formulaically because the requirements, or criterion, are a judicial expression of the statutory authority in s. 39(1) of the *Law and Equity Act: Tracy v. Instaloans Financial Solutions Centres (B.C.) Ltd.*, 2007 BCCA 481 at para. 33.

[98] The fundamental question in each case is whether granting the injunction is just and equitable in all the circumstances: *Wale* at para. 52.

Analysis

[99] In *CBC*, Justice Brown discussed what is meant by a strong *prima facie* case. He wrote:

> [17] … Courts have employed various formulations, requiring the applicant to establish a "strong and clear chance of success"; a "strong and clear" or "unusually strong and clear" case; that he or she is "clearly right" or "clearly in the right"; that he or she enjoys a "high probability" or "great likelihood of success"; a "high degree of assurance" of success; a "significant prospect" of success; or "almost certain" success. Common to all these formulations is a burden on the applicant to show a case of such merit that it is very likely to succeed at trial. Meaning, that upon a preliminary review of the case, the application judge must be satisfied that there is a strong likelihood on the law and the evidence presented that, at trial, the applicant will be ultimately successful in proving the allegations set out in the originating notice.

[100] I find that the Lloyds have not met the high standard of demonstrating that there is a strong likelihood on the law and the evidence that they will ultimately be successful in proving their allegations. I cannot say that the Lloyds' position is very likely to succeed. My preliminary assessment does not bind the eventual trial judge as the evidentiary record before them will include additional material and they will have the benefit of assessing the parties' and the experts' credibility.

[101] Determinations will have to be made at trial based on the following principles regarding drainage, developed in a number of cases, and summarised below.

The Claim in Nuisance

[102] The parties agree that a private nuisance is made out where the defendant interferes with their neighbour's use or enjoyment of land in a way that is both substantial and unreasonable. The interference may come from either causing physical injury to property or by interfering with the use or enjoyment of the land or interest in land: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paras. 18, 23.

[103] A landowner does not cause a nuisance by allowing surface water flowing naturally across his land to a neighbour's land but, until surface water reaches a watercourse, the lower of two owners owes no servitude to the upper to receive the water naturally draining off the upper owner's land. The lower owner may protect their own land and is not liable for the damage which the upper owner suffers from the exercise of such right. This right to protect their land includes the right to prevent the water from flowing onto their property, even if the effect is to force the water back on to the lands of the upper owner: *Caplin v. Gill,* [1997] 84 D.L.R. (3d) 765 at para. 4, 1977 CanLII 253 (B.C.S.C.) [*Caplin*].

[104] In *Caplin*, the plaintiffs and the defendants owned adjoining properties. The plaintiffs' property was above the defendants', and surface water ran off the plaintiffs' property onto the defendants' property. In the summer of 1975, the defendants built a five-foot high dyke on their property to stop the flow of surface water. Water running off the plaintiffs' property collected at the dyke, rose and was cast back, flooding the plaintiffs' yard. The court determined that there was no cause of action, citing to the Supreme Court of Canada's decision in *Rural Municipality of Scott v. Edwards*, [1934] S.C.R. 332, 1934 CanLII 59 [*Edwards SCC*], aff'g *Edwards v. Scott (Rural Municipality)*, [1934] 3 D.L.R. 793, 1933 CanLII 188 (Sask. C.A.) [*Edwards CA*]: *Caplin* at paras. 3–4. As the court explained, if the water had been running in a natural channel or watercourse, the defendants would not have had a right to divert it. However, it was not running in a natural channel or watercourse; it was surface water: *Caplin* at paras. 6–8.

[105] A “watercourse” has been described as water, usually flowing in a definite channel, having a bed and sides or banks, and discharging itself into some other stream or body of water. To constitute a “watercourse”, the flowing water must be more than mere surface drainage over the entire face of the tract of land: *Edwards CA*. As the court explained at para. 10, “A depression or natural draining which merely carries water in a rainy season is not a watercourse”.

[106] In the circumstances in *Edwards CA*, the court did not find that there was a watercourse. Rather, there was a succession of sloughs or depressions where surface water collected, that, at times of excessive rains or melting snow, diffused over considerable areas.

