

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *600835 B.C. Ltd. v. Lavigne*,
2023 BCSC 2373

Date: 20230809
Docket: S22408
Registry: Nelson

Between:

600835 B.C. Ltd.

Plaintiff

And

Luc Marcel Joseph Lavigne

Defendant

Before: The Honourable Madam Justice Lyster

Oral Reasons for Judgment

Counsel for the Plaintiff:

M. Scheffelmaier

Appearing on his own behalf:

L. Lavigne

Place and Date of Trial/Hearing:

Nelson, B.C.
May 3-4, 2023

Place and Date of Judgment:

Nelson, B.C.
August 9, 2023

[1] **THE COURT:** These are my oral reasons for decision with respect to Mr. Lavigne's summary trial application. They have been edited for publication.

Introduction

[2] Broadly speaking, this case centres around the installation of a septic system on property owned by the defendant, Mr. Lavigne, and his wife, Kelly Lavigne. The Lavigne property is located in Grandview Properties.

[3] Coleman Properties Ltd. ("Coleman Properties") was the developer of Grandview Properties. Coleman Properties owns the plaintiff, 600835 B.C. Ltd., which provides septic services to Grandview Properties. I will refer to the numbered company as the "Septic Company". Greg Coleman is the principal of both Coleman Properties and the Septic Company.

[4] The Septic Company filed a notice of civil claim against Mr. Lavigne on September 26, 2022. In general, the Septic Company pleaded that, in April 2022, Mr. Lavigne connected his newly installed septic system to the Septic Company system contrary to the terms of the Sewer Services Agreement (the "Agreement") and, in particular, without signing the Agreement, without paying the applicable fees, and without providing the Septic Company with an opportunity to inspect the Lavigne septic system.

[5] The Septic Company further pleaded that Mr. Lavigne had buried his septic system, rendering it impossible to inspect, and prevented the Septic Company from entering the Lavigne property to inspect the septic installation contrary to the Septic Company's right to do so.

[6] In its notice of civil claim, the Septic Company alleged that Mr. Lavigne signed the Agreement on May 18, 2022. That date, I note, is accurate. It further alleged that on June 21, 2022, it entered onto the Lavigne property to uncover and disconnect the septic system. It alleges that it incurred costs of \$9,091.25 to do so. Mr. Lavigne did not pay those costs, and the Septic Company made a claim of builders lien on the property on August 9, 2022. In its notice of civil claim, the Septic Company

sought judgment in the amount of \$9,091.25, a builders lien, and a certificate of pending litigation (“CPL”).

[7] Mr. Lavigne filed his response to civil claim on October 26, 2022. He pleaded that installation of the septic system began in September 2021 in accordance with the British Columbia *Sewerage System Regulations*, and that it was partially buried in October 2021 as required by WorkSafeBC. Mr. Lavigne pleaded that the plaintiff, by which I assume he means Mr. Coleman, first inspected the system in October 2021, and at that time falsely asserted that the tanks were buried too deep and needed to be raised. He pleaded that work halted over the winter months and resumed in April 2022, when WDX Excavating uncovered the septic system and Joseph Karthein, a registered wastewater onsite practitioner, completed the installation.

[8] Mr. Lavigne pleaded that, in April 2022, Chris Coleman, Greg Coleman's son, inspected the septic system and falsely reasserted that the tanks were buried too deep. Mr. Lavigne pleaded that, on June 20, 2022, Chris Coleman and Mr. Karthein affirmed that the septic system conformed to the Septic Company's specifications and that it was not connected to the Septic Company's system. He pleaded that, on June 21, 2022, the Septic Company installed a shut-off valve in the easement. He further pleaded that that same day Chris Coleman and Craig Sapriken inspected the system and affirmed it conformed to the Septic Company's specifications and was not connected.

[9] Mr. Lavigne further pleaded that, on September 6, 2022, Mr. Karthein finalized the installation of the septic system, and that on September 9, 2022, he applied to the Septic Company for service. He pleaded that on September 9, 2022, the Septic Company sought, in his words, to extort the sum of \$18,091.25 from him to enable service.

[10] On October 21, 2022, Mr. Lavigne filed a counterclaim against the Septic Company, Coleman Properties and Greg Coleman personally. In it he sought relief, including that the lien and CPL be cancelled and the notice of civil claim be

dismissed. He further sought to have the Septic Company enable the septic service at no cost to him, and he sought judgment in the amount of \$18,091.25 for hardship and inconvenience suffered by him and Mrs. Lavigne.

[11] On November 16, 2022, the Septic Company filed its response to counterclaim. On April 20, 2023, Mr. Coleman and Coleman Properties filed an amended response to counterclaim. It is not necessary to summarize those responses.

[12] This matter originally came on for hearing before me on February 27, 2023. Mr. Lavigne had filed an application seeking relief including the dismissal of the notice of civil claim. In that hearing, it became apparent that, although in substance he was applying for a summary trial, he had not pleaded Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] and the Septic Company had not responded to his application as it would have done to a summary trial application.

[13] On consent, I made directions for the parties to file amended materials in order to permit a summary trial application to be heard, which the parties did, leading to the present application before me.

[14] Both parties wished to have this matter decided by way of summary trial. I consider the matter appropriate for resolution by way of summary trial. I am able to resolve all necessary factual disputes on the affidavit evidence filed. Deciding this dispute by way of summary trial furthers the objectives of Rule 1-3 of the *Rules* as doing so is proportionate to the amounts of money involved, the importance of the issues and the complexity of the proceeding.

