IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Horst v. Purcell*,
2024 BCSC 1217

Date: 20240708
Docket: S25840
Registry: Cranbrook

Between:

Jason Michael Horst

Plaintiff

And

Robert Douglas Purcell and Virginia Anne Edgington Purcell

Defendants

And

Jason Michael Horst and Carmen Horst

Defendants by way of Counterclaim

Before: The Honourable Justice Fleming

Reasons for Judgment

Counsel for Jason Michael Horst (the Plaintiff and Defendant by way of Counterclaim) and Carmen Horst (the Defendant by way of Counterclaim):	B. Fairley (November, December 2021, April and September 2022) M. Blakley (March and June 2023)
The Defendants, Robert Douglas Purcell and Virginia Anne Edgington Purcell, appearing in person:	R.D. Purcell V.A. Purcell
Counsel for the Attendee, The Attorney General of British Columbia:	N. Isaac H. Stewart (June 2023)
Place and Dates of Trial:	Cranbrook, B.C. November 22–26, 29–30, 2021, December 1–3, 2021, April 8, 2022, September 12–16, 21–22, 2022, March 3, 2023, June 19–20 and 23, 2023
Place and Date of Judgment:	Cranbrook, B.C. July 8, 2024

TABLE OF CONTENTS

Introduction

[1] These reasons address a multitude of claims in a civil action and the petition of Jason Horst, the plaintiff and defendant by way of counterclaim, to expropriate an easement under the *Water Sustainability Act*, S.B.C. 2014, c. 15 [*WSA*] over land belonging to the defendants, Robert (Douglas) Purcell and Virginia Purcell (the "Purcells").[1]

[2] The parties own large, adjoining rural properties in the east Kootenays. Mr. Horst purchased his 180-acre property, sublot 15 ("Horst property") in 2004 from his grandmother, Marie Claire Phillips ("Ms. Phillips"). He lives there with his spouse, Carmen Horst, and their children. The Purcells purchased their 80-acre property, the west-half of sublot 16 ("Purcell property") in 2006, after the previous owners, the McIntyres, lost it to foreclosure.

[3] The Horst property is west and, in part, south of the Purcell property. The parties' homes are close to one another, at the north end of each property. The Purcell property also lies on either side of the Elko Grasmere Road ("EGR"), the main road through the area. The Horst property has no direct northern route to the EGR. Mr. Horst and previous owners of his property accessed the EGR through the Purcell property using what he calls the "Horst Access Road", which is part of the Purcells' driveway ("Driveway/HAR").

[4] The parties receive all of their water from Maguire Creek located east of the Purcell property on Crown land, through a gravity-fed underground pipeline system, originally constructed in 1996 by Ms. Phillips and the McIntyres to replace above-ground ditches.

[5] In addition to the main 10" pipeline, the water system consists of an intake structure in Maguire Creek, 4" to 8" irrigation pipelines, two 1.5" domestic pipelines, and a number of valves, which control the flow of water.

[1] The petition was ordered converted to an action and heard with the civil action on October 22, 2018.

[6] After crossing Crown land and most of the Purcell property, the main pipeline ends in the lower water system, very close to the east side of the Horst property.

[7] Near the intake structure in Maguire Creek, the upper main valve controls the flow of water into the main pipeline. The lower main valve, part of the lower water system, controls the flow of most of the irrigation water. The small domestic pipelines that deliver water to the Horst and Purcell properties, attach to the main pipeline above the lower main valve. Until 2017, part of the Purcells' domestic pipeline was located underground on the Horst property.

[8] A 4" irrigation pipeline (along with a valve) that supplies water to east side of the Purcell property, also attaches to the main pipeline above the lower main valve, on the east side of the Purcell property. Two 8" irrigation pipelines attach are attached to the lower water system below, but near to the lower main valve. One of them supplies irrigation water to sublot 10, located immediately south of the Horst and Purcell properties, which was owned by Glenn Proudfoot and his spouse ("Proudfoot pipeline"). The other 8" irrigation pipeline supplied water to the Horst property ("Gooseneck pipeline" or "Gooseneck"). A third 4" irrigation pipeline (and its valve) that supplied water to the west side of the Purcell property branched off the Gooseneck pipeline ("Purcell West pipeline").

[9] A very small drain valve located between the lower main valve and the two 8" irrigation pipelines drains residual water underground.

[10] In addition to the lower main valve, valves on the Proudfoot, Gooseneck, and Purcell West pipelines in the lower water system controlled the supply of irrigation water through each of them.

[11] The Proudfoot pipeline travels south through the Purcell property and then across the south-east corner of the Horst property before entering the Proudfoot property.

[12] Under their water licences, the parties are only permitted to use irrigation water from April 1 to September 30 each year.

[13] Before 2014, the Gooseneck and the Purcell West pipelines emerged above ground and their valves were above ground. The rest of the lower water system and the Proudfoot pipeline and its valve were underground.

[14] The valve on the Gooseneck pipeline failed or broke in or about 2011 or 2012 due to frost damage. Instead of replacing the valve, Mr. Horst removed it, which meant the lower main valve had to be closed to stop the flow of irrigation water out of the Gooseneck pipeline.

[15] The Purcells allege another neighbour and Mr. Horst's tenant farmer, Arlin Johnson, would open the lower main valve outside of the irrigation season to water his cattle on the Horst property. As a result, water pooled on the ground above the lower water system.

[16] In August 2014, the underground valve for the Proudfoot pipeline started leaking and was found to be cracked, also allegedly due to frost damage. Instead of replacing it where it was in the lower water system, Mr. Proudfoot installed a valve on the Proudfoot property.

[17] In September 2014, the Purcells learned the lower main valve was not closing completely. Consequently, it was not possible to stop the flow of water out of the Gooseneck pipeline onto the ground above the lower water system at the end of the irrigation season. Concerned about the risk of further frost damage to the lower water system, the Purcells proposed what they characterized as an urgent repair, which involved putting the above ground parts of the lower water system underground. At the same time, they decided to add a watering system for their horses on the west side of their property and to move Mr. Horst's access to his irrigation pipeline from their property to his.

[18] Designed by Mr. Purcell, the plan for the repair included cutting and removing the Gooseneck pipeline near its starting point below ground, plugging the remaining stub and replacing his and their above-ground irrigation pipelines with underground pipelines and valves, locating his valve on his property.

[19] The Purcells allege that Mr. Horst always opposed shutting off the upper main valve for any period of time. Viewing it as safe to do so, they decided to conduct the urgent repair by closing the lower main valve as much as possible and leaving the Proudfoot pipeline open to relieve pressure in the system.

[20] The Purcells also say that after learning Mr. Proudfoot was relocating the valve for the Proudfoot pipeline to the Proudfoot property, Mr. Horst became opposed to the repair. Alleging he never agreed, Mr. Horst has maintained the whole water system is only authorized by his water license, he owns the portion of the water system located on the Purcell property exclusively, and no one else has the right to use it let alone the authority to interfere with it.

[21] After the Gooseneck pipeline was cut and the stub was plugged on November 7, 2014, the excavated area around the lower water system suddenly flooded (the “Flood”), requiring the upper main valve to be closed. A few weeks prior to the Flood, Ms. Purcell had noticed Mr. Horst put a lock on the upper main valve, which she said had to be cut before turning off the upper main valve.

[22] While dealing with the flooded site, the parties’ domestic water lines were inadvertently cut, leaving them with no domestic water for several weeks.

[23] The Purcells allege that Mr. Horst caused the Flood by closing a valve he had secretly installed on the Proudfoot pipeline, knowing the plan was to use it to relieve pressure during the repair. Mr. Horst acknowledges installing the valve to slow or stop the flow of irrigation water to the Proudfoot property, but he denies being aware of the need to keep the pipeline open. He says he installed the valve because the Proudfoot irrigation pipeline was unauthorized and usurped the priority of his supply of irrigation water under his water license.

[24] After the flooded excavation site was drained, the Purcells discovered the gasket on the lower main valve was pushed out or “blown”, which explained the Flood.

[25] Absent Mr. Horst's consent to the urgent repair, rather than install his underground irrigation pipeline as proposed—extending onto the Horst property along and locating the valve there—the Purcells installed a pipeline underground up to or very near to the property line for him to connect to, which he never did. One of Mr. Horst's claims is for damages based on an absence of irrigation water since 2015.

[26] Once the urgent and Flood-related repairs were completed, the Purcells enclosed the underground lower water system in a locked concrete vault that provides direct access to the underground valves for the lower main system, including the parties' domestic pipelines.

[27] Since proposing the urgent repair in September 2014, the Purcells allege that Mr. Horst, Mr. Johnson, and sometimes Mr. Horst's spouse, Ms. Horst, harassed and intimidated them, and trespassed on their property.

[28] The Purcells also allege that Mr. Horst and Mr. Johnson routinely trespassed on their property before the urgent repair.

[29] In May 2015, the Purcells notified Mr. Horst that he and Ms. Horst would no longer be permitted to use the Driveway/HAR. In August 2015, the Purcells installed a temporary barrier to prevent access. The Horsts complained to the RCMP that the Purcells were blocking access to Crown land. Following an investigation in September 2015, the Purcells constructed fencing across the Horsts' entrance to the Driveway/HAR.

[30] Within a short time, Mr. Horst filed his original notice of civil claim and an order made on September 22, 2015 that provided the Horsts with emergency and once-a-day, in-and-out access to the Driveway/HAR. That access order was set aside on March 10, 2016.

[31] Mr. Horst takes the position that the Driveway/HAR is a public road or highway. He also makes an alternative claim for an equitable easement over the Driveway/HAR.

[32] Since March 2016, the Horsts have accessed the EGR from the south-end of the Horst property, using what Mr. Horst calls the “south access road”, which is far longer than the Driveway/HAR.

[33] In late July 2017, Mr. Horst and Mr. Johnson excavated and removed the portion of the Purcells’ domestic pipeline that was buried on the Horst property. Mr. Horst acknowledges that he then tried to prevent the Purcells from installing a new domestic water pipeline on their property by threatening contractors on the property with legal action. Around this same time, he broke through fencing the Purcells had installed and cut the lock on the concrete vault that provides access to the lower water system, resulting in a confrontation with the Purcells and more RCMP involvement.

[34] On September 22, 2017, the Purcells obtained an interim injunction which has remained in place. The terms of the injunction apply not just to Mr. Horst, but also the Purcells and all persons with notice of the order. The injunction restrains a range of conduct including threatening, harassing, swearing, or yelling at “each other or anyone” on “their” respective properties; trespassing, or otherwise, entering or placing anything on each other’s properties; and causing any damage to, or otherwise altering each other’s property or anything on each other’s property including the water infrastructure. Mr. Horst was required to delivery a copy of the injunction to Ms. Horst and Mr. Johnson.

[35] The Purcells allege Mr. Horst and Mr. Johnson have continued to harass and intimidate them and Mr. Johnson has continued to trespass on their property. During a particularly serious alleged trespass in 2022, the Purcells say Mr. Johnson threatened and charged at Ms. Purcell in a tractor, and damaged their property by chopping down a number of trees and setting a large fire.

[36] The Purcells’ allegations of ongoing harassment and intimidation include yelling, threatening, swearing, watching, following, photographing and videotaping, throwing dead skunks onto their property, and making a multitude of frivolous or

false complaints to the RCMP, a number of government departments, and BC Hydro.

[37] The Purcells ask for a permanent injunction that would apply to Mr. Johnson, as well as the Horsts, and would prevent Mr. Horst from accessing the water system on their property, except perhaps in an emergency.

[38] In April 2018, Mr. Horst filed his petition seeking to expropriate a 20-metre-wide easement across the Purcell property in relation to the underground water system. Section 32 of the *WSA* provides a licensee with the right to expropriate "any land reasonable required for the construction, maintenance, improvement or operation of works authorized or necessarily required under the water [licence]". The Purcells argue the easement is not reasonably required because there is no need for further construction or improvements to the water system on their property, underground pipelines require next to no maintenance, and they alone have performed all of the maintenance of the whole of the water system for many years.

[39] Mr. Horst filed an amended notice of civil claim in June 2019. The Purcells' pleadings ultimately included a second further amended counterclaim filed in November 2019.

[40] The various disputed claims and issues that arise from all of the pleadings fall for the most part into four categories. The first category involves Mr. Horst's claims related to the Driveway/HAR, as well as what he identifies as an historic trail that connects his property to the EGR by a different route through the north-end of the Purcell property. The second category encompasses the parties' ownership claims related to the portion of the water system on the Purcell property. I have included in this category all of the disputed circumstances related to the water system and the Purcells' allegations of trespass, harassment, and intimidation. The third category includes the parties' claims for damages. I deal last with the *WSA* easement and the permanent injunctive relief.

[41] In addition to his own evidence, Mr. Horst called retired lawyer Glen Yuen to provide expert opinion evidence related to the terms of the proposed *WSA* easement. Mr. Horst's other witnesses included Fraser Sinclair and Michael Raymond Phillips regarding use and maintenance of the Driveway/HAR and Ed Shaw regarding prior water licences and other aspects of the provincial water authority's past involvement. Neither Ms. Horst nor Mr. Johnson testified, despite their role in the Purcells' allegations of harassment and trespass and Ms. Horst's status as a defendant to the counterclaim.