[107] In *Allison v. Radtke*, 2014 BCSC 1832 at para. 166 [*Allison*], Justice Ker summarized the principles with respect to nuisance as they relate to water flowing from one owner’s property to another’s:

> i. a landowner does not cause a nuisance if the landowner allows surface water flowing naturally across his land to a neighbour’s land;
>
> ii. a lower landowner need not accept surface water flowing naturally onto his property from a neighbour’s property and the lower landowner may block or divert the water to prevent its entry into his or her property;
>
> iii. a landowner cannot alter his or her land so that it causes surface water to collect and then flow on a neighbour’s property in a manner which it would not have done so but for the alterations (i.e., a landowner cannot artificially increase or concentrate the natural flow of surface water onto his neighbour’s property); and
>
> iv. a lower landowner must accept from a higher landowner any water which is flowing in a natural watercourse and the lower landowner cannot block the flow from his land and the higher landowner cannot block the flow or interfere with it so as to increase the burden on the lower landowner.

[108] In this case, on the evidentiary record before me, and without the benefit of hearing from the experts, the Drainage System does not appear to have replaced a natural watercourse. Rather, it replaced a series of swales and ditches with a surface run-off collection system in which water was collected in catch basins and directed to Drainage Pipe D. The Lloyd’s appear to have concentrated the natural

flow of surface water on the Lloyd Property and delivered it through Drainage Pipe D to the Johnson Property.

[109] The issue that will have to be decided at trial is whether the effect of the Permit was to change the applicable nuisance principles summarized by Ker J. in *Allison*. The Permit itself did not approve changes to the Lloyd Property that would affect drainage. It related solely to the Johnson Property. It may be that there was an agreement or an arrangement that was entered into between the Lloyds and Mr. Stenberg, when he was making changes to the Johnson Property, to comply with his obligations under the Permit. It may also be that the Township approved or accepted that agreement or arrangement. The issues will be whether any such agreement or arrangement binds a subsequent purchaser without notice of it and whether any changes to the Drainage System, that occurred after the approval or acceptance, have increased the drainage from the Lloyd Property.

[110] The Johnsons may succeed in their argument that it would be unreasonable to make the Johnson Property servient to the Lloyd Property without an approved drainage plan, easement or an agreement to accept what a trial judge may find is increased drainage.

[111] I cannot conclude, on the evidentiary record before me, that there is a strong likelihood that the Lloyds will be successful in proving that the steps the Johnsons took to block Drainage Pipe D constitutes a substantial and unreasonable interference with the Lloyds' use and enjoyment of the Lloyd Property such that the Johnsons will be held liable in nuisance.

The Claim in Negligence

[112] Negligence is made out where a party uses their property in a way that poses a foreseeable risk to their neighbour's property and that causes their neighbour damages: *Loring v. Brightwood Golf & Country Club Ltd*., 8 N.S.R. (2d) 431, 1974 CanLII 1335 (C.A.); and *Ward v. Cariboo Regional District*, 2021 BCSC 1495.

[113] I accept that the Johnsons knew, at least in 2021 and 2022, that blocking Drainage Pipe D would result in flooding of the Lloyd Property. Nonetheless, if the

Johnsons succeed with their arguments with respect to nuisance, their protection of their own property will not amount to negligence.

[114] As a result, I cannot find that the Lloyds have a strong likelihood of success on their claim in negligence.

The Claim in Proprietary Estoppel

[115] The Lloyds also argue proprietary estoppel. Proprietary estoppel protects the equity, which, in turn, protects the reasonable reliance of the claimant. Proprietary estoppel avoids the unfairness that results to a party if another is permitted to break their word and insist on their strict legal rights.

[116] An equity arises when the following elements of proprietary estoppel are satisfied:

1. a representation or assurance is made to a claimant, on the basis of which the claimant expects that it will enjoy some right or benefit over property;

2. the claimant relies on that expectation by doing or refraining from doing something, and its reliance is reasonable in all of the circumstances; and

3. the claimant suffers a detriment as a result of its reliance, such that it would be unfair or unjust to allow the party responsible for the representation or reliance to go back on its word.

(See *Cowper-Smith v. Morgan*, 2017 SCC 61 at para. 15.)

[117] The Johnsons submit that, as the registered owners of the Johnson Property, they did not make, or authorize to be made on their behalf, representations or assurances to the Lloyds with respect to drainage. Kyle’s email was not a representation or assurance that Drainage Pipe D would remain open. His email was sent to his father-in-law, not the Lloyds, and, given the nature of their relationship, the Lloyds did not rely on it. An email less than a month later from David mentioning

"some progress" on the drainage issue suggests that it still remained unresolved. Further, there is at least an argument that any reliance placed by the Lloyd's on the email was not reasonable as any potential representation or assurance was not made between the parties.