[15] I have carefully reviewed the affidavit evidence submitted by the parties. As I explained during the hearing, the court can only rely on admissible evidence. Submissions and pleadings are not evidence. Further, unsworn statements attached as exhibits to affidavits are not admissible for the truth of their contents.

Findings of Fact

[16] I make the following findings of fact on the basis of the admissible evidence before me.

[17] In 2019, the Lavignes began constructing their house in Grandview Properties. They did not purchase their lot directly from Coleman Properties, but from an intermediate purchaser. Greg Coleman says that they presented their first proposed building plan to him in July 2019, and that he does not believe he ever approved the initial site plan. It included the location of septic tanks but did not include the specifications for the installation of a septic system.

[18] Greg Coleman says that it is his practice to inform owners that they should engage Mr. Salhstrom to obtain septic designs. Mr. Salhstrom is an engineer who owns WSA Engineering. Greg Coleman says that the Septic Company defers all septic installations to Mr. Salhstrom's firm. He also says that he informed Mr. Lavigne to contact Mr. Salhstrom on January 24, 2022. As I will discuss, this date makes little or no sense given the chronology of events.

[19] As I will discuss in a moment, Mr. Lavigne contacted Mr. Salhstrom in September 2019, but according to his email to Mr. Salhstrom, he did so at the suggestion, not of Mr. Greg Coleman, but of someone with the Regional District of Central Kootenay ("RDCK"). On the evidence before me, I am unable to find that Mr. Coleman ever told Mr. Lavigne that he should engage Mr. Salhstrom to obtain septic designs.

[20] On September 13, 2019, Mr. Lavigne sent an email to Mr. Salhstrom. In his email, Mr. Lavigne said that Mandy McIntyre with the RDCK had given him his name regarding septic requirements for his property. He wrote that all he knew at this point was that effluent would be collected in a tank on the property and pumped into the Community system, that is, the system operated by the Septic Company. He said that he and Greg Coleman had located the sewage pipe needed to tie into the system at the property line.

[21] Mr. Lavigne followed up with Mr. Sahlstrom by email on September 21, 2019. He did so again on November 14, 2019. In that email he said that the RDCK said that the last thing needed to grant approval for a building permit was documentation for the septic system. He asked Mr. Sahlstrom and Ms. McIntyre to direct him to the agency or persons who could provide him with the necessary documentation.

[22] It is clear that in the fall of 2019 Mr. Lavigne was diligently attempting to ensure that he complied with all requirements for the completion of his septic system, but he was not receiving any responses from Ms. McIntyre or Mr. Sahlstrom.

[23] On January 21, 2020, Ms. McIntyre wrote Mr. Sahlstrom, providing Mr. Lavigne's name and address and saying that they, that is the Lavignes, wished to obtain from Mr. Sahlstrom confirmation to hook into the septic system.

[24] All of these emails are attached to Mr. Sahlstrom's affidavit. He says that they "are the email correspondence between myself and Mr. Lavigne, and Mr. Lavigne as well as myself and the RDCK respecting Mr. Lavigne's septic system". There is no evidence of any replies from Mr. Sahlstrom to Mr. Lavigne or what, if anything, Mr. Sahlstrom did in response to these inquiries, with the exception of a January 21, 2020 letter from him to Ms. McIntyre and Greg Coleman. In it Mr. Sahlstrom confirmed that the Septic Company could receive the quantity and quality of effluent anticipated from the Lavigne home subject to the terms and conditions of the Sewer Agreement and confirmation by an engineer, or registered onsite wastewater practitioner ("ROWP"), that the tank, pump and piping have been inspected and are satisfactory to the Septic Company.

[25] There is no evidence that Mr. Lavigne received a copy of Mr. Sahlstrom's January 21, 2020 email. This is significant, as it would have alerted Mr. Lavigne to the further requirements he was required to meet.

[26] I will also note at this point that Mr. Lavigne said in his first affidavit that the plaintiffs, that is the Septic Company, had sent him the septic detail for installation of

the septic system. Mr. Sahlstrom denies having provided Mr. Lavigne with the septic detail. So does Greg Coleman. Beyond that, Mr. Sahlstrom states that he did not advise Mr. Lavigne about the installation of his septic system and that he did not approve any septic design or approve any septic installation. I accept that evidence from Mr. Sahlstrom. Whoever Mr. Lavigne received the septic detail from, it was not Mr. Sahlstrom.

[27] There appears to have been some sort of ongoing lack of communication or perhaps miscommunication regarding Mr. Sahlstrom's role. Greg Coleman says that the Septic Company defers all septic installation issues to Mr. Sahlstrom, and that Mr. Sahlstrom, among other things, provides the engineered drawing to the property owner. Mr. Sahlstrom did not provide an engineered drawing to Mr. Lavigne. Indeed, on the evidence before me, I find that he never replied to any of Mr. Lavigne's emails to him. I cannot say why that did not occur.

[28] As mentioned, Mr. Lavigne said in his initial email to Mr. Sahlstrom that he and Mr. Coleman had located the sewage pipe needed to connect to the community system. Greg Coleman provides no evidence about this. He deposes in his affidavit that Mr. Lavigne never contacted him "again" to discuss the design and installation of his septic system. There is no earlier conversation referred to to make sense of that "again". Overall, Greg Coleman's affidavit lacks detail, contains internal contradictions such as the ones I have already referred to, and is full of beliefs, speculation and assumptions, the basis for which is not stated. I am very cautious about relying on his affidavit where it is not corroborated by other evidence.