[42] It was clear from the evidence that Mr. Horst kept Mr. Johnson apprised of his disputes with the Purcells over the water system, the Driveway/HAR, and then the litigation. In addition to being aware, Ms. Horst was also directly involved at times.

[43] Aside from themselves, the Purcells' witnesses included Mr. Proudfoot, Wes Thompson, the contractor that repaired the water system in 2014 and 2015, Victor Bossio, who constructed the original underground pipeline water system in 1996, Stuart Robinson, another contractor, Jennifer Andrews with the provincial water authority, and Chris Ford, a certified water pipeline installer who gave fact and expert opinion evidence related to underground water pipelines and the cause of the Flood.

[44] Mr. Horst and the Purcells challenged the admissibility of one another's expert opinion evidence.

[45] The record also includes multiple volumes of documents and photographs and some video footage.

[46] In these reasons, I discuss the evidence relevant to the first category separately from the others, aware of the significance of the overall chronology to the parties' motivations and perspectives. I also discuss aspects of the evidence relevant to the third category as part of the second category because it provides critical context or is also relevant to the claims in the second category.

[47] Although I do not refer to all the evidence, I have considered it.

[48] Credibility is another significant contested issue in this case. For reasons I will come to, I have assessed Mr. Horst's disputed evidence as not credible. In contrast, I view testimony of the Purcells as credible. Self-represented by the time of the trial, I was impressed not just by the quality of their evidence but also by much of their advocacy in this particularly challenging case both factually and legally. There were, however, significant gaps in the legal submissions I received from both the Purcells and Mr. Horst.

Preliminary Comments

[49] The provincial government issues water licences for the diversion and use of water, through the comptroller or water manager. Over the years, the ministry and or branch of the provincial government responsible has changed. For simplicity, I will refer to the provincial water authority, past and present, as "Water Stewardship".

[50] Under the *WSA* and previous legislation, water licences are made appurtenant to land or other things. A water licence will specify the appurtenance, a date of precedence (or priority), the authorized purpose(s) for the water use, and the maximum quantity of water that may be used for each purpose. When the appurtenance, in this case, land, is disposed of, the water licence passes or transfers with the conveyance. Regarding the date of precedence, the priority given to the supply of water from the same source provided for in different licences is based on the order in which the licences were granted. In other words, the licence with the earliest or earlier date is entitled to water first.

[51] Water licences can be final or conditional. There is no requirement for a final licence and a final licence may be replaced by a conditional licence.

[52] Licences authorize "works" or the construction of works related to the diversion and use of water, including diversion structures, which remove the water from its source, division tanks, which measure the amount of water being removed, and in this case, ditches or pipes as the means of conveying the water. In terms of their interpretation, water licences state that they authorize works "approximately" as

shown on attached plans, including the points of diversion and the routes for ditches and pipes.

[53] The parties adduced a great deal of evidence related to the history of water licences for their properties and others, as well as correspondence with Water Stewardship dating back decades.

[54] Concerned I was being asked to make findings and resolve issues within the jurisdiction of Water Stewardship, and the potential implications of Mr. Horst's public highway and historic trail claims for the Crown, through the parties, I invited the Attorney General of BC ("AG") to make legal submissions. Counsel for the AG accepted the invitation. Their written and oral submissions were of great assistance.

Background Circumstances

[55] I set out the following background circumstances to provide more general context.

[56] The Purcell, Horst, and Proudfoot properties are sublots of lot 361. The property belonging to Mr. Johnson and his wife, sublot 22, is not.

[57] In 1893, the Crown granted lot 361 to the Columbia and Kootenay Railway. The grant included several provisos, one of which related to irrigation water.

[58] A map attached to the Crown grant depicts a trail that transverses the right quarter of lot 361 from top to bottom, which forms the basis for Mr. Horst's historic trail claim.

[59] At some point, the Columbia and Kootenay Railway lost title to lot 361.

[60] In 1945, the Crown granted the west-half of sublot 16—the Purcell property—to Charles Dodge. There is no map attached to the grant, but it contained a number of provisos or exemptions. Mr. Horst relies on the last proviso in support of his water rights claims. The proviso allows the licensee under final water licence ("FWL")

3464, or licensees to substituted licences, to enter the property to maintain, repair, and operate the water system authorized under FWL 3464.

[61] FWL 3464 was issued to Joseph Derosier on July 25, 1921.

[62] The McIntyres bought the Purcell property from Mr. Dodge and also acquired sublots 9, 10, and 11.

[63] In or about the late 1920s, the Phillips family purchased the Horst property. After Mr. Horst's grandfather, Frank Phillips married his grandmother, Ms. Phillips, they lived on the Horst property with their children. Ultimately, Ms. Phillips came to own it herself before selling it to Mr. Horst in 2004. Mr. Horst contends that he and Ms. Phillips hold and held water licences issued in substitution of FWL 3464.

[64] One of the substituted licences, issued to Ms. Phillips in 1980, authorized the construction of works that included a diversion structure, division tank, and pipe to be completed by the end of 1982.

[65] However, Ms. Phillips and the McIntyres continued to rely on ditches to convey water from Maguire Creek to their properties until Water Stewardship threatened to cancel her licence in 1995.

[66] Mr. Bossio constructed the underground pipeline system, pursuant to a written contract with Ms. Phillips and the McIntyres which they signed May 13, 1996.

[67] Ms. Phillips and the McIntyres continued to share the water system, although the McIntyres never obtained a water licence related to the Purcell property that authorized works that included pipe.

[68] Instead, the water for the Purcell property continued to be supplied under a licence issued to Mr. Dodge on July 4, 1960 for sublot 9 and the west-half of sublot 16 that authorized the construction of works that include diversion structures and ditch.

[69] Frank McIntyre was leasing farmland on the Horst property when Mr. Horst bought it in 2004. In 2006, Mr. Horst entered into a lease agreement with Mr. Johnson after terminating the lease with Mr. McIntyre, apparently due to non-payment of rent.

[70] As indicated, the McIntyres lost ownership of their properties. Mr. Proudfoot gave undisputed evidence that Lillooet Management Ltd. and C.D. Bradbury Holdings Ltd., companies he "owned", petitioned the properties into receivership in 2006. Mr. Proudfoot and his wife then purchased sublots 10 and 11, and the Mellings purchased sublot 9.

[71] Appended to these reasons as Schedule "A" is a labelled aerial photograph that shows better than words can the location and configuration of the Purcell, Horst, and some surrounding properties, including the Proudfoot, Melling, and Johnson properties. As can be seen, the Johnson property is located immediately north or north east of the Horst and Purcell properties.

[72] In July 2006, Mr. Proudfoot's companies applied for an apportionment of the water licence that serviced the Purcell property and sublot 9 into two licences.

[73] The Purcells' purchase of their property completed on September 15, 2006.

[74] In 2007, they received a water licence for domestic and irrigation water. The licence identified the authorized works as diversion structure and pipes, "which shall be located approximately as shown on the attached plan", with the construction to be completed by December 31, 2010.

[75] Before and after they received the licence, the Purcells shared the water system with the Horsts, which also provided irrigation water to the Proudfoot property (sublot 10).

[76] As I have indicated, the Purcells' "urgent" repair involving the reconfiguration of above-grounds parts of the lower water system underground, started in the early fall of 2014.

[77] I append additional schedules to these reasons which are drawings or schematics that depict the water system before and after the 2014 repair prepared by Mr. Purcell. A professional engineer, he spent much of his career designing, building, and repairing pipelines including very large high-pressure gas pipelines in extreme weather climates. Although his experience and skill are reflected in the appended documents and other aspects of his evidence, I cannot and have not considered any of his evidence as expert opinion evidence. The additional schedules appended to these reasons are:

- Schedule “B”: a sketch of the lower water system prior to 2012.
- Schedule “C”: a schematic of the “original” configuration of the water system from Maguire Creek (pre-2012).
- Schedule “D”: a schematic of the current configuration of the water system, again from Maguire Creek.

[78] Although not undisputed, mostly because of what Mr. Horst says is not included, I accept the sketch and schematics are accurate and materially complete.

Credibility

[79] Before turning to the substantive claims, I will discuss my general findings regarding the parties’ credibility (and reliability). Specific aspects of the evidence that underlie these findings are highlighted during my review of the evidence relevant to different claims and issues.

Legal Principles

[80] The court’s fact-finding role and the evidentiary disputes in this case require me to assess the credibility and reliability of the parties and some of the other witnesses’ evidence.

[81] The credibility of a witness refers to their truthfulness or honesty and reliability to their accuracy. Both credibility and reliability are assessed by considering the evidence of a witness in the context of the evidence as a whole. They are related but distinct concepts. For example, an honest witness may be mistaken about what they

believe they observed or remember. Further, credibility and reliability are not all or nothing concepts. As the trial judge, I may believe some, all, or none of the testimony of a witness and attach different weights to different part of their evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291, [1996] S.C.J. No. 8 at para. 93.

[82] The fundamental approach to assessing the credibility of an interested witness's testimony was articulated many years ago in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (B.C.C.A.) at 357:

> The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions […]

[83] *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, identified several factors that inform the assessment of both credibility and reliability, which I summarize as follows: the capacity and opportunity of the witness to observe or perceive the events at issue; their ability to remember those events; whether or the extent to which a witness can resist being influenced by an interest in a desire outcome when recalling those events; inconsistency in the witness's evidence, meaning a difference in their testimony between direct and cross-examination, or between prior statements, discovery evidence and their evidence at trial; whether the witness's evidence harmonizes with or is contradicted by other reliable evidence; whether their evidence seems unreasonable, improbable or unlikely, bearing in mind the probabilities affecting the case; and the witness' demeanour, meaning the way they presented while testifying.

[84] Regarding the last factor, *Chorny* and other authorities have recognized the danger of relying solely or primarily on demeanour to determine credibility. The risks include preferring the testimony of the better actor or conversely, misinterpreting an honest witness' poor presentation as deceptive: *R. v. Jeng*, 2004 BCCA 464 at para. 54; *R. v. Tyers*, 2015 BCCA 507 at para. 18.

[85] There is an important distinction between demeanour and how a witness answers questions. In contrast to how a witness behaves, unresponsive, evasive, or confusing answers are viewed as at odds with attempting to be truthful, and may well play an important role in assessing their credibility. Similarly, intense animosity towards the opposing party may also adversely affect a witness's credibility: *K.R. v. J.R.*, 2022 BCSC 1856 at paras. 339–340.

[86] How a witness answers questions and some of the *Stenner* factors are captured by the notion of balance. Balance exists when a witness does not exaggerate or minimize and acknowledges circumstances and memory frailties that do not align with their interest, as well as weaknesses in their evidence. A balanced witness responds to questions directly and fairly, instead of strategically. Nor do they provide unsolicited self-serving evidence or make unreasonable attempts to control the narrative.

Discussion

[87] Assessing his evidence in the context of the evidence as a whole, as I have indicated, I find Mr. Horst was not a credible witness. As result, I conclude that I cannot safely rely on his disputed testimony except where it is confirmed by objective evidence or other evidence I do accept. Many factors contribute to this finding. Most significant perhaps is the obvious influence of Mr. Horst's inability or unwillingness to see beyond his own "rights" which he misconceives as absolute entitlements, and the corresponding failure to recognize the rights, interests, and needs of others, namely, the Purcells. Although it is not uncommon for parties to be affected by their interest in the outcome of the litigation, it is rare in my experience for someone to be as entrenched as Mr. Horst appeared to be throughout his testimony. His perspective infused all of his evidence about the Purcells, his understanding of his claims and his response to theirs. It was also accompanied by a troubling displays of a lack of empathy. For example, during cross-examination about alleged harassment, Mr. Horst testified to watching the Purcells deal with the dead body of one of their horses, he understood the horse had been killed by another horse, and he found all of this interesting. The incident had occurred shortly

before he gave this evidence. Indicating she had been unaware of what caused the death of her horse, Ms. Purcell appeared very shaken. Along with the eeriness of his interest, I noted Mr. Horst appeared amused by Ms. Purcell's distress.

[88] Some of Mr. Horst's evidence about his conduct and decision-making, which I viewed as unreasonable, if not inexplicable, added to my impression about his lack of credibility. I have in mind his apparent decision not to approach the Purcells about connecting to the underground irrigation pipeline they had installed for his property during the "urgent" repair, forgoing any irrigation water for several years, and then pursuing damages for the alleged damaged. Another example involves choosing not to improve the condition of the south access road or acquire any snow removal equipment since he began using it in 2016, although he alleges it is unsafe and he has been stuck there in dangerous weather conditions.

[89] Appreciating unreasonableness and not telling the truth are not necessarily correlated, other factors also underlie my conclusion that Mr. Horst was not faithful to the oath to tell the truth, the whole truth and nothing but the truth.

[90] For example, Mr. Horst gave evidence that was inconsistent with or contradicted by his own prior communications such as requesting an easement over the Driveway/HAR in 2006 shortly before the Purcells bought their property. He also relied on transparently self-serving evidence—a photograph he took—in support of denying he closed the valve he installed on the Proudfoot pipeline on or shortly before November 7, 2014 when the Gooseneck pipeline was cut and the Proudfoot pipeline needed to be open to accommodate water passing through the lower main valve and relieve pressure in the system. There were also other inconsistencies or contradictions between his evidence and objective evidence or evidence of credible third-party witnesses, such as Mr. Bossio.