[118] As a result, I cannot find that the Lloyds have a strong likelihood of success on their claim in proprietary estoppel.

Will the Lloyds suffer irreparable harm?

[119] Most successful plaintiffs in civil actions receive an award of monetary damages. If anticipated harm can be adequately compensated by damages, an injunction is unnecessary. Irreparable harm has been defined as harm that cannot be quantified in monetary terms or harm that cannot be compensated for because, for example, damages will not be collectible.

[120] As the Court of Appeal said in *Edward Jones v. Voldeng*, 2012 BCCA 295, an interlocutory injunction is an extraordinary remedy and will rarely be ordered where no irreparable harm is likely: at para. 24.

[121] In this case, I conclude that damages would be an adequate remedy. I note that in the chronology report prepared by Mr. Chen of Wedler Engineering, he totalled what the Lloyds had expended with respect to the 2020, 2021, and 2022 Floods at just over $90,000.

[122] I accept that until this matter is determined at trial, the Lloyds may be required to expend additional funds to deal with flooding. I also accept that the flooding has caused them stress and inconvenience. However, those claims are also compensable in damages if successful at trial. There is no evidence on which I could find that a damage award would be uncollectible.

The Balance of Convenience

[123] This part of the test for an injunction requires me to consider the evidence advanced by the Lloyds and the Johnsons and to weigh it to determine where the

balance lies and whether granting an injunction is just and equitable in the circumstances.

[124] The balance of convenience considers the harm that would be caused to the Johnsons as a result of granting the mandatory injunction and weighs it against the harm the Lloyds will suffer if it is not granted.

[125] In *Canadian Broadcasting Corporation v. CKPG Television Ltd*., 64 B.C.L.R. (2d) 96 at 102, 1992 CanLII 560 (C.A.), the court set out the factors to be considered when assessing the balance of convenience:

a) the adequacy of damages as a remedy for the applicant if the injunction is not granted and for the respondent if the injunction is granted;

b) the likelihood that if damages are finally awarded they will be paid;

c) the preservation of contested property;

d) other factors affecting whether harm from the granting or refusal of the injunction would be irreparable;

e) which of the parties has acted to alter the balance of their relationship and so affected the *status quo*;

f) the strength of the applicant's case;

g) any factors affecting the public interest; and

h) any other factors affecting the balance of justice and convenience.

[126] In the circumstances of this case, I conclude that the balance of convenience favours the Johnsons.

[127] The Lloyds complain about the loss of their enjoyment of the Lloyd Property as a result of the closure of Drainage Pipe D. There is evidence to suggest that there would be some flooding of the Lloyd Property even with the Shut-off Valve open.

[128] In any event, the Lloyds have been able to take mitigating steps, and there is no evidence that the Septic System has failed. There is no evidence that the Lloyds will be unable to collect damages. No loss of property is suggested in this case.

[129] Although the Lloyds suggest that they are unable to sell the Lloyd Property, there is no evidence of a current intention to do so.

[130] It is not an unreasonable interference with the use and enjoyment of the Lloyd Property to expect the Lloyds, as the property owners, to deal with their own drainage difficulties. If their position is eventually upheld at trial, they will be able to recover the reasonable cost of doing so from the Johnsons.

[131] I accept that it is arguable that the Johnsons have affected the *status quo* by closing the Shut-off Valve. In the balance, this might favour granting an injunction. However, the Lloyds were advised in March 2016 that the Johnsons denied any obligation to maintain the Drainage System. At the time, the Lloyds threatened to sue and seek an injunction. They did not do so until March 2023, after suffering floods in three consecutive years. The Johnsons have pled the *Limitation Act,* S.B.C. 2012, c. 13 in their defence.

[132] The delay in pursuing this action weighs in the balance against granting the injunctive relief.

Conclusion

[133] Given my findings that, on the evidence before me, the Lloyds have not made out a strong *prima facie* case, any harm may be compensated in damages, and that the balance of convenience does not favour granting the injunction, I conclude that the test for a mandatory interlocutory injunction has not been met.

[134] Unless the parties seek to make further submissions on costs, the Johnsons are entitled to their costs in the cause.

"MacNaughton J."