[29] In the absence of any response by Greg Coleman on this point, I accept Mr. Lavigne's evidence that he and Greg Coleman located the sewage pipe to connect the Lavigne septic system to the Community System, and that they did so in or about September 2019.

[30] Greg Coleman says that on August 31, 2020, Mr. Lavigne contacted him by email and asked him for guidance about selecting a septic tank. Greg Coleman says that he asked Mr. Lavigne to call him to discuss this because he was concerned

about the request. He says that Mr. Sahlstrom should have advised Mr. Lavigne about this and that he does not provide such advice because he is not qualified to do so. Greg Coleman says that "that email" is attached as an exhibit to Mr. Sahlstrom's affidavit, but it is not. The email Greg Coleman refers to is not in evidence, making his evidence about it uncorroborated hearsay evidence. I cannot find that such an email exchange occurred on the evidence before me.

[31] Greg Coleman says that Mr. Lavigne did not call him and that he assumed that he had either remembered his advice to contact Mr. Sahlstrom or was not pushing forward with the installation of his septic system at that time. As I have already mentioned, in his second affidavit Greg Coleman says that he told Mr. Lavigne to contact Mr. Sahlstrom on January 24, 2022. On the evidence before me that cannot be an accurate date. It may be a typographical error. The court has no way of determining when, if ever, Greg Coleman told Mr. Lavigne to contact Mr. Sahlstrom.

[32] Greg Coleman's evidence about these issues makes little sense. If he was concerned about Mr. Lavigne's request for advice, then it would have behooved him to follow-up further with Mr. Lavigne and/or Mr. Sahlstrom to ensure that Mr. Lavigne was getting the proper advice from the proper source. He did neither. If Mr. Lavigne was seeking Mr. Coleman's advice in August 2020, he would have been left in the dark.

[33] Greg Coleman says that he believes that, in or about March 2021, Mr. Lavigne retained two contractors, Mr. Dobbs, a site prep contractor, and Mr. Balance, a plumber, to install his septic system. The basis for this belief is not stated, nor when he formed it.

[34] Greg Coleman says that he believes that, in or about June 2021, Mr. Dobbs installed the septic tanks. Again, the basis for this belief is not stated, nor when he formed it.

[35] Greg Coleman says that he believes that at some point after that Mr. Balance connected the septic system to the Community System without notice or approval by the Septic Company. Once again, the basis for this belief and when it was formed is not stated.

[36] I have been unable to find any evidence that would conclusively establish when Mr. Dobbs and Mr. Balance were hired by Mr. Lavigne or for what purposes. As I describe below, Chris Coleman's evidence does establish that Mr. Dobbs was present in June 2022 doing some excavation. Likely, Mr. Dobbs was the site-prep contractor and Mr. Balance the plumber retained by Mr. Lavigne.

[37] On September 1, 2021, Mr. Lavigne sent an email to Mr. Sapriken. He indicated that a gentleman by the name of Richard Rowland of a company called Kootenay Wild had recommended Mr. Sapriken's company for advice and septic maintenance needs. Mr. Lavigne wrote that he was writing following a conversation the past weekend with Greg Coleman regarding the installation of septic tanks on his property. Mr. Lavigne went on to write that in May 2021 their plumber tied the property water line into the main water line, as well as the property sewer into the community septic system as per the developer's recommendations. He further wrote that in July 2021 a dual compartment septic tank and pump out tank had been lowered into the ground and connected to the house sewer line by a contractor. He wrote that to date installation of the effluent pump and connection from the pump-out tank to the property sewer line and into the community septic system had not been completed.

[38] Mr. Lavigne continued to write that the developer had told him the septic tank installation on his property would need to be approved by an ROWP prior to installation. He wrote that he would need to find someone willing to sign off on the installation and quoted Greg Coleman as saying, "Good luck with that. You will probably have to dig up your tanks and start over again for that to happen". Mr. Lavigne wrote that this was news to him and to his contractor. He provided technical details of the tank installation and he asked for Mr. Sapriken's guidance.

[39] I find that Mr. Lavigne's September 1, 2021 email to Mr. Sapriken accurately described the septic work he had had done to that date. The septic tank was installed but was not yet connected to the Community System. Mr. Lavigne would have had no reason to misrepresent to Mr. Sapriken the work he had had done. All he was seeking to do at that point was to get Mr. Sapriken's guidance about what he needed to do to finish the work on the septic system, in particular getting it connected to the Community System.

[40] Mr. Sapriken replied to Mr. Lavigne's email on September 3, 2021. He explained his role at Grandview, which he said was that his company performs annual maintenance and repairs. He explained the difference in expertise of RWOPs and contractors. He suggested a few items to confirm with Mr. Lavigne's installer to ensure that they were done correctly. He expressed some concerns about the backfill that had been used and its likely effect on the tanks. He told Mr. Lavigne that the septic tank he had installed would be "out of round" or would "eventually go out of round". Mr. Sapriken said that he was willing to see what they could do to make this work and that he would be prepared to visit the site to perform a compliance evaluation.

[41] Mr. Lavigne replied on September 4, 2021, saying that he would like to have Mr. Sapriken come out to take a look. There is no evidence that that occurred at that time or why it did not. Mr. Sapriken forwarded this email thread to Greg Coleman, I note, on May 25, 2022.