[91] Obviously intelligent and displaying a good memory on non-contentious issues, Mr. Horst also testified to not recalling in a way that aligned with his interest. He was similarly evasive or non-responsive during cross-examination.

[92] Mr. Horst did acknowledge some circumstances that were not in his interest, mostly related to his alleged misconduct. When he did so, however, he typically portrayed his conduct as justified based on his distorted view of his rights and the other party's lack of entitlement.

[93] As discussed below, Mr. Horst opposed the Purcells' application to add Mr. Bossio as a witness. Prior to the trial, the Purcells believed Mr. Bossio was deceased because of an obituary they had found. During the trial, they learned it was Mr. Bossio's father who had died and Mr. Bossio was available to testify.

[94] Unreasonably, in my view, Mr. Horst opposed the Purcells' application to add Mr. Bossio as a witness, which I allowed.

[95] His evidence about the surrounding circumstances, the construction itself, his dealings with Ms. Phillips and Mr. McIntyre and fulfillment of the contract contradicted aspects of Mr. Horst's testimony. Based on the content of Mr. Bossio's evidence, I became concerned Mr. Horst's opposition had been motivated at least in part by a desire to protect his testimony for being exposed as inaccurate.

[96] In sharp contrast, I find Mr. Purcell and Ms. Purcell testified honestly and as accurately as they could.

[97] Mr. Purcell's evidence had many strengths. Factual, logical, careful. and balanced, he was responsive and reasonable throughout. I was never concerned Mr. Purcell was exaggerating, minimizing. or attempting to manipulate. He had no difficulty acknowledging circumstances that were not in his interest, including circumstances he could not remember. He did struggle to remember dates and some historical circumstances, which I accept was due to the very long period of time involved, the multitude of events at issue and, in some instances, their relative unimportance. Given his sincerity and his intelligence, I am not concerned about the accuracy of the many circumstances he was able to recall and describe.

[98] Ms. Purcell's memory for details was not only much better but impressive, as was her grasp of the documentary and photographic evidence. Her account of

various circumstances, in addition to be detailed, was thoughtful and convincing. Being more descriptive and explanatory than Mr. Purcell, Ms. Purcell too was reasonable and balanced throughout both direct and cross-examination.

[99] No meaningful concerns were raised about the credibility of the witnesses of the parties. Nor in assessing their evidence have I identified a basis for concern.

[100] Mr. Bossio impressed me as particularly credible and reliable. An independent witness with no interest in the outcome, he was straightforward, responsive, and reasonable. He also displayed an excellent memory and a remarkably organized approach. On this last point, he arrived with his records related to the project although it completed almost 25 years ago. I also found Mr. Thompson straightforward and sincere. There were times when, I am satisfied, he misremembered or he could not recall particular circumstances related to his work on the lower water system, which Ms. Purcell also testified about. Where Mr. Thompson's evidence differed from hers, I prefer Ms. Purcell's evidence given her superior memory and knowledge of the broader circumstances.

[101] A related exercise involves assessing the ultimate reliability of the affidavit evidence of Elizabeth Gravelle, Mr. Horst's great aunt, sworn March 2016 and July 2019. Ms. Gravelle died before the trial began. Under the principled exception, hearsay evidence is admissible if it meets the dual criteria of necessity and threshold reliability. In advance of the trial, another judge ruled her affidavits admissible, meaning necessity and threshold reliability were found to be established. I am left to assess the ultimately reliability of her evidence in deciding on its weight. I received no submissions on this issue. As noted, Ms. Gravelle's second affidavit were sworn in July 2019, years after Mr. Horst filed his notice of civil claim, although, in response to the interrogatories of the Purcells. Discussed below, she deposes to events as far back as the 1920s. Some dates are anchored to important life events and I have determined it is safe to give some weight to what she describes generally.

Driveway/HAR Claims

Public Highway

[102] Mr. Horst seeks a declaration that the Driveway/HAR is a public highway pursuant to s. 42 of the *Transportation Act*, S.B.C. 2004, c. 44 [*Transportation Act*], or, in the alternative, based on the common law doctrine of dedication. In the further alternative, he claims an equitable easement over the Driveway/HAR based on the doctrine of proprietary estoppel. He also seeks a declaration that a trail, which he alleges crosses the Purcell property very close to their residence, is a historic trail that is owned by the Crown and therefore a public right of way. As with the other claims, the purpose of the historic trail claim is directed at securing access to the EGR from the north-end of the Horst property where Mr. Horst's residence is located.

[103] I begin with the legal framework that applies to Mr. Horst's public highway claims.

Legal Principles

[104] A highway is defined in s. 1 of the *Transportation Act* in relevant part as follows:

> **"highway"** means a public street, road, trail, lane, bridge, trestle, tunnel, ferry landing, ferry approach, any other public way or any other land or improvement that becomes or has become a highway by any of the following:
>
> […]
>
> (b) a public expenditure to which section 42 applies;
>
> (c) a common law dedication made by the government or any other person;
>
> […]
>
> (e) in the case of a road, colouring, outlining or designating the road on a record in such a way that section 13 or 57 of the *Land Act* applies to that road;

[105] Section 42 of the *Transportation Act* reads:

> **Travelled roads becoming highways**
>
> **42** (1) Subject to subsection (2), if public money is spent on a travelled road that is not a highway, the travelled road is deemed and declared to be a highway.
>
> (2) Subsection (1) does not apply to any road or class of roads, or to any expenditure or class of expenditures, that is prescribed by the regulations.

[106] Section 4(1)(a) of the *Transportation Act Regulation*, B.C. Reg. 546/2004 specifies that s. 42(1) does not apply to an expenditure of public money where the expenditure is confined to snowploughing or ice control.

[107] Rather than codifying the common law, s. 42 of the *Transportation Act* creates a statutory method for establishing a highway that exists in parallel to common law dedication: *Whistler Service Park Ltd. v. Normway Industries Ltd.*, 1990 BCCA 792.

[108] The provincial government does not have the authority to declare a road a public highway under s. 42 of the *Transportation Act*. Only the court has the authority to declare a road a public highway under s. 42: *Hollis v. HMTQ and AGBC* (12 March 1998), Victoria 6733 (B.C.S.C.).

[109] As can be seen, s. 42(1) includes three requirements: the land must be a road; the road must be "travelled"; and public money must be spent on it.

[110] The person seeking the declaration bears the burden of proving the second and third requirements: *Whistler Service Park.*

[111] Both the second and third requirements must be established on a "preponderance of probabilities" with "cogent and substantial evidence": *Dunstan v. Hell's Gate Enterprises Ltd.* (1987), 20 B.C.L.R. (2d) 29 (C.A.) at para. 33. In *Whistler Service Park*, the evidentiary standard was described as "so substantial in nature and demonstrate[s] such circumstances as to remove any suspicion that an expropriation without compensation is taking place": at para. 31.

Travelled Road

[112] The Court of Appeal in *Whistler Service Park* upheld the trial judge's conclusion the road in dispute had become a public highway. Constructed in the 1930s as a logging road, the road later formed part of the route between Whistler and Pemberton used by locals, fisherman, 4x4 tourists and sightseers, with traffic slowly increasing over the years. From 1964 to 1973, the road was used as a detour during the construction of Highway 99 north of Squamish.

[113] In *Silvern Estates Ltd. v. British Columbia*, 2007 BCCA 284, the travelled road finding was based on ample evidence that the rural road at issue had been travelled since at least the early 1930s, sometimes for commercial purposes to access mining interest but also by tourists and the general public.

[114] *Vesuna v. British Columbia (Transportation)*, 2011 BCSC 941, aff'd 2013 BCCA 10, considered the meaning of travelled road under s. 42 of the *Transportation Act*. Based on *Whistler Service Park*, *Silvern Estates*, and *Dunstan*, Justice Griffin, as she then was, in *Vesuna*, concluded the route in question must have had some substantive public use, something more than rare or occasional use: at para. 107. Noting the absence of evidence from local residents to establish the road at issue, a logging road, was used by the general public, she found it was not a travelled road. In contrast to *Whistler Services Park* and *Silvern Estates*, only the private owner, people granted permission by the owner, and the Crown were permitted to use it, which was gated and locked.

[115] After *Vesuna* and based on other authorities, Justice Russell in *Skutnik v. British Columbia (Attorney General)*, 2013 BCSC 195, concluded that evidence of "casual" travel was insufficient to meet the requirement for a travelled road under s. 42. Holding that travel must instead be significant, based on a number of factors, she explained:

> [68] […] In some instances, the degree of travel might not be so great but recognition of the road as a necessary route of access will prompt a finding the road is travelled. It may also be measured by way of historical use, the

> number of users in relation to the population of the community and the diversity of users (i.e. not simply the locals). […]

[116] Justice Russell went on to find the road at issue, which was 24 kilometres long, was sufficiently travelled. Constructed between the late 1940s and early 1950s, it was the only roadway between D'arcy and Seton Portage, BC, and provided an essential access route to nearby communities for many local residents. The road also had a lengthy history of use by a variety of different groups, including local residents, on-reserve First Nations people, BC Hydro, BC Rail, members of the public, and tourists: *Skutnik* at para. 91.

[117] Much more recently in *Harrison v. Nemeth*, 2022 BCSC 1958, Justice Donegan found the plaintiff's evidence on the travelled road requirement insufficient to establish the lower threshold of a strong *prima facie* case in the context of an injunction application. The plaintiffs used the road at issue, described variously as a roadway and a dirt lane, which ran through their neighbour's property, to access their own property from the highway. The evidence showed only occasional use by employees and guests of the property owners and an undefined number of neighbouring friends over 25 years earlier .

Common Law Dedication

[118] A road may also become a public highway through common law dedication, which has two requirements: (a) the owner demonstrates an intention to dedicate the road to the public for the purpose of a highway; and (b) the public accepts the road as a highway. Again, Mr. Horst as the person asserting the existence of the highway bears the onus of proving both requirements on the same standard of proof that applies to s. 42(1) claims.

[119] Regarding the first requirement for common law dedication, an owner may dedicate the road by word, deed, or conduct that shows an actual intention to dedicate: *452195 B.C. Ltd., Abbotsford (City)*, 2013 BCSC 2055 at para. 199. Further, evidence of public use of the disputed road may be used to infer an intention to dedicate and or public acceptance.

[120] In *Montcalm Aggregates Ltd. v. Maple Ridge (District)* (1994), 86 B.C.L.R. (2d) 359 (C.A.), the owner's dedication was inferred "from the fact of free public use of the land as a road over a substantial a period of time with the owner's knowledge, from which acquiescence can be inferred". Where the owner makes an express dedication, however, lengthy public use is not necessary to constitute public acceptance: para. 17.

[121] As the AG points out, in *Dunstan*, the Court of Appeal cautioned against inferring dedication by the owner and public acceptance too readily where the evidence more likely reflects the owner's "neighbourly tolerance' than an intention to surrender his property without compensation, relying on *Reed v. Town of Lincoln* (1974), 6 O.R. (2d) 391 (C.A.) at 396:

> […] Evidence of the use of the road by the public is merely evidence from which the intent to dedicate may be inferred (per Lord Kinnear in *Folkestone Corp. v. Brockman* [*et al.,* [1914] A.C. 338], at p. 352). Such an intention ought not be too readily inferred from the use by members of the public of a road traversing private property in a rural community, especially in a locality where the normal system of roads did not develop. In these circumstances the owner of the property may well, in a neighbourly spirit, permit local residents to use a way across it for their convenience without having any intention of dedicating the road as a public highway. The inference of neighbourly tolerance is the more likely when dedication is sought to be established at a period when the area is in a relatively early stage of its development […]
>
> [Citations omitted.]

[122] The AG also referred to cases where use of a road by a limited class of persons was found not to constitute public use.

[123] In *Brady v. Zirnhelt* (1998), 57 B.C.L.R. (3d) 144 (C.A.), the Court of Appeal allowed the appeal, concluding the trial judge who found a road that crossed the defendants' ranch used by guests, immediate neighbours, and trades people, and provided the only access to the local highway was not a public highway had erred: para. 50.

[124] Much more recently, in *Allen v. 0990199 B.C. Ltd.*, 2018 BCSC 1465, a road through the defendant's land, which the plaintiffs used for many years and provided

the only vehicle access to and from their property was also found not to be "public road". Describing it as a private road to the outside world, Justice Crossin also observed there was no evidence the public used the road more than sporadically or in any meaningful sense: para. 148.

[125] Similarly, in *Cook's Road Maintenance Association v. Crowhill Estates* (2001), 196 D.L.R. (4th) 35 (Ont. C.A.), the Ontario Court of Appeal found a road used for several decades by the plaintiff cottagers, their tradespeople, guests, and the occasional hunter or sightseer was not a public road, concluding that evidence of public use must involve use by those who are not members of the "user class" seeking the declaration:

> [35] […] The use of the road by members of the public which may be relied on to support an inference that the road had been dedicated as a public road must be independent of its use by members of the user class seeking a declaration that it had been dedicated for a public use […]

Relevant Evidence

[126] The evidence relevant to the public highway claims includes some of Mr. Horst's testimony, the testimony of Michael (Ray) Phillips ("Mr. Phillips") and Fraser Sinclair, the two affidavits of Ms. Gravelle, and some documents.