[42] Greg Coleman quotes an email exchange which he says he had with Mr. Lavigne on January 24, 2022. Oddly, and without explanation, he does not attach the emails quoted as exhibits to his affidavit. According to Greg Coleman, he wrote Mr. Lavigne that the last time they had talked, he had asked Mr. Lavigne to get him the "signed docs regarding your connection to the septic system" and to contact "my engineer to proceed with the process to install the approved system". He wrote that he suspected that had not been done. He wrote that all of this was part and parcel to getting final building approval from the RDCK. According to Greg Coleman in his

affidavit, Mr. Lavigne replied to say, "Your suspicions are correct. We continue to be in touch with RDCK and their requirements for building approval. We will be in touch once we get to the septic stage". I place little weight on this evidence as Greg Coleman failed to provide the best evidence of the quoted emails, that is, the emails the themselves.

[43] Greg Coleman says that on April 22, 2022, he attended at the Lavigne property. No one was home. He discovered that Mr. Lavigne had already installed and buried his septic system. He believed or assumed, as a result of his observations, that Mr. Lavigne was pumping effluent into the Community System without permission.

[44] On April 27, 2022, Chris Coleman, Greg Coleman's son, entered the Lavignes' home at his father's request. The home was under construction at the time. He went inside without having gained anyone's attention. The subsequent meeting with Mr. Lavigne was civil.

[45] On that occasion, Chris Coleman inspected the Lavigne septic system and took a photograph of the riser above the pump chamber. It had a piece of plywood over the top. Chris Coleman looked under the plywood. The pump chamber had some fluid in it. Chris Coleman drew the conclusion that an item he saw in the chamber was a septic pump.

[46] I accept Mr. Lavigne's evidence that it was actually a sump pump which he had installed that spring to pump out spring run-off that was accumulating in the tank. I also accept his evidence that he had the sump pump removed once the run-off had been pumped out by May 2022.

[47] Chris Coleman found what he saw concerning. He states that, from his experience, he thought that there could only be as much liquid in the pump chamber as he saw if it was being used to pump effluent into the Community septic system. On the evidence before me, Chris Coleman has no particular expertise in these matters and I place no weight on his beliefs, although I do accept that they were

honestly held. He was also concerned because the Septic Company had not inspected the system to know if it was installed correctly. I accept that the Septic Company had not inspected the system and had no means of knowing if it was installed correctly at that time.

[48] Mr. Lavigne says that, on this occasion, Chris Coleman told him that the tanks were too deep and needed to be raised. Chris Coleman does not give evidence about whether he told Mr. Lavigne this. If he did tell Mr. Lavigne the tanks were too deep, once again the evidence does not establish that Chris Coleman has any expertise in such matters.

[49] Chris Coleman reported his observations to Greg Coleman, who asked him to return to the Lavigne home and take more photographs. He did so on April 28, 2022. Chris Coleman did not interact with Mr. Lavigne that day.

[50] It is difficult for me to interpret the photographs Chris Coleman took on April 28. They appear to be of the inside of the pump chamber. It is possible that the outside of the pump chamber walls are deformed. There appears to be liquid inside the pump chamber. I cannot say how much.

[51] Mr. Lavigne says that at the time the Septic Company performed work in June 2022, there were no functional bathrooms in the Lavigne house, and hence no sewage. He denies that the fluid observed by Chris Coleman in the pump chamber was effluent. Both Chris Coleman and Mr. Lavigne say that there was a loose piece of plywood covering the top of the pump chamber. Mr. Lavigne says that this piece of plywood did not prevent snow melt from entering the pump chamber. I accept Mr. Lavigne's evidence that the fluid in the pump chamber was not effluent and was likely snow melt or run-off.

[52] On May 4, 2022, Greg Coleman sent an email to the Lavignes. He stated that they had installed a septic system on their lot that does not meet the design requirements of the Septic Company. He said that a recent inspection identified numerous deficiencies, including that the system had been purchased without

reference to the engineered drawings, that the system was installed without the supervision of a certified practitioner, the tanks were too deep for reasonable maintenance, a pump had been installed without the supervision of a certified practitioner, and that incorrect piping and fittings were visible inside the pump chamber. He wrote that there was fluid in the pump chamber which suggested that the Lavignes may have been pumping effluent into the septic system. He told the Lavignes that until the installation met the Septic Company's requirements, they were required to disconnect from the system, which required them to remove the pump and remove the discharge line from the pump chamber. He wrote that they would be inspecting for compliance the next day, that is May 5, 2022, and that failure to comply would result in them being disconnected from the septic system at their cost.

[53] Mr. Lavigne replied on May 4, 2022. He stated that the house was vacant, without any toilets or sinks, so no sewage had been going into the tank. The water in the pump chamber was from run-off and snow melt. The pump was a sump pump to pump out the water. Mr. Lavigne questioned Greg Coleman's qualifications to make the assessment he had, noting that he is not a certified practitioner. He noted that Greg Coleman had been asked to seek permission to come on the property and that he had failed to heed this request. He wrote that May 4 did not work for the Lavignes and asked Greg Coleman to arrange an alternative date.

[54] It was about this time that the relations between the Lavignes and Greg Coleman, which were already badly frayed, took a serious turn for the worse.

[55] On May 16, 2022, Greg and Chris Coleman attended the Lavigne property with a technician from WSA. They intended to inspect the installation with the technician, but Mr. Lavigne did not permit them on his property.

[56] On May 18, 2022, Mr. Lavigne wrote counsel for the Septic Company. The letter highlights the Lavignes' concerns about their privacy and Greg Coleman's behaviour, which they characterized as militant, domineering, uncivil and belligerent. They asserted that Greg Coleman's behaviour went beyond seeking reasonable

access to their property to harassment. They wrote that their septic system was in conformity with the septic engineer's requirements. This appears to be a reference to the septic detail diagram, which is, as I have said, of unknown provenance. They wrote that the tanks were not yet connected to the Community System and that all work was under Mr. Karthein's supervision.

[57] In his letter, Mr. Lavigne denied outright denying access to their property. He referred to an arrangement that Mrs. Lavigne had facilitated between RCMP Constable Wilson and Greg Coleman, and their agreement to have Greg Coleman's septic engineer perform an inspection at 4:00 p.m. on May 5, 2022. According to Mr. Lavigne, the engineer did not show up at that time. He also wrote that Greg Coleman had been invited to set up a mutually convenient time to do an inspection but that Greg Coleman had not responded.

[58] Referring to paragraph 27(1) of the Sewer Services Agreement, the Lavignes conceded that Greg Coleman is not required to ask permission to come on their property, but they said that they had requested that he do so as a matter of courtesy and good faith. They proposed that, instead of Greg, Chris Coleman be delegated to perform septic inspections. I am advised that a signed copy of the Agreement was sent with this letter.

[59] On May 20, 2022, counsel responded to this letter. Counsel rejected Mr. Lavigne's proposals. Counsel further advised that the Septic Company would be disconnecting the Lavigne septic service and that they would not reconnect it until the Lavignes had complied with the requests set out in their letter of May 16. All allegations of harassment were denied. The Septic Company did not accept Mr. Lavigne's assurances about the septic system and would not be providing any septic services until they had inspected the system themselves without interference and all deficiencies were remedied.

[60] On May 21, 2022, Mr. Lavigne replied. He stated that they had no issue with an inspection by the Septic Company to address the five issues that had been identified in its earlier email. They agreed that there would be no issues if Greg

Coleman refrained from interacting with them while on their property. So far as the evidence before me shows, neither the Septic Company itself nor its counsel appeared to have replied to that letter.

[61] On June 7, 2022, Chris Coleman attended the Lavigne property. Mr. Lavigne and Mr. Dobbs were there. Mr. Dobbs was doing some excavation and, in doing so, he exposed a portion of the septic discharge pipe. According to Chris Coleman, Mr. Lavigne told him that he had just cut the discharge pipe to disconnect his system from the Community System. Chris Coleman took photos that day which appear to show a cut pipe. Chris Coleman says that he was concerned Mr. Lavigne may have used the wrong type of pipe, and he believes that it was on this day that Mr. Dobbs gave him the piece of septic discharge pipe that had been used.

[62] I have been unable to locate any evidence from Mr. Lavigne with respect to this conversation with Chris Coleman. He provides photographs which he asserts show that, as of June 15 through July 22, 2022, the Lavigne septic system was not attached to the plaintiffs' disposal field. This does not mean that there was not a connection which was cut earlier as asserted by Chris Coleman. At the same time, if the Lavignes' septic system had earlier been attached to the Community System, it does not mean that they were discharging effluent prior to cutting the pipe. I find that they never discharged effluent.

[63] On June 8, 2022, Greg Coleman wrote the Lavignes a letter providing notice of disconnection. He wrote that they would remain disconnected until the Septic Company was satisfied that the installation meets its specification; they provided him with a signed copy of the Agreement; they adhered to the instruction to keep the right-of-way clear; and they had paid all expenses relating to this matter and for the disconnection and subsequent reconnection. The stipulation that the Lavignes provide Greg Coleman with a signed copy of the Agreement was an error as it is my understanding that a signed copy of the Agreement was included with the Lavignes' May 18, 2022 letter to counsel.

[64] Chris Coleman says that on June 9, 2022, he and Greg Coleman determined that the pipe was of lesser quality compared to that defined by the detailed engineering drawing of a typical septic installation at Grandview Properties. That amounts to an expert opinion and I place no weight on it.

[65] Also on June 9, 2022, Chris Coleman says that he told Mr. Lavigne that they would be disconnecting his system from the Community System as soon as they could schedule the work.

[66] On June 10, 2022, the Lavignes sent a letter to counsel for the Septic Company. This letter appears to be in response to the June 8, 2022 letter from Greg Coleman. They denied that they were in breach of the Agreement. They sought mediation pursuant to the terms of the Agreement. They denied that they were liable for any expenses. They asked that Greg Coleman cease and desist coming onto their property, failing which they would contact the RCMP.

[67] On June 15, 2022, the Lavignes wrote counsel for the Septic Company in response to a June 13, 2022 letter that does not appear to be in evidence. In it, they in essence repeat the assertions contained in their previous correspondence.

[68] On June 20 and 21, 2022, Chris Coleman attended the property to supervise the disconnection. He also performed work, as did another employee of Coleman Properties and two employees of All Around Septic Inc. According to Chris Coleman, they had to locate the septic discharge line that had been buried, as well as other utility lines that were in close proximity. Mr. Lavigne was present and cooperative but he was unable to assist in locating the other utility lines. They located the connection pipe on June 21, and tried to determine where it had been connected to the Lavigne septic system. This required them to go on to and perform work on the Lavigne property. They did not locate the connection. In the end, they decided to install a new curb stop valve and riser and placed it in a closed position. The effect of this was that the Lavignes would be unable to discharge from their septic system into the Community System without the Septic Company opening the valve.