[127] Born in 1923, Ms. Gravelle identified herself as an elder of the Ktunaxa Nation and a linguist. She deposed that after her father bought the Horst property, she started living there with her family in 1928 or 1929. "Relocated" to residential school from the age of six or seven until she was 14, she recalled visiting the Horst property every summer. After returning to the Horst property when she left residential school in 1937, she said she used an access road daily.

[128] Ms. Gravelle described the "old highway" that travelled from north to south being closer to the property line or further west than the EGR, which replaced it in the mid-1930s. There was a short access road that connected the Horst property to the old highway. Although Mr. Horst suggests she provided evidence that the Ministry of Transportation built a new longer access road, she said a new access road was required (given the location of the EGR) but nothing about who built it.

Ms. Gravelle did state the new access road is the same road that is being used "today" to "service" the Horst property.

[129] Indicating she was certain the new access road was established by the time she got married in 1941, Ms. Gravelle said she moved away from the Horst property and returned that same year, after her spouse enlisted to fight in World War II. Deposing her brother, Frank Phillips and his wife, Ms. Phillips, moved onto the Horst property in 1946, in Ms. Gravelle's July 2019 affidavit, she indicated she no longer lived on the Horst property after that.

[130] Again, on January 18, 1945, the Crown granted the west-half of sublot 16 from lot 361 to Charles Dodge. The east-half of sublot 16 was and has remained Crown land.

[131] Mr. Horst relies on a water map to suggest the Driveway/HAR was recognized by the Crown as a road at the time of the Crown grant to Mr. Dodge.

[132] Ray Phillips is the son of Frank and Ms. Phillips and Mr. Horst's uncle. He testified to living on the Horst property from 1955 to 1973. Mr. Phillips was aware that Mr. Dodge was the first owner of the Purcell property, which he then sold to the McIntyres. His father kept horses on the Horst property, as did the McIntyres on the Purcell property. Mr. Phillips testified that after his father died in 1970, his mother, Ms. Phillips, did not farm the Horst property herself but had a series of tenant farmers. Mr. Phillips did not recall Mr. McIntyre being one of them. Ms. Phillips moved to Fernie in 1993, although she continued to stay at the Horst property from May to October. Mr. Horst and his sister were often there after their father died in 1990.

[133] Mr. Phillips testified the residence on the Horst property and the Driveway/HAR, which he used everyday to go pretty much everywhere, were in the same locations as today; his family also used the Driveway/HAR to haul hay from a neighbouring property they also owned where they kept farm machinery, to the barn on the Horst property. There was no other road or track used to access the EGR.

Asked how many times per week the family used the Driveway/HAR, he estimated 20 at least, or two to three times per day. Mr. Phillips also testified that starting in 1960, he took the school bus to school from the Driveway/HAR. Although he recalled Mr. Horst and his sister taking the school bus when they stayed at the Horst property, he did not know if the McIntyres' children did.

[134] Asked if Mr. Dodge or Mr. McIntyre were ever prevented access to the Driveway/HAR, Mr. Phillips responded no.

[135] In cross-examination, Mr. Phillips indicated Mr. Dodge owned the Purcell and the "Proudfoot" properties, and there was no house where the Purcells' residence is located, until 1980. Mr. Phillips also said Mr. Dodge could not see the Driveway/HAR without binoculars and acknowledged that members of the public did not use the Driveway/HAR.

[136] Mr. Sinclair's testimony focused on work he did on the Driveway/HAR as an equipment operator with the Ministry of Transportation from 1984 to 1988 and then various private contractors until 2006. Mr. Sinclair described the school bus pulling in and turning around at the Driveway/HAR. He said that he (and other equipment operators) would grade, pack, and ditch (from a little ditch on the south side) the Driveway/HAR up to Mr. Horst's gate twice per year in the spring and fall. They also snowplowed in the winter depending on the weather. Since he retired, Mr. Sinclair has not seen any equipment working on the Driveway/HAR.

[137] Mr. Sinclair acknowledged that he was not specifically instructed to maintain the Driveway/HAR. Instead, there was a block system for roads and they did everything in that block. He thought the Driveway/HAR was included because the school bus turned around at that location.

[138] Mr. Sinclair has lived most of his life in Grasmere. He said he knew Mr. Horst's grandmother and the Horst property from visiting there with his mother. Asked about the use of the school bus, Mr. Sinclair said the McIntyres' children

would have taken it and some other children living north were brought down to that spot for the school bus.

[139] During his testimony, Mr. Horst recalled visiting the Horst property as a child as far back as the early 1980s. Like Mr. Phillips, he said they always accessed the EGR using the Driveway/HAR and there was never any other route. Mr. Horst said he took the school bus when he lived on the Horst property during high school and other neighbours' children also got on and off at the Driveway/HAR. He also recalled his grandmother leasing the some of the Horst property to a series of farming tenants that included Mr. McIntyre.

[140] No one addressed whether it was simply convenient for the school bus to turn around on the Driveway/HAR.

[141] In addition to he and his wife using the Driveway/HAR after they bought the Horst property, Mr. Horst stated it continued to be used by his farming tenants. Mr. McIntyre was that tenant for two or three years until Mr. Horst terminated the lease for non-payment of rent. In 2006, he leased the land to Mr. Johnson who lives on sublot 22 next to the Purcells.

[142] Addressing maintenance of the Driveway/HAR, Mr. Horst said he remembered seeing a highway maintenance contractor grade the Driveway/HAR in the early 1980s. Mr. Horst identified a photograph he took of it being graded in April 2006, which he said was the last time he saw any work being done there. Neither he nor the other witnesses gave any indication the school bus continued to stop at or on the Driveway/HAR after April 2006. In cross-examination, Mr. Horst acknowledged he received nothing specific about the Driveway/HAR and very little about the EGR in response to his freedom of information requests for records regarding maintenance on the Driveway/HAR.

[143] The EGR is a 5-kilometre rural road that ends at the north-end in a cul-de-sac. Ms. Purcell described it as very lightly travelled with almost no vehicle traffic.

[144] The Driveway/HAR is part of the Purcells' driveway which also includes a large circular portion. From the entrance off of the EGR, the driveway splits left and right or west and east. The west side passes close to the residence before meeting up with the east side a short distance from the what has been referred to as Mr. Horst's gate, which is some feet north of the actual property line. Ms. Purcell estimated the length of the Driveway/HAR, or the east side of the driveway from the entrance off the EGR to the gate as 200 metres. Mr. Horst's estimate was 200 feet. On either estimate, the Driveway/HAR is appropriately characterized as a reasonably short unpaved driveway.

Discussion

[145] In my view, the evidence falls well short of establishing the Driveway/HAR was/is either a travelled road under s. 42 or meeting the common law requirement of an intention to dedicate it to the public for use as a highway.

[146] During his submissions, Mr. Horst argued there is no evidence that the use of the Driveway/HAR resulted from neighbourly tolerance, which would seem to reverse the onus of proof. More importantly, neighbourly tolerance is precisely the inference I would draw from all of the evidence related to the use of the Driveway/HAR over many years.

[147] Ultimately, Mr. Horst relied on the long-term use of the Driveway/HAR as a "school bus route" to establish the travelled road requirement under s. 42, and along with previous owners' acceptance of maintenance provided by the Ministry of Transportation, an intention to dedicate it to the public.

[148] I disagree with Mr. Horst's contention that the evidence shows the community considered the Driveway/HAR to be a public road. Aside from Mr. Sinclair's evidence, there is no direct evidence from community members. Other than the school bus stopping and turning around there to pick-up and drop-off some of the children who lived on nearby properties until 2006, there is no evidence the community or the general public used the Driveway/HAR at all. Further, in terms of the specific use of the Driveway/HAR as a place to stop and turn around for the

school bus over the years, although it was maintained twice a year up to Mr. Horst's gate, I am not able to discern how much or how little of the Driveway/HAR or driveway was used by the school bus.

[149] In any event, apart from those living on the Horst property and leasing some of its farm land, only a "limited class of persons", some of the children from neighbouring properties and school bus drivers who picked them up and dropped them off used the Driveway/HAR. Although all of this use was regular and occurred for many years, neither the number and diversity of users, nor the necessary route of travel factors discussed in *Skutnik* are made out here. Nor is *Vesuna's* substantive public use criteria met. The facts which ground the findings of a travelled road in *Skutnik* and *Whistler Service Park*, are readily distinguishable from those here.

[150] Turning to other aspects of the common law requirement, there is no evidence of express dedication by the previous owners of the Purcell property. Nor, as I have said, is there evidence of any public use of the Driveway/HAR apart from an unspecified part of it being used by the school bus to pick up and drop off some of the neighbourhood children. Assuming the use started while Mr. Dodge still owned the Purcell property and continued until 2006, I would not infer from this use by one class of users that either Mr. Dodge or Mr. McIntyre, whose own children used the school bus, intended to dedicate the Driveway/HAR to the public for use as a highway. The same is true when I also consider the use by persons living at the Horst property and tenant farmers, along with Mr. Sinclair's evidence that Mr. Dodge and Mr. McIntyre never objected to them using the Driveway/HAR. Given the location of the Purcell and Horst properties in a remote rural area, the caution about inferring dedication from evidence that more likely reflects the owner's neighbourly tolerance although very dated remains apt.

[151] Given my findings and conclusions, it is unnecessary to consider the other requirements under s. 42 of the *Transportation Act* and the common law for establishing a public highway. Mr. Horst's claim that the Driveway/Horst Access Road is a public highway is dismissed.

Equitable Easement – Proprietary Estoppel

[152] I turn now to Mr. Horst's claim that he is entitled to an equitable easement over the Driveway/HAR, based on the doctrine of proprietary estoppel.

[153] Proprietary estoppel involves the equitable acquisition of an interest in property where an owner knowingly stands by while another person incurs a detriment in the belief that they are, or will be, entitled to an interest in land: *The Owners Strata Plan NES33 v. Westshore Developments Limited*, 2015 BCSC 1280 at para. 66; *Bland v. Bland*, 2017 BCSC 1712 at para. 44. The foundation of a claim of proprietary estoppel is an equitable right arising out of the conduct of the parties: *Sabey v. Rommel*, 2014 BCCA 360 at paras. 43-44. The test has been articulated as follows:

> 1. Is an equity established? An equity will be established where:
>
> a. There was an assurance or representation, attributable to the owner that the claimant has or will have some right to the property, and
>
> b. The claimant relied on this assurance to their detriment so that it would be unconscionable for the owner to go back on that assurance.
>
> 2. If an equity is established, the court must determine the extent of the equity and the remedy appropriate to satisfy the remedy.

Sabey at para. 30.

[154] *Young v. Beck*, 2017 BCCA 248 subsequently canvassed several cases that considered the elements of proprietary estoppel. In *Purdy v. Pighin*, 2022 BCSC 1499, Justice Lyster, at para. 50, observed there were differences the how the elements were discussed in those same cases. Emphasizing the inquiry reduces to the ultimate issue of unconscionability, she concluded a claimant needs to establish: (1) a representation or assurance, which may be implied from conduct and acquiescence; (2) reliance; (3) detriment; and (4) a property right that can be transferred to satisfy the equity.

[155] Possible remedies for proprietary estoppel include easements, or lesser equitable rights: *Trethewey-Edge Dyking District v. Coniagas Ranches Ltd.*, 2003

BCCA 197 at para. 78. The remedy must accord with the expectation that was created, and must comport with the minimum equity doctrine, which provides for a remedy that achieves the minimum required to do justice between the parties: *Sabey* at para. 29. An easement confers the right of one property owner (the dominant tenement) to use the land of another (the servient tenement): *Roop v. Hofmeyr*, 2016 BCCA 310.

[156] Like this case, *Purdy* involved a dispute over an access road on ranch lands owned by some of the respondents. The petitioners' property was otherwise "landlocked" without direct access to a public road. The dispute over the first element, a representation or assurance, was rather narrow. While the petitioners alleged an express agreement to provide them with a permanent easement over the access road, some of the respondents alleged the easement was only for as long as they owned the property. Accepting the petitioners' version of events, Lyster J. also accepted they had relied on the assurance to their detriment, concluding it was "most unlikely" they would have bought the property because without a permanent right to use the access road, given it would be landlocked and therefore unmarketable.

[157] Turning to the question of remedy, Lyster J. determined an equitable easement was necessary to satisfy the equity established. Absent evidence to support the concerns of some of the respondents about possible increased traffic being detrimental to the ranch operations, she granted an easement over the access road that provided the petitioners with free and uninterrupted access.

[158] In *Erickson v. Jones*, 2008 BCCA 379, the Court of Appeal upheld the trial judge's decision that the plaintiffs and co-owners of their property, who bought many years later, were entitled to an equitable easement over an access road on the defendant's property. The property was previously owned by Mr. Loper. At that time, the defendant owned a contiguous property. He also built the access road in part with funds contributed by the plaintiffs after they agreed to the previous access road, which ran through the middle of Mr. Loper's then property, being moved or rebuilt to

run along the boundary. A portion of the new access road also ran along the boundary of the defendant's then property at a location specified by him. Mr. Loper, the defendant, and the plaintiffs believed then that they had a right to use the access road, because it was a public road. The plaintiffs used the access road for 25 years and the co-owners, for many years. When the defendant bought Mr. Loper's property, he made it clear he intended to limit or prevent access to the access road.