[69] Chris Coleman attended the property again on June 22. Also present at that time were Mr. Karthein and Mr. Sapriken. According to Chris Coleman, the latter two gentlemen identified a few issues that would need to be corrected before the system could be considered acceptable.

[70] I do not have an affidavit from Mr. Karthein, although there is a letter from him dated September 6, 2022, which I deal with below. Mr. Sapriken, a registered onsite wastewater practitioner, and the principal of All Around Septic Services Ltd., swore an affidavit, but in it he does not speak to this June 22 inspection. He does say that he did not confirm the conformity of the Lavigne septic system with the Septic Company's specifications, and that he did not approve any septic design or supervise or approve any septic installation. He says that he would not sign off on the appropriateness of Mr. Lavigne's installation after inspection because he did not see it installed.

[71] Later, on December 2, 2022, Mr. Lavigne sent Mr. Sapriken an email. He asked him to confirm that, on June 22, 2022, he inspected the septic system and that their septic system conformed to the specifications of the Septic Company. Mr. Sapriken replied that same day. He said that he attended the home on June 22, 2022 with Chris Coleman to evaluate the installation of the sewerage system. He wrote that only a few items were noted that required attention by the installer as a minor adjustment and that any further work or adjustments beyond his visit were taken care of by the installer without his involvement.

[72] On September 9, 2022, the Lavignes wrote counsel for the Septic Company seeking to be reconnected to the septic system. They attached a letter from Mr. Karthein. This is likely the September 6, 2022 letter in which Mr. Karthein confirmed that the tanks, electrical components, pump and pipe were acceptable. He stated that the tanks and sewer line were installed by the homeowner prior to his involvement but that he had no concerns with the work. He said that some backfilling was required, but the system was fully functional and would be ready to operate as soon as the sewer main curb stop was opened by the developer.

[73] On all of the evidence, I find that, as of June 22, 2022, the Lavigne septic system needed only a few minor adjustments to make it acceptable to the Septic Company. I further find that the plaintiffs were aware of that fact, likely as of June 22, 2022, and most certainly by the time they received Mr. Karthein's September 6, 2022 letter on September 9, 2022.

[74] On September 9, 2022, counsel wrote the Lavignes stating that the Septic Company would not reconnect the Lavignes until they had paid the costs incurred as a result of their failure to obtain approvals prior to installing the system, in the amount of \$9,091.25, plus \$4,000 in legal fees incurred, plus prepayment of \$5,000 prior to reconnection, with the stipulation that if reconnection cost less than \$5,000 then the difference would be repaid.

[75] As of the date of hearing, the Lavignes continued to not have a connection to the Community septic system.

Analysis of the Legal Issues

[76] In the Septic Company's notice of civil claim it sought a declaration that it was entitled to a lien pursuant to the *Builders Lien Act*, S.B.C. 1997, c. 45 [BLA] in the amount of \$9,091.25 against the Lavigne property and judgment in that amount. In submissions, it reduced the damages sought to \$8,860.24. That sum includes \$4,240.24 charged by Coleman Properties to the Septic Company for work performed and materials used between June 20 and 24, 2022, and \$4,620 billed by All Around Septic Services Ltd. to Coleman Properties for excavation work on June 20 and 21, 2022. The Septic Company seeks damages on the basis of breach of contract, namely, Mr. Lavigne's alleged breach of the Septic Agreement.

[77] According to Greg Coleman, the initial buyer of the Lavigne lot was provided with a disclosure statement that included information about the Community sewage system. It provided that each purchaser shall be required to enter into an agreement with the Septic Company at the time of purchase of the lot. There is no evidence about whether the Lavignes received this disclosure at the time they purchased the lot from the previous owner. There is no evidence that the Lavignes were told that

they were required to enter into the Septic Agreement at the time they purchased their property or of when they were first provided with a copy of the Septic Agreement for their signature.

[78] The Lavignes signed the Septic Agreement on May 18, 2022. Mr. Lavigne cannot have been in breach of the Septic Agreement before he signed it. Any breach, therefore, must have occurred after May 18, 2022 for Mr. Lavigne to be liable.

[79] In general terms, the Septic Agreement covers the terms on which the Septic Company provides septic services to owners of properties in the Grandview Properties development. "Septic service" is defined in paragraph 1(m) as the "conveying, draining and containing of sewage and liquid wastes from authorized premises to the disposal field and their disposal and treatment". "Authorized premises" are defined in paragraph 1(a) as "premises which are entitled to and authorized for service in the opinion of the septic corporation acting reasonably". In order to receive septic services an owner must make an application for services. On receipt of the funds required under the tariff, the Septic Company will inspect the septic tank, pump and connection piping and enable services once it is satisfied with that equipment.

[80] Paragraph two provides that the Septic Company will provide septic services to authorized premises. Under paragraph three, the registered owner of authorized premises may apply for services from the Septic Company. Paragraph four provides that it is the intent of the parties that the "Agreement is to be an absolutely net agreement to the Septic Corporation", with the owners to be responsible for all operating expenses.