[159] The trial judge denied the plaintiffs' other claim that the "old" and "new" access roads were public highways. Turning to proprietary estoppel, the trial judge found that the defendant, Mr. Loper, and the plaintiffs had agreed that only they would use the "new" access road and the "old road" would no longer be used. The trial judge concluded it would inequitable and unjust to permit the defendant to insist on his legal rights, implicitly finding that an equity had been established, not only by the agreement but also by the defendant's conduct in constructing the access road and then allowing it to be used by the plaintiffs (and the co-owners). The trial judge also concluded that agreeing not to use the old road, contributing to the cost of constructing the new access road, along with Mr. Jones' long-standing acquiescence, resulted in a detriment for the plaintiffs.

[160] In characterizing the detriment, the Court of Appeal held that what the plaintiffs gave up was the opportunity to have their "right" to use the old road resolved, in reliance on the conduct and acquiescence of Mr. Loper and the defendant, as well as the payment of money to construct and maintain the "new" access road.

[161] A potentially relevant unresolved question is the extent to which an unregistered equitable easement can be enforced against a successor in title who takes with notice: *Roop*. Section 29 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], provides a transfer of land is not affected by a notice of an unregistered interest affecting the land, except in the case of fraud. While s. 29 also makes it clear that a bona fide purchaser who did not have notice will not be affected, what constitutes fraud under s. 29 is not. The discussion in *Roop* includes:

> [62] […] In *Vancouver City Savings Credit Union v. Serving For Success Consulting Ltd.*, 2011 BCSC 124, Mr. Justice Bracken observed that in British Columbia, there are two divergent lines of authority for what constitutes fraud under s. 29:
>
> > [62] …The first line of authority, reflected in *Woodwest*, states that a purchaser of real property who takes title to a property with knowledge of a prior unregistered adverse interest, and who then attempts to rely on s. 29 of the *Land Title Act*, may be found to have committed equitable fraud.
> >
> > [63] The second line of authority, as evidenced in *Szabo*, [*Szabo v. Janeil Enterprises Ltd.*, 2006 BCSC 502] requires something more than knowledge; usually conduct that constitutes some form of dishonesty.

[162] As the Court of Appeal observed, ultimately Justice Bracken in *Vancouver City Savings Credit Union v. Serving For Success Consulting Ltd*., 2011 BCSC 124, concluded that the line of authority reflected in *Szabo v. Janeil Enterprises Ltd*., 2006 BCSC 502 was correct and should be followed. This means evidence of actual notice coupled and some sort of act of dishonesty or deceit are required to establish fraud on the part of the person seeking protection under s. 29 of the *LTA*. At para. 89, Bracken J. held:

> [89] To prove equitable fraud it must be established that the party acquiring a registered interest in land had sufficient actual knowledge of the conflicting interest in the property to cause a reasonable person to make inquiries as to the terms and legal implications of the prior instrument. In addition, there must be some other circumstance to take the matter out of the ordinary course of business or to show some clear intention to use the statute to defeat the respondents' interests in circumstances contrary to common morality such that it would be inequitable for the court to allow reliance upon the statute as protection. Something more than simple knowledge is required. This interpretation seems consistent with the clear words of ss. 20, 29 and 30 of the *Land Title Act.*

Related Evidence

[163] Mr. Horst bought the Horst property from his grandmother in 2004 for $175,000. About two years later, the Purcells paid $467,000 for the Purcell property, although it is less than half the size of the Horst property.

[164] Mr. Horst testified that the Driveway/HAR was in good condition in 2004. He never did any work on it. Along with he and Ms. Horst using the Driveway/HAR to

access the EGR, he referred to his tenants, Mr. McIntyre and Mr. Johnson, using it to transport animals and equipment.

[165] There is no evidence about any discussions between Mr. McIntyre and Mr. Horst or previous owners of the Horst property and Mr. McIntyre or Mr. Dodge regarding the Driveway/HAR.

[166] Mr. Proudfoot managed the Purcell property and the McIntyres' other former properties on behalf of Lillooet Management Ltd. and C.D. Bradbury Holdings before selling the Purcell property to the Purcells and purchasing sublots 10 and 11 to himself.

[167] Asked to confirm that he never delivered a notice to Mr. Horst not to use the Driveway/HAR, Mr. Proudfoot testified he made inquiries about prior agreements between landowners and could not find anything. He also said dealing with the water system was the priority at the time.

[168] In cross-examination, Mr. Horst reluctantly acknowledge that he requested an easement over the Driveway/HAR in or about 2006 that was not accepted.

[169] In a letter to Neil Fimrite on behalf of Lillooet Management and Bradbury Holdings dated August 14, 2006, Mr. Horst wrote:

> We need to settle "issues and paperwork" regarding easements through the West ½ of Sublot 16 […] for the water system […] as well as my driveway, which passes through this sublot.

[170] Mr. Horst also wrote that he required acknowledgement of his 50% ownership of the "common" water system, in addition to complaining about Mr. Proudfoot's "unauthorized" modification of the water system.

[171] Mr. Horst's letter to Mr. Fimrite begins by asking for confirmation that Mr. Proudfoot was acting as their agent.

[172] Mr. Fimrite, the president of Lillooet Management responded on August 22, 2006, focusing on issues related to the water system. Regarding Mr. Horst's request

for an easement over the Driveway/HAR, he advised the buyers (the Purcells) had been made aware of his request to "conclude a formal arrangement for a more convenient access point to your property through Lot 16 (*sic*)". Mr. Fimrite referred Mr. Horst back to Mr. Proudfoot, but also told him he anticipated he and the Purcells would be able to reach a mutual agreement with respect to common issues.

[173] Mr. Proudfoot testified to actually writing the letter from Mr. Fimrite. He indicated he suggested contacting the buyers about an easement over the Driveway/HAR because a survey needed to be done, the conditions of the easement and even the property line between the Horst and Purcell properties had to be determined, along with a lot of "legal tidying up to reflect the intention of the McIntyres and Ms. Phillips to establish a joint water system".

[174] Mr. Horst said he wrote his letter because Mr. Proudfoot was threatening to oust him from Conditional Water Licence ("CWL") 111880 and wanted to arrange a swap of a small "orphan" piece of the Horst property for a new access road along the northern boundary of the Purcell property. Asked to agree that he had refused Mr. Proudfoot's offer of an easement, he denied being offered one.

[175] In cross-examination, Mr. Horst also said that he told Mr. Proudfoot when he proposed the swap that the Driveway/HAR is a public road having educated himself about the meaning of government maintenance and the significance of the grader.

[176] Mr. Horst emphasized he has since been further educated; he views the Driveway/HAR as a public road and he does not require an easement.

[177] Ms. Purcell testified that before the purchase, Mr. Proudfoot and their lawyer told her that there were no easements on the Purcell property. Mr. Proudfoot mentioned a proposed easement that would provide the Mellings with easy driveway access to their property, sublot 9, and other potential easements related to the water system including irrigation pipelines. Mr. Proudfoot advised her not to provide easements to Mr. Horst unless he agreed to one related to the portion of their domestic water line that was buried on his property.

[178] The Purcells provided a driveway easement to the Mellings but no others.

[179] Ms. Purcell testified to receiving a friendly letter from Mr. Horst dated November 27, 2006 which is in evidence.

[180] He introduced himself and Ms. Horst and extended an invitation to visit so they could become acquainted, as well as discuss “the issues that we have in common” including their “mutual need for easements”.

[181] Despite his request for an easement over the Driveway/HAR in August 2006, Mr. Horst testified that he was referring to an easement for the “water works” not the Driveway/HAR, in his letter.

[182] Ms. Purcell recalled sending a Christmas card and then calling Mr. Horst in response to his letter. She recounted a positive conversation. During the call, Mr. Horst mentioned their need for mutual easements in relation to the domestic water line and the Driveway/HAR. Ms. Purcell said she told Mr. Horst they wanted to get to know the property for a couple of years and would not be issuing any easements except to the Mellings. She also said she told him that in the meantime he and Ms. Horst were free to use the “driveway” (Driveway/HAR).

[183] Mr. Horst denied talking about easements with Ms. Purcell during a phone call or even speaking with her by phone.

[184] The Purcells were mostly absent from the Purcell property except during the summers until they moved there full-time in or about 2014.

[185] In response to events discussed below, during the repair of the water system, Ms. Purcell sent an email on November 4, 2014 to all of the adjoining neighbours including Mr. Horst, Mr. Johnson, Mr. Proudfoot, and Mr. Melling, requesting they obtain permission before entering the Purcell property, unless visiting socially or if there was an emergency. Specifically addressing the irrigation system or lower main water system, Ms. Purcell wrote (in part):

> […]

> For those of you who have been in the practice of operation irrigation valves from our property or laying pipe without our permission […] please arrange to locate valves for irrigation access on your own property before irrigation season next spring. We are willing to work with you to achieve this […]
>
> Some of this work to relocate irrigation access is already in progress, however there is currently a significant amount of pipe laying across our land, which we will be removing at some point and returning to its owner.
>
> **Farming, Construction, Livestock and Maintenance Projects**
>
> Except where you have received our explicit permission we are not ok with the use of any part of our property as an access route for your farming machinery and equipment, livestock, stock trailers, maintenance equipment, construction equipment or other machinery. Please use other access routes available to you or ask us for explicit permission.
>
> […]
>
> [Emphasis added.]

[186] That same day, Ms. Purcell sent an email to Mr. Horst advising him that he had their continued permission to use the Driveway/HAR. She also wrote: "[w]e are happy for you to use this for your own personal vehicles, your RV and visitors' personal vehicles. We recognize that this entry way is convenient for you and your family to use and we are happy to allow that".

[187] Ms. Purcell testified that she and Mr. Purcell then became concerned by the Horsts "misuse" of the Driveway/HAR. In January 2015, she saw that it had been plowed and a ramp that covered a hose of theirs that crossed the Driveway/HAR had been knocked out of the way and damaged.

[188] The Purcells sent an email to Mr. Horst on January 5, 2015 about the incident that also included: "[i]f you have hired someone to plow this road please be aware that you need to let us know and ask permission prior to doing so. This is our property. You are aware there is no easement allowing you access over this area. We will continue for now in the spirit of neighbourliness, to provide you with our permission to cross our property in this location to access your house. We expect your respectful use of this access route. It would be unfortunate if we had to withdraw our approval for any reason, as it is clearly more convenient and less

expensive for you to access your home this way rather using the other possible routes you have as options".

[189] Mr. Horst did not respond. The Purcells sent him another email on January 12, 2015 copied to Mr. Johnson regarding the damage caused during the plowing. In the email, the Purcells reiterated that there was no easement and "reminded" Mr. Horst that they were not permitting any use of the driveway for non-passenger vehicles. The Purcells explained that Mr. Johnson has been included because Mr. Horst had previously told them Mr. Johnson plowed the Driveway/HAR when Mr. Horst was away for work in the winter.

[190] Mr. Horst testified to viewing the emails about the Driveway/HAR as retaliation for his refusal to cooperate with their unauthorized use and changes to the lower water system, referring to the urgent repair.

[191] On June 11, 2015, Ms. Purcell sent an email to Mr. Horst advising him they would be fencing their property and would not be permitting him to continue to use the Driveway/HAR. In the email, she commented they had been advised it was not in their best interests to continue providing him with access, based on his actions over the "past few months", which were itemized. Mr. Horst was asked to arrange for another access route by July 15, 2015.

[192] Ms. Purcell re-sent the email along with another email on July 11, 2015 that indicated although Mr. Horst had not responded, it appeared as though he was constructing or had constructed an alternate route already.

[193] Ms. Purcell testified that they noticed he was getting in and out of the north side of his property through Mr. Johnson's property.

[194] However, July 15, 2015 came and went and the Horsts continued to use the Driveway/HAR.

[195] In or about the end of July 2015, the Purcells put up some pallets as a temporary barrier. Ms. Horst complained to the RCMP that the Purcells were

preventing access to Crown land. The RCMP investigated. According to Ms. Purcell, after being interviewed and sending the assigned officer several documents, the RCMP advised her that they agreed that the Driveway/HAR was not Crown land and that they had told Mr. Horst he needed to build his own driveway. Mr. Horst told the RCMP officers that he disagreed and would be getting a survey. Of course, all of this is only admissible for the fact of what was said. In cross-examination, Mr. Horst said he did not recall speaking with the officer, but his position at the time was the Driveway/HAR was a public highway and the historic trail was Crown land.

[196] Ms. Purcell testified that by August 2015, she and Mr. Purcell still had not fenced off the Driveway/HAR and the Horsts kept using it. On August 16, 2015, she sent an email to the Horsts advising them they would be continuing to fence their property, although she gave evidence they were having trouble securing a contractor because the Horsts and Mr. Johnson would yell at those who came and make alarming claims. In mid-September, after a neighbour constructed a couple of fencing panels for the Purcells, Mr. Horst sent an email putting them on notice that the Driveway/HAR was public property.

[197] This was his first and only communication with the Purcells in response to their notice in June 2015.