[81] Paragraph 10 governs the discontinuation of service. It provides:

The Septic Corporation may discontinue Service to any Customer who violates the terms and conditions contained in this Agreement. In the event of further contravention of this Agreement, the Septic Corporation may detach the Service connection from the property boundary of the Customer's lot, and upon re-application for Service, the Customer shall be liable to pay the Septic

Corporation's cost of performing the said detachment and re-connection in addition to other applicable Rates and charges.

[82] Paragraph 11 provides that the Septic Company has the right of access to authorized premises at all reasonable times, and that it has an easement for the purpose of providing services and accessing lots as is required.

[83] Paragraph 19 provides that only tanks and pumps approved by the Septic Company, in advance, shall be installed on any lot, and that installation shall be done by a tradesperson approved by the Septic Company.

[84] Paragraph 27 governs dispute resolution. Subparagraph (a) provides that the parties shall use their best efforts to settle any disputes. Subparagraph (b) provides that if the parties have not agreed to the settlement of a dispute within 30 days, the dispute shall be submitted to arbitration. Under subparagraph (c), a party may apply to court for an injunction or other restraining order.

[85] The Septic Company submits that Mr. Lavigne breached the Septic Agreement by purchasing and installing a septic system, not receiving approval for the installer, not providing the Septic Company with an opportunity to supervise the installation, burying the septic system without inspection, having his plumber connect to the connection pump, and refusing to allow Greg Coleman onto the property. A fundamental problem with the Septic Company's position is that all of those things occurred prior to the Lavigne's signing the Sewer Services Agreement. As I have said, Mr. Lavigne cannot have been in breach of an agreement he had not yet agreed to.

[86] The Sewer Services Agreement is based upon the assumption that the owner of a lot will have signed it prior to beginning any work on their septic system. Mr. Lavigne did not do so and the Septic Company failed to take the steps necessary to ensure that that occurred in the Lavignes' case.

[87] This was one of a number of failures on the part of the Septic Company and those designated to act on its behalf to ensure that Mr. Lavigne had the information

he needed to comply with the Septic Company's requirements. I refer in particular to Mr. Sahlstrom's failures to respond to Mr. Lavigne's emails in the fall of 2021 when Mr. Lavigne was seeking the information he needed to comply with the requirements for a building permit, and Greg Coleman's failures to ensure that Mr. Lavigne received the information he needed from Mr. Sahlstrom. Mr. Lavigne was clearly trying to comply with all necessary requirements, but Mr. Sahlstrom, the person Greg Coleman says he defers all septic enquiries to, did not respond.

[88] I accept that once the Lavignes had signed the Sewer Services Agreement and applied for service, the Septic Company was entitled, under paragraph three, to inspect the septic tank, pump and connection piping to confirm their suitability to be connected to the works.

[89] Paragraph 3 provides that, "If the septic tank, pump and connection piping are satisfactory to the Septic Corporation, acting reasonably, it shall connect the Authorized Premise to the Service and enable same."

[90] I also accept that under paragraph 11, the Septic Company has the right to access authorized premises at all reasonable times for the purposes of making connections, inspecting pipes, tanks, pumps and appurtenances, or checking on the use of the services.

[91] The Septic Company exercised its right to inspect the Lavignes' septic system during the June 21-24, 2022 period. On the evidence, there were no difficulties experienced during that period, and the Lavignes did not put up any impediments to the necessary inspection occurring.

[92] I have already found that, as of June 22, 2022, the Lavignes' septic system needed only a few minor adjustments to make it acceptable to the Septic Company.

[93] The Sewer Services agreement explicitly imposes reasonableness requirements on the Septic Company in a number of paragraphs. As I have previously mentioned, paragraph 1(a) defines "Authorized Premises" as "premises which are entitled to, and authorized for, Service in the opinion of the Septic

Corporation, acting reasonably". Under paragraph three, "if the septic tank, pump and connection piping are satisfactory to the Septic Corporation, acting reasonably, it shall connect the Authorized Premise to the Service and enable same". Access to premises under paragraph 11 is to be "at all reasonable times". Under paragraph 13, the Septic Company is entitled to establish "reasonable and necessary rules for the safe and effective use and operation of the Service".

[94] The dispute resolution process in the Agreement requires that the parties "use their best efforts to settle" any dispute arising out of or in relation to the Agreement and "to this effect, they shall consult and negotiate with each other, in good faith and understanding of the mutual interests, to reach a just and equitable solution satisfactory to all parties".

[95] These explicit requirements in the Agreement for the Septic Company to act reasonably are consistent with the duty of good faith which the Supreme Court of Canada in *Bhasin v. Hrynew*, 2014 SCC 71, recognized as a general organizing principle of the common law of contracts.

[96] On a number of occasions, I find that the Septic Company failed to act reasonably or in good faith in its dealings with the Lavignes. For example, in his May 4, 2022 email, Greg Coleman made assumptions about what the Lavignes had or had not done, which are not well-founded on the evidence, particularly in regards to whether they were pumping effluent into the septic system. Rather than seek to engage in dialogue to solve the problem, Greg Coleman issued an ultimatum requiring compliance within a day.

[97] Relations, as I have described, between the parties became fraught and contentious. The Lavignes were concerned about their privacy and they found Greg Coleman's approaches to them to be aggressive. As set out in their May 18, 2022 letter, the Lavignes understood that the Septic Company has the right to come onto their property to inspect their septic system. They sought to achieve a compromise, asking that the Septic Company seek approval before doing so, and that Chris Coleman be the one to come onto their property. In this connection, they referred to

paragraph 27(a) of the Sewer Services Agreement, and the parties' duties thereunder to consult and negotiate to reach a just and equitable solution.