[198] Shortly after, Mr. Horst filed his notice of civil claim in September 2015. The Purcells' previous lawyer received his application for an order restoring his access to the Driveway/HAR on very short notice.

[199] Ms. Purcell said at that point they learned that Ms. Horst was pregnant. As a result, they were willing to negotiate a temporary gate, but the hearing proceeded.

[200] After the access order was cancelled in 2016, Mr. Horst began using the south access road, which he described as makeshift. It travels south from his residence through the middle of a very large hayfield before turning east onto the EGR. Based on his half mile estimate of the length of the east west border between

the Horst and the Purcell properties, he identified the length of the south access road as 800 metres.

[201] Mr. Horst said his children take the bus to school, which is 50 km away, from a different location on the EGR, although they do not go to school if it is snowy. He also said he has been stuck on the south access road many times in the snow, once with his then one year daughter when the temperature was dangerously cold. He also described it becoming very muddy in the spring and washing out several times. When its impassible, he said, they "rely on the goodwill" of Mr. Johnson to access the EGR.

[202] In cross-examination, Mr. Horst did not disagree that there is a more direct route south through his property but he also testified the south access road is the least intrusive to his irrigation system and the shorter route would travel through his best land where snow also accumulates more. Mr. Horst also seemed to acknowledge there was another road or track that travels west behind his house along the edge of the hayfield that is used by farm vehicles.

[203] Cross-examined about the similarly-long length of three of seven neighbours' driveways, including the Mellings, he denied knowing "what they had done".

[204] Mr. Horst agreed he has taken no steps to improve the condition of the south access road, even though he has gravel deposits on his land and is able to operate an excavator. Surprisingly, he also said he has no snow removal equipment except for a shovel.

Discussion

[205] Mr. Horst provided very brief submissions in support of his alternative claim for an equitable easement. The Purcells argue his claim must fail because it is clear he knew that his access to the Driveway/HAR was subject to the desires of the owner of the Purcell property, which is the reason he asked for a driveway easement from Lillooet Management and Bradbury Holdings. In addition to emphasizing Mr. Horst paid below market value for his property, they also argue that any

improvements he made were at his own risk and not in reliance on an actual belief he had permanent access.

[206] Based on *Roop*, *Vancouver City Savings Credit Union*, and s. 29 of the *LTA*, I would not characterize the information the Purcells had at the time they purchased their property as notice of an unregistered equitable easement. What they were informed of and would have been made aware of was Mr. Horst's request for an actual easement which Lillooet Management and Bradbury Holdings refused or deferred to the Purcells and his use of the Driveway/HAR.

[207] Addressing the legal test, the only basis for establishing representations or assurances would involve inferring a right to use the Driveway/HAR from the fact that the McIntyres (and the owners before them if relevant) and Lillooet Management and Bradbury Holdings did not prevent or acquiesced to the access that occurred. Based on Mr. Horst's previous request, the content of Mr. Horst's November 2006 letter to the Purcells and my assessment of credibility, I accept Ms. Purcells' evidence about their subsequent phone call. Mr. Horst again mentioned their need for mutual easements. In response, Ms. Purcell told him that she and Mr. Purcell wanted to get to know the property and would not be issuing any easements but he and Ms. Horst were free to use the Driveway/HAR in the meantime. In other words, she advised Mr. Horst he had their permission to continue using the Driveway/HAR.

[208] Assuming the acquiescence of previous owners would be sufficient, the evidence does not establish that Mr. Horst relied on it to his detriment or that it would be unconscionable for the Purcells to "go back on" the assurance.

[209] Based on the relative purchase prices and given the Purcells bought their property through the open market and Mr. Horst from an aging family member, I accept that Mr. Horst paid well below market value for the Horst property. He gave no evidence about the cost of some renovations he did to his home or whether they were part of regular upkeep or related to the changing needs of his growing family. Although he alleges the south access road through his property is unsafe in the winter due to very cold weather, snow and muddy conditions during wet weather,

and it is clearly far longer than the Driveway/HAR, these circumstances are a far cry from the otherwise landlocked and, therefore, unmarketable property in *Purdy*.

[210] Further, the notion that using the south access road poses a meaningful risk is difficult to reconcile with the fact Mr. Horst has taken no steps at all to improve its condition or acquire snow removal equipment for almost eight years. During any unpassable days, and I would infer urgent circumstances, Mr. Horst has and would be able access the EGR from the north side of his property through Mr. Johnson's property. Unlike the plaintiff in *Erickson* who contributed financially, Mr. Horst never did contribute to the maintenance of the Driveway/HAR.

Historic Trail

[211] Lastly, as I have indicated, Mr. Horst seeks a declaration that a historic trail crosses the Purcell property in a different location from the Driveway/HAR because it was exempted from the original Crown grant of lot 361.

[212] The original Crown grant of lot 361 attaches a map that shows lot 361 and surrounding lots. Assuming a north orientation, a dotted line labelled "trail to south fork Elk River" crosses the east quarter of lot 361 and below it, the east third of lot 360 running north-south.

[213] There are multiple provisos in the original Crown grant. As the Purcells point out, none of them exempt roads or trails. Instead, there is a proviso that permits any part of the land to be resumed for making roads, canals, bridges, towing-paths, or other works of public utility. This exemption expressly does not extend to any land on which buildings have been erected.

[214] Both the Purcells and the AG point to *Douglas Lake Cattle Company v. Nicola Valley Fish and Game Club*, 2021 BCCA 99, as defeating Mr. Horst's position on this issue. The case involved a Crown grant from 1897 that attached a map, which depicted a trail and a road, but there was no specific reservation of roads or trails in the wording of the grant. The Court of Appeal overturned the trial judge's conclusion that a trail marked on a map attached to the Crown grant was intended to be

exempted, based on the legislation in effect at the time of the grant, and ss. 1 of the *Transportation Act* and the provisions of the *Land Act*, R.S.B.C. 1996, c. 245, which govern the potential creation of a highway by reservation from a Crown grant. Noting the statutory framework expressly distinguishes between trails and roads and only roads are retroactively exempted from Crown grants, the Court of Appeal in *Douglas Lake Cattle Company* explained:

> [62] […] First, there is no support in the law for the view that reference to a trail on a map or plan annexed to a grant results in the reservation of the trail from the grant. As the [appellant] notes, the legislation in effect at the time of the grant distinguished between trails and road (and specifically required trails to be noted on surveys and field notes) and exempted only the latter from grants. That distinction is maintained in the current legislation, which retroactively exempts roads from grants.

[215] In response to the AGs' submissions, Mr. Horst relied instead on the grant of the Purcell property in 1945 as exempting the same trail based on the proviso: "PROVIDED also that all highways, within the meaning of the 'Highway Act', existing over or through said lands at the date hereof shall be exempted from this grant" and the definition of highways in the *Highway Act*, R.S.B.C. 1996, c. 188, as including trails.

[216] Unlike the original Crown grant of lot 361, the grant of the Purcell property to Mr. Dodge did not attach a map depicting any roads or trails.

[217] In my view, the relevant grant is the original Crown grant. At the very least, the grant to Mr. Dodge must be interpreted in light of the original Crown grant. I fail to see how it is possible for a trail not exempted or reserved to the Crown in the original grant of a lot may be exempted in a subsequent grant of a sublot.

[218] In any event, I also agree with the Purcells that the evidence simply does not establish what Mr. Horst contends about the location and route of the trail. Relying on a surveyor's note book from 1892 and his own interpretation of old maps, parts of maps and an aerial photo that includes lot 361, Mr. Horst says the trail intersects with the north east corner of his property and the north west corner of the Purcell property.

[219] The surveyor's note book contain an index that refer to 10 "Blocks", including lot 361, followed by a number of pages of field notes dealing with block or lot 361. Those pages include three columns but no headings identifying the columns. There are numbers in the middle column, which I expect are notes about distances but it is not clear what the boundaries are or the unit of measurement. Near the top of page 88 on the left is a reference to "Witness Post". To the right it reads "Fir Stump 6". Further down the page a very faint trail is depicted that runs at an angle through "105.00". The top of the page reads Northern Bdy Blk 360 Southern "361". There are other references to particular trees and stumps of trees as benchmarks in the notes.

[220] Mr. Horst's evidence also includes parts of maps that he said he obtained from the BC Archives. The notes and some of the maps of lot 361 are so faint they essentially unreadable. Other are not very clear. One partial map shows the sublots superimposed on the lot 361. A dotted line labelled "Government Road" in depicted as crossing over the south east corner of the Horst property into the Purcell property and then parallel to the Horst/Purcell east west border on the Purcell side to the north east—north west junction of the two properties. Government Road is different from the trail. Mr. Horst also relies on maps that he drew himself based on these other materials showing Government Road, the trail and the present day EGR in close proximity to one another.

[221] Ms. Purcell testified that there is no actual trail (on the ground) where Mr. Horst said he frequently walks or rides his ATV on portions of the old highway, he had known for years the EGR was not in the same location and he only became aware of the trail when he obtained the original Crown grant and saw the attached map.

[222] In these circumstances, without the benefit of a current survey to locate the route of the trail shown in the grant, I am not in a position to make reasonably accurate findings about its location in relation to the property lines for the Horst and Purcell properties.

[223] It follows that his historic trail claim is dismissed.

Water System Claims

[224] Relying on a proviso in the 1945 Crown grant of the Purcell property and his water licence, Mr. Horst asserts that only he owns and is authorized to use, repair, and maintain the whole of water system from Maguire Creek to his property based on the *WSA*. As indicated, Mr. Horst also applies to expropriate an easement over the Purcell property that straddles the water system, based on his right as a water licensee under s. 32 of the *WSA*.

[225] The Purcells deny Mr. Horst has any claim to the water system on their property. In addition to arguing only they are authorized by their water licence to use, repair, and maintain the water system on their property, the Purcells say the proviso in the Crown grant does not apply to the post 1996 water system because of the change from ditches to pipe. They also argue that they own the underground water system on their property because it was a fixture when they bought the property.

[226] The Purcells oppose Mr. Horst's proposed easement under the *WSA* on various grounds. Most significantly, they argue the easement is not reasonably necessary because the water system does not require any further construction or repair and they alone have done all of the maintenance to the whole of the water system for several years. They also argue that providing Mr. Horst with an easement would pose a threat to their safety, their equine therapy business and the water system itself given his past conduct and the conduct of Mr. Johnson.

Previous Water Licences

[227] The relevant proviso in the 1945 Crown grant of the Purcell property to Mr. Dodge refers, as I have said, to FWL 3464 (and FWL 11909). It reads (in part):

> […] it shall be lawful at all times during the currency of Final Water [Licences] [3464] […] and […] [1190] or […] any other water [licences] […] issued in substitution thereof […] for the licensees under such Final or […] substituted licences to enter upon the lands hereby granted and to maintain, repair and operate […] the works authorized at the date of this Grant under the said Final Water [Licences]" […]

[228] FWL 3464 is in evidence. The authorized works for diverting and carrying water consisted of ditches. The date of precedence or priority is October 16, 1900.

[229] That date derives from a “Grant of Water Right for Agricultural Purposes” issued that same day to Frank Derosier on “the north west quarter of the north east quarter of Lot 361”, which was still owned by the Railway, for irrigation and domestic purposes.

[230] FWL 3464 specified irrigation as the purpose for the water use, although term (j) allows for incidental domestic use. The licence identified the “irrigable lands” as “about 60 acres, comprising part of” sublot 16—the Horst property. The location of that part is shown by cross hatching on a diagram attached to the licence, which corresponds roughly with the hayfield south of Mr. Horst’s residence. The authorized works consist of “ditch”. The diagram shows the approximate location of that ditch as crossing sublot 16 from the bottom quarter of the eastern boundary at an upward angle, branching close to the Horst property and then two branches entering the Horst property. The upper branch ends inside the property line about one-quarter below the north-west boundary. The other branch heads south before crossing into the Horst property about mid lot and then branching again.

[231] In response to her application for a change of works, on August 14, 1980, Ms. Phillips received Conditional Water Licence (“CWL”) 54105. Expressly issued in substitution for FWL 3464, it provided for domestic and irrigation water and authorized works to be constructed comprised of “ a diversion structure, division tank and pipe” located “approximately as shown on the attached plan”. The plan identified a division tank at the east border of the Purcell property and a horizontal line across the Purcell property and about two third of the Horst property, which the plan legend identifies as pipe. The CWL 54104 licence also required the construction to be completed by December 31, 1982.

[232] The earliest water licence in evidence regarding the Purcell property is Conditional Water Licence 25791 issued to Mr. Dodge on July 4, 1960 for sublot 9 and the west-half of sublot 16. It provided for the use of water from Maguire Creek

for irrigation and authorized the construction of works that include diversion structures and ditch located approximately as shown on the attached map. The copy of the attached map is of very poor quality.

[233] With respect to sublots 10 and 11, not 16, the McIntyres received Conditional Water Licence 42247 issued May 1, 1974, in substitution of FWL 11909, which provided for the use of domestic and irrigation water. Regarding the works, it authorized the construction of a diversion structure and pipe by December 31, 1975, again as located approximately as shown on the attached map. The path of the pipe on the map shows it crossing sublot 16 at downward angle, through the upper corner of sublot 9 and then into the right or west side of sublot 10.