[98] The Septic Company's response was the May 20, 2022 letter from their lawyer stating that, "Our most recent letter was not an invitation to negotiate this matter". Counsel wrote that the Septic Company would be disconnecting the service. There was no attempt by the Septic Company to comply with paragraph 27(a).

[99] As I have stated, on September 9, 2022, the Lavignes wrote counsel for the Septic Company, attaching the letter from Mr. Karthein confirming their septic system's compliance. They requested that their system be reconnected. They were immediately met by counsel for the Septic Company's letter of that same date advising that the Septic Company would not reconnect the septic system until they had paid \$9,091.25, plus \$4,000 in legal expenses, and prepayment of \$5,000 for reconnection.

[100] There was no basis in the Sewer Services Agreement for the legal expenses claimed or for prepayment of \$5,000 for reconnection. Any work necessary to reconnect the Lavignes' septic system had already been done in June 2022 when the Septic Company excavated the septic system and installed the curb stop valve. All the Septic Company had to do at that point was turn the valve to reconnect the Lavignes.

[101] It is notable that the Septic Company does not continue to seek prepayment of \$5,000 for reconnection in this proceeding. What it seeks is the costs incurred by it in June 2022, plus its costs of this proceeding. Had a more reasonable position been taken by the Septic Company in September 2022, it is open to question whether this proceeding would have been necessary.

[102] Despite my concerns with the reasonableness of the Septic Company's conduct throughout this dispute, I accept that it was entitled to and needed to excavate to inspect the septic system that the Lavignes had installed and buried. The Septic Company had a duty and the right to ensure that the system was in

conformity, and excavation was necessary to accomplish that. I do not accept that it was reasonable or necessary to install the curb stop assembly or to disconnect the septic system.

[103] The Septic Company has proven damages for the cost of excavation and some labour to inspect the system. The invoices provided by Greg Coleman do not permit me to determine with precision which amounts relate to which work. The determination of damages requires an assessment, not a mathematical calculation. The amount paid by Coleman Properties to All Around Septic Services Ltd. likely represents a reasonable approximation of the value of the necessary and reasonable excavation and inspection work. I therefore order Mr. Lavigne to pay the Septic Company damages in the amount of \$4,620.

[104] I have not yet addressed the builders lien and CPL, both of which Mr. Lavigne sought to have cancelled. I am satisfied that the Septic Company was entitled to a builders lien solely for the amount I have found Mr. Lavigne liable for. The work performed by the Septic Company on the Lavigne property constituted an “improvement” as defined in s. 1(1) of the *BLA*.

[105] Pursuant to s. 2(f), a contractor who performs work has a lien for the price of the work and material used on the land on which the improvement was located. Pursuant to s. 3(1), an improvement done with the prior knowledge, but not at the request, of an owner is deemed to have been done at the request of the owner.

[106] Mr. Lavigne submitted that the Septic Company failed to file its lien within the time permitted under the *BLA*. Section 20(2)(b) of the *BLA* provides that a contractor may file a lien no later than 45 days after the improvement was completed or abandoned. Section 1(5) provides that an improvement is deemed to be abandoned on the expiry of 30 days during which no work has been done.

[107] The Septic Company denies that the improvement has been completed or abandoned citing the fact that the system still needed to be reconnected. It is clear that the last work was performed on June 24, 2022. I find that the improvement is

deemed to have been abandoned 30 days after that date. The builders lien was filed on August 9, 2022, which is within 40 days after the deemed abandonment date. Therefore, the builders lien was filed in time.

[108] Section 33(1) of the *BLA* provides that, if a claim of lien has been filed, an action to enforce the lien and a CPL must be registered within one year of the lien being filed. The Septic Company was entitled to a CPL.

[109] In order to cancel the builders lien and extinguish the CPL, Mr. Lavigne will be required to pay the amount of damages I have found he is liable for, that is, \$4,620. On payment of that amount, the builders lien is to be cancelled and the CPL extinguished.

[110] I turn to a consideration of the other relief that was sought in Mr. Lavigne's notice of application.

[111] He sought an injunction preventing the plaintiffs from filing a subsequent claim notice as it pertains to this matter. There is no need or basis for making such an order. The principles of *res judicata* would prevent the plaintiffs from filing a new action seeking the relief sought in this action.

[112] Mr. Lavigne also sought an order that the plaintiffs enable septic service without cost to him. For the reasons I have already given, I find that Mr. Lavigne is entitled to have his septic service enabled. He is required to pay only the turn-on fee of \$50 set out in Part D of Schedule A to the Sewer Services Agreement.

[113] I order the Septic Company to enable to the Lavigne septic service on payment of \$50, plus payment of the damages I have already assessed.

[114] Mr. Lavigne also sought an order that reparations be awarded for damages sustained subsequent to the plaintiffs' refusal to enable septic service. I do not doubt that this matter has caused Mr. and Mrs. Lavigne significant stress. However, no basis has been established by Mr. Lavigne for damages to be awarded against the Septic Company and the other plaintiffs.

[115] Both parties sought the costs of this action. In my view, success has been divided. Each party will, therefore, bear its own costs.

“L.M. Lyster J.”

LYSTER J.