[234] Not long before CWL 54105 was issued, on March 17, 1980, Ms. Phillips wrote to Water Stewardship regarding FWL 3464 stating her point of diversion was to be done jointly with the McIntyres and others.

[235] A letter to Ms. Phillips dated October 6, 1980 enclosed a permit authorizing the occupation of Crown land that was 1,300 ft long and 15 ft wide, as well as a copy of CWL 54105. Among other things, the letter advised Ms. Phillips that water licences do not authorize entry onto privately owned land for the construction of works: “Consent of the owners must be secured or a right of way expropriated. Consent should be in proper form and registered in the Land Registry Office”.

[236] As indicated, the underground pipeline system was not constructed until 1996.

[237] In February 1995, Water Stewardship advised Ms. Phillips the works she had in place, ditches, were not authorized by her licence and she had to take steps to bring the licence into compliance or risk cancellation proceedings.

[238] On August 30, 1995, the McIntyres provided their written permission for an underground pipeline to go through their land from Maguire Creek.

[239] The next day, Ms. Phillips wrote a short letter to Water Stewardship that set out that what she identified as her response to being asked if her new intake would be upstream or downstream of the McIntyres: “it will in fact be replacing McIntyres’ intake at the existing spot”.

Pipeline Construction

[240] Mr. Horst testified to being on the Horst property during the construction of the underground water system in the summer of 1996. He said only his grandmother, Ms. Phillips, was there providing instruction to the workers.

[241] Ms. Phillips, the McIntyres, and Mr. Bossio signed a written contract regarding the construction that is in evidence. Schedule B to the contract is a payment schedule, which required Ms. Phillips to pay $36,900 and the McIntyres to pay $31,200.

[242] Commenting there was no evidence the McIntyres contributed anything to the cost of construction, Mr. Horst testified Frank McIntyre was always broke to support the suggestion only Ms. Phillips paid.

[243] Mr. Bossio testified the McIntryes in fact paid their portion, he supervised the construction, and Mr. McIntyre was there the odd time, but Ms. Phillips was not.

[244] Mr. Bossio also stated that in advance of the contract, he was concerned that Ms. Phillips should have an easement over the water system on the Purcell property. He explained that although everyone knew each other there could be a problem “down the line”. Mr. Bossio brought up the possibility of drawing up an easement so “both parties would know where they stood” and he actually took Ms. Phillips to a lawyer to get some advice. After being told the cost would be $500, she said did not want to incur more cost. Mr. Bossio encouraged her to still consider it but a couple of weeks later Ms. Phillips told him she did not want to “pursue that angle”.

[245] Consistent with the scope of the construction set out in schedule A to the contract, Mr. Bossio testified to installing a new intake structure, a 10” pipe (the main

pipeline), which was buried seven ft down on average in most places, a 10” gate valve (the upper main valve), another 10” valve on the west side of the EGR (lower main valve). At the end was an 8” T for two (irrigation) lines to come off. Above the lower main valve were two stubs for domestic water lines and a 4” valve for irrigation water on the east side of the Purcell property, which as I have said were later attached.

[246] Taken through photographs of the water system, Mr. Bossio specified the Gooseneck, Mr. Horst’s above-ground pipe irrigation pipeline that projected about four or five feet in the air before levelling off, was not part of what he installed. Mr. Horst also gave unchallenged evidence the Gooseneck was attached to the lower water system to provide irrigation water to the Horst property after the construction 1996 or 1997.

Subsequent Licences and Shared Use

[247] Ms. Phillips received Conditional Water Licence 111880, issued June 11, 1997, in substitution of CWL 54105. The works authorized include: “diversion structure, division tank, pipe, pump and sprinkler system which are located approximately as shown on the attached map”. The map is anything but precise. It is small and includes sublots 9 through 16 and 22.

[248] Along with the Gooseneck, at some point, the Purcell and Proudfoot irrigation pipelines were also added.

[249] The McIntyres did not receive any further water licences related to the Purcell property or their other properties. Consequently, the water licence obtained by the Purcells with the conveyance of the Purcell property was CWL 25791.

[250] Mr. Horst received another water licence, Conditional Water Licence 121132, issued February 3, 2006 that provided for industrial stock watering on his property. It authorized works identified as diversion structure, pipe and trough, again located approximately as shown on the attached plan.

[251] On July 27, 2006, Lillooet Management and Bradbury Holdings applied to apportion CWL 25791 into two licences that would provide irrigation and domestic water for the Purcell property and the Melling property.

[252] The Purcells' purchase of their property completed less than two months later.

[253] In response to the application for apportionment, they received CWL 25792 issued in partial substitution of CWL 25971 on June 21, 2007, which provided for domestic and irrigation water. It identified the authorized works as diversion structure and pipes, "which shall be located approximately as shown on the attached plan", with the construction to be completed by December 31, 2010. Along with the licence, the Purcells also received a permit authorizing the occupation of Crown land and a report titled "Report for Water Licence Amendment" prepared by Mr. Roach.

[254] In the report, he described the authorized works as partially constructed and noted the application to reapportion should be considered a "C/P" (change of purpose) application as well as a "C/W" (change of works) application and "granted as such". Mr. Roach also wrote: "I understand the new owners have taken steps to establish formal joint works agreements as well as easements".

[255] Mr. Horst and the Purcells shared the modern water system before and after CWL 25971 was issued.

[256] I have already set out Mr. Horst's correspondence with Lillooet Management and Bradbury Holdings in August 2006, his letter to the Purcells in November 2006, and Ms. Purcells' evidence, which I accepted about their subsequent telephone conversation regarding his request for mutual easements. In the August 2006 letter, he expressly took the position that he and the owners of the Purcell property had a 50% ownership interest in the water system which he also referred to as common.

[257] Other correspondence between Mr. Horst, Water Stewardship, and Mr. Proudfoot related in part to Mr. Horst's complaints regarding Mr. Proudfoot's modifications to the water system for the benefit of the Melling property, and

correspondence between Mr. Horst and the Mellings related to his view they were not authorized to use the water system, is in evidence but I do not intend to discuss it.

[258] Ms. Purcell testified about experiencing problems with their domestic water supply long before the 2014 repair. Although Mr. Proudfoot had told them there was plenty of water, they struggled with very low pressure in their domestic system. At times there was very little water coming out of the tap. The Purcells tried to drill a well with no success.

[259] The Purcells and Mr. Horst gave evidence about cleaning or clearing the intake (screen) in Maguire Creek of leaves, debris, and gravel to maintain the water system and address drops in pressure. Ms. Purcell testified that Mr. Horst and Mr. Johnson had done this maintenance sometimes, but Mr. Horst has done nothing for the past eight years.

[260] Describing the intake area in Maguire Creek as a large deep pool, Ms. Purcell also said that extra gravel needs to be removed to maintain sufficient space for the water. Only the Purcells have done this since they bought the property, at a cost of $1,000 each time.

[261] Mr. Horst identified the last time he cleared the intake as during the summer of 2012. He acknowledged being aware the Purcells had used machinery to clear out the area, adding they had cut off his domestic water supply because of this on one occasion.

[262] He also testified there were a lot of issues with the volume of water in 2014 and he took it upon himself to install a perforated lid on the intake that Mr. Johnson had fabricated.

[263] I would note than in an email exchange with Duane Hendricks at Water Stewardship, on May 30, 2014, Mr. Horst wrote they had no water at his house that morning and he had determined the intake was full of sediment. He asked whether approval was necessary for urgent maintenance limited to excavating the sediment

around the intake, which strikes me as odd given his long standing view the intake was only authorized by his licence. In any event, Mr. Hendricks responded that a licence allows for maintenance along as it is in keeping with "the works as they are licenced".

[264] Ms. Purcell testified that since 2014, she and Mr. Purcell have continued to do all the maintenance at the intake on Maguire Creek, which has led to complaints by Mr. Horst.

[265] Correspondence between counsel in July 2018 shows the Purcells notified Mr. Horst that the intake structure was completely covered in debris and gravel and becoming completely blocked. Many hours of hand digging had resulted in almost no progress. The Purcells proposed excavating and shutting off the water system for one day to prevent material from getting into the water system. Mr. Horst opposed them performing any work on "his" intake structure and asserted they did not have the authority to disconnect his water supply. He also stated that he was not experiencing any interruption and the accumulated gravel acted as a filter.

[266] When the Purcells proceeded, Mr. Horst reported them to Water Stewardship.

[267] In cross-examination, Mr. Horst did not deny doing so again in 2019.

[268] Other Water Stewardship documents and evidence of site inspections show the agency was well aware of the shared use of the water system before and after the Purcells' received their water licence and the 2014 repair.

[269] Ms. Andrews is the section head of Water Stewardship. A statutory decision maker with the power to cancel water licences, she leads a team of 13 who administers the *WSA* and other statutes. During her testimony, she confirmed that Mr. Horst has two current water licences and the Purcells have one. She also confirmed there are no cancellation or other proceedings involving the Purcells' licence. When asked about complaints from Mr. Horsts, Ms. Andrews said she had received phone calls and concerns from him, Mr. Johnson and maybe Mr. Proudfoot and the Purcells.

[270] When cross-examined about points of diversion and maps or plans attached to the Purcell and Horst water licences, Ms. Andrews did not agree the maps established the location of their works were different. Noting that different mapping tools were used and mapping tools can be unreliable, she indicated that what maps on licences show for certain is that water rights exist for a certain property.

[271] Regarding points of diversion, diversion structures and division structures, she also gave evidence that over time the language was sometimes used imprecisely.

[272] Also cross-examined about different pipe in different locations being authorized in the Purcell and Horst licences, Ms. Andrews responded this was inconclusive based on the plans, both licences indicate approximate pipe and point of diversion location, the two pipes, especially on Crown land, are depicted as following a similar path and no authorization is required to share pipes.

[273] Ms. Andrews was questioned about a document titled “Water Licences Report” that refers to a BC government website (September 2, 2014). The report is a chart that lists water licences for Maguire Creek and nine licensees, including the parties, Mr. Johnson and his spouse, Mr. Proudfoot, and the Mellings, along with many particulars including points of diversion in a column titled Points Code.

[274] The number for the points of diversion in the report is the same for the Purcell and Proudfoot licences. This was also the number for the point of diversion in the McIntyres’ licence. Mr. Horst’s licences share a different point of diversion number.

[275] Ms. Andrews testified it is possible for two different licences with different point of diversion numbers to share the same physical location.

[276] She was also taken to emails between Mr. Hendricks, Mr. Shaw, and Mr. Daigle at Water Stewardship that attach separate copies of a draft letter from Mr. Hendricks to Mr. Horst, Mr. Melling, and Ms. Purcell dated October 3, 2013. In the draft letter, Mr. Hendricks refers to several years of outstanding issues with the water system. Identifying the current issue as runoff debris filling the intake structure,

Mr. Hendricks wrote “the four users of this intake structure” must set aside their differences and work together to produce a joint works use and maintenance agreement.

[277] Ms. Andrews agreed the letter showed Water Stewardship was taking the position that the four users shared an intake structure.

[278] In an almost identical similar letter (except the last paragraph) that was actually sent to Ms. Purcell and is dated July 11, 2014, Mr. Hendricks again refers to the “four users of this intake structure”.

[279] Further, in an email sent to the Horsts on November 14, 2014 after the Flood, Mr. Daigle wrote that he had reviewed the files and was satisfied that there are four licences on the one system that share the works up to the points where individual lines leave the main system. As a result, he believed the Purcells have the right “to work to improve or repair the system in accordance with their licence”.

[280] Ms. Andrews emphasized that the role of her team under the *WSA* is to manage water rights. Their focus is on the volume of water used and whether people with water rights are getting their water. In terms of strict compliance with works, she said there is a lack of capacity. Follow up where works are buried is difficult. She also emphasized her team has no role in determining who owns precisely what pipeline, which is not addressed by the *WSA*.

[281] There is no other evidence that would suggest Water Stewardship has any concern or intends to take any action based on Mr. Horst’s complaints about the Purcells’ use, repair and maintenance of the water system.

Break of the Horsts’ Valve

[282] A survey done in 2006 that established the property line showed that the Gooseneck valve and pipeline were on the Purcell property. Prior to that, it was understood they were only on his property.

[283] After buying the property, the Purcells hired Mr. Johnson to construct fencing along the property line based on the survey. Prior to that, there were no fences. Horse owners, the Purcells had double fences built to create smaller pastures and for the "safety" of the horses.

[284] Again, the Purcells were mostly away except in the summers before moving to the property full-time in 2014. Mr. Purcell was semi-retired from his long career as a professional engineer in the oil and gas business. Ms. Purcell wanted to start an equine therapy business, describing it as her dream. After obtaining a master's degree in clinical psychology, she became certified in equine therapy, completing her training in 2015.

[285] Ms. Purcell testified that in the summer of 2011 or 2012, Mr. Johnson's wife told her that the Gooseneck valve had cracked and broken due to frost and Mr. Johnson had figured out a way to fabricate a repair. Mr. Horst testified to learning the valve was leaking in March 2010 after an extreme cold snap. Later on, after learning it would cost $1,000 to replace and a discussion with Ms. Purcell who did not offer to pay for the replacement, he opted to take it out. Mr. Horst also described the valve as superfluous, rarely used, and not missed. Ms. Purcell recalled Mr. Horst telling her it broke due to frost damage and he had made a change so the valve was not needed anymore.

[286] The Purcells were at their property in the "winter" of 2012. Ms. Purcell noticed water pooling on the ground over the area of the lower water system and under the fence that was being used by Mr. Johnson's cattle on the Horst property. Ms. Purcell could also see above-ground pipe over the entire length of their pasture, which then turned west to Mr. Horst's property. Photographs taken October 23, 2012 depict snow on the ground and all of these circumstances, including very large pools of water straddling the fence line and above the area of the lower water system; Mr. Horst's above-ground irrigation pipeline (Gooseneck) taken apart above a large pool of water; and a long stretch of above ground pipeline going toward Mr. Horst's field with cattle in it.

[287] Similarly, Mr. Proudfoot gave evidence about Mr. Johnson opening the lower main valve after it was shut down until spring and Mr. Horst and Mr. Johnson using Mr. Horst's irrigation pipeline to allow water to flow all year long over the top of the lower water system and over the property line for the livestock grazing on his property.

[288] Ms. Purcell said she was really disappointed by what she saw in 2012, stating they had asked Mr. Horst to remove his above-ground pipe from their property.

[289] Cross-examined about the importance of turning off the irrigation system and not allowing water to pooling on the ground above the lower water system, Mr. Horst essentially agreed. Taken to the same photographs and asked to agree the source of the water pooling on the ground at the fence line was the Gooseneck pipeline, Mr. Horst responded, "I'm going to say I don't know". He also referred to October 23, 2012, as "still early". Specifying he and Mr. Proudfoot had wrenches to turn the lower main valve on and off, Mr. Horst acknowledged he could not think of a reason for Mr. Proudfoot to turn it on. Asked to agree that Mr. Johnson did have a reason—watering his cattle, Mr. Horst commented this was not part of their arrangement. He also commented that in 2010, water was pooling on the ground over the lower water system because Ms. Purcell was watering her horses from a trough, although the Purcells were not there that winter and Mr. Johnson was looking after her horses.

[290] Ms. Purcell testified to being concerned about the safety of her horses because of Mr. Horst's above-ground irrigation pipeline, specifying that except for a part of the Gooseneck riser that extended four to five feet in the air, it was hidden by the high grass during the summer. Photographs taken on September 23, 2014 show stock panels, fence rails, and hazard flagging around parts of the above-ground pipeline. Other photos depict the Gooseneck riser visible above tall grass. Mr. Horst essentially mocked Ms. Purcell for installing the flagging, indicating horses are colour blind and there was no possible risk.

[291] Mr. Horst also said the first time the Purcells complained about the Gooseneck pipeline was on September 26, 2014, when Ms. Purcell demanded he

remove it that night. Mr. Horst said he responded by telling her she had to provide six months notice.

[292] In addition to stating they had asked Mr. Horst previously, Ms. Purcell recalled asking him to remove the Gooseneck pipeline twice in September 2014, the second time on September 30. She testified that when she asked him the first time, he said he would think about it when the irrigation season was over. On September 30, he said he wanted 30 days notice.

2014 Crack in the Proudfoot Valve

[293] In mid-August of 2014, the valve for the Proudfoot pipeline located near the lower main valve and the underground portion of the Gooseneck, developed a significant leak. Indicating Mr. Horst told her about it, Ms. Purcell said they both observed water spilling out of the cap on the valve key above the underground valve. A photograph she sent to Mr. Proudfoot, who was away at the time, depicts this. He subsequently hired Mr. Thompson to excavate the area. They found the bonnet or top of the valve was cracked. A large crack across half of the top is visible in photographs. Mr. Proudfoot and the Purcells attributed the damage to frost damage. Mr. Proudfoot attributed the frost damage to Mr. Johnson opening the lower main valve in the winter to flood the area over the lower water system in order to water his cattle. Mr. Horst suggested the frost damage was because the Proudfoot valve was not buried deeply enough. In cross-examination, Mr. Proudfoot estimated it was located between two and four feet underground. Asked to agree this was inadequate to prevent frost damage, he identified 30” or deeper as the “general rule of thumb”.

[294] Christopher Ford testified as a fact and an expert witness for the Purcells regarding a number of issues related to underground water pipelines. His report dated June 28, 2019 included an opinion about the cause of the Flood, which Mr. Horst objected to based on Mr. Ford’s qualifications. Following a *voir dire*, I determined Mr. Ford was qualified to provide expert opinion evidence about the installation, repair, operation and maintenance of underground water. I reserved on

the dispute over Mr. Ford's expertise in relation to causation, which along with his opinion about the cause of the Flood and other evidence relevant to causation is discussed in the context of the Purcells' claim for damages.

[295] Mr. Ford is a certified irrigation designer with many years of experience designing and installing water pipelines and implementing large scale irrigation projects throughout BC and the Yukon. He estimated working on 150 water pipeline projects similar to the water system in this case. In addition to his certification, Mr. Ford has taken annual courses regarding the installation of waterlines and all types of irrigation. He has said he has attended "pump and irrigation school" many times each year, except one.

[296] Mr. Ford testified the standard depth for buried water line on farms and ranches throughout BC is approximately six feet below the surface. He expressed the opinion that frost can be driven down to a depth of four feet, but irrigation water lines that will be winterized every fall are installed at a maximum of four feet below the surface.

[297] Asked in cross-examination, if this could be why the Proudfoot valve cracked, Mr. Ford responded he did not know.

[298] As indicated, Mr. Proudfoot decided to decommission the cracked valve in the lower water system, put a cap on it and install a valve for the Proudfoot pipeline on the Proudfoot property (sublot 10) instead. As a result, Mr. Purcell stated, they decided they could attach to what was left an above ground irrigation (horse waterer) for their horses on the west side of their property.

2014 Urgent Repair

[299] Ms. Purcell and Mr. Purcell testified to hearing water running as they and Mr. Proudfoot were standing around the excavated site and determining it was coming from the Gooseneck area in September 2014. When they tried to close the lower main valve, to stop the flow of water, however, they discovered it would not close all the way.

[300] Ms. Purcell told Mr. Horst about the problem in a text message on September 23, 2014. She asked him if this was a recent issue or if it was part of the "breakage" from a couple of years ago. Mr. Horst responded that the valve should close but there could be a pebble jamming it. After checking for debris, however, the lower main valve still would not close.

[301] Because this meant there was no way to prevent water from getting into the surface irrigation piping and pooling on the ground, and given the past damage to the Gooseneck and Proudfoot valves, Mr. Purcell and Mr. Proudfoot were concerned about further damage to the lower water system and the lower main valve in particular. Mr. Purcell's concern was based in part on his past experience with water freezing in pipeline components, which due to the expansion causes damage to pipes and valves.

[302] In response, the Purcells hired Mr. Thompson to uncover more of the lower water system, focus on the below ground portion of the Gooseneck pipeline located further underground but in close proximity to the Proudfoot valve. The exploration involved hand digging to avoid causing any damage because no one was certain where things were located and how they were configured, as well as excavating.

[303] The Purcells decided against uncovering the lower main valve or repairing it because that would have required a lot more excavation, other labour and shutting down the whole water system.

[304] A photograph taken on September 27, 2014 shows Mr. Horst standing by the fence with a lawn chair and his large dog. Ms. Purcell testified that by then, he had taken to standing with his dog at the property line and yelling over the fence as well as video taping them and the contractors every day.

[305] Mr. Thompson described Mr. Horst as always yelling or "not acting normal" and appearing very upset on the other side of the fence. Mr. Thompson said he could not understand why, because the water system was "broke" and needed to be repaired so everyone could use it.

[306] Mr. Purcell gave detailed evidence about sketches he drafted and the schematics he prepared that are appended to these reasons. He also gave evidence about discussing his design to prevent frost damage with Mr. Horst.

[307] Mr. Purcell recalled asking Mr. Horst over to take a look at the excavated site, which he did. Mr. Purcell showed him what was there and suggested doing what was in his sketches—cutting off the riser to the Gooseneck pipeline (well below ground) as well as fabricating a connection for his irrigation pipeline and theirs with underground valves to alleviate the concern about frost damage over the winter. Mr. Horst thanked him and stated, “I just wanted to be included”. Mr. Purcell told him he would send him the sketches with options, which he did.

[308] As indicated, the plan was for Horst and Purcell (west) irrigation pipelines to be placed underground, and to locate the valve for Mr. Horst’s irrigation pipeline underground on his property.

[309] Asked in cross-examination if the Purcells were clear with him about the reasons they viewed the repair as necessary, Mr. Horst said they communicated several things to him. Asked to agree they spoke to him frequently about the plan for the repair and sought his involvement, Mr. Horst said they communicated with him about what they intended to dictate. Mr. Horst acknowledged the Purcells sent him drawings and he saw what had been uncovered in the excavation site. Mr. Horst also indicated he was aware of details of the plan that included removing the Gooseneck and installing an underground irrigation pipeline for him to connect to just over his property line and control with an underground irrigation valve on his property.

[310] In an email to Mr. Horst on September 30, 2014, Mr. Purcell wrote (in part):

> Further to our discussion at the “goose neck area” […] the other day attached is the sketch you requested of the repairs that are needed to prevent the system from freezing this winter due to the leaking main system valve at that location that allows water to pass into the above ground piping. Note I have actually attached two sketches, one being an alternative that might save some cost depending on availability of the various pipe fittings needed. Either way provides a suitable solution and will result in all piping that has water on

> a continuous basis to be underground at a sufficient depth to prevent frost damage. I am waiting for information on pricing […] and will pass on the relative costs as soon as I hear back. As you are aware we need to get this repair done quickly before the cold weather sets in. Let me know if you have any question or comments.

[311] The next day, Mr. Purcell sent another email to Mr. Horst setting out the pricing information he had received and a revised sketch to "optimize cost".

[312] On October 2, 2014, Ms. Purcell texted Mr. Horst, asking if he had a chance to look over what Mr. Purcell had sent and to let her know if he wanted to discuss it. She also asked him to let them know if he wanted to participate and split the cost in some way "asap" because the parts needed to be ordered soon before freezing.

[313] Mr. Horst responded by email and a text message on October 2, 2014. He told the Purcells he would not be participating and they did not have his permission to "dig up, modify, or connect to my works which are authorized by CL 111880".

[314] Mr. Horst testified that the proposal to put the whole system underground to prevent frost damage was just an excuse. It was unnecessary, he said, because the drain valve (between the lower main valve and the irrigation pipelines) drained any water safely underground. He also said he had never experienced freezing in the above ground piping.

[315] Mr. Purcell described feeling very puzzled and confused by Mr. Horst's response and not understanding what he meant by "his works", etc.

[316] The Purcells became more informed about Mr. Horst's positions and views through their involvement in an appeal before the Environmental Appeal Board Mr. Horst brought from a decision he had engaged in unauthorized diversion of water from the intake pond on Maguire Creek to an abandoned ditch.

[317] The Purcells decided to proceed with the repair, concerned, they said, about the much greater risk and cost involved in waiting until winter. The plan was still to cut the Gooseneck riser and install an underground pipeline for Mr. Horst's irrigation water. Without his permission, rather than extended it to his property along with an

underground valve, they planned to install a flange and blind flange at the end of the underground pipeline near the property line for him to connect to.

[318] On November 4, 2014, Ms. Purcell sent a long email to Mr. Horst advising him of the plan to proceed. Although they would omit the extension of pipe onto his property, she explained, for easy access they would include a provision for him to "tie in". Addressing his decision not to participate and his reference to his licence, she enclosed copies of the plans for both of their respective water licences and stated they showed his water system on his property and their water system on theirs. She emphasized the need to repair the system before winter, given the lower main valve was no longer closing completely and water would run above ground all winter, producing a "high risk of frost damage to the entire system, including potential cracking of valves and pipe". Ms. Purcell also wrote it was unacceptable for him to continue operating his irrigation system by entering their property. She ended by telling him there was still an opportunity for him to participate if he was interested.

[319] The following day Ms. Purcell sent an email to Duane Hendricks at Water Stewardship and forwarded the emails exchanged with Mr. Horst from September 30, 2014 onward. She advised Mr. Hendricks about the repairs they were making to the "irrigation piping located on the west side" of their property. Referring to the "ongoing sensitivity of issues related to the "EAB 2013-WAT-029 Appeal (Horst)", Ms. Purcell indicated she understood the legislation allowed for the repair and maintenance of the systems authorized by water licences, but she wanted to be proactive and keep Water Stewardship and all of the interested parties advised. Her email was copied to counsel for Water Stewardship, Bill Wagner, as well as the other licence holders.

[320] Mr. Wagner responded by emailing the Purcells' former counsel, Mr. Hendricks, and the others. He stated that he was not aware of any dispute over ownership of the works in question and s. 5(c) of the *Water Act*, R.S.B.C. 1996, c. 483 [*Water Act*] permits a licence holder to maintain authorized works in the ordinary course.

[321] Assuming Mr. Hendricks would have informed Mr. Wagner of any concern about the Purcells doing the repair, and absent any other communication from Water Stewardship, Ms. Purcell concluded she and Mr. Purcell had Water Stewardship's "buy in".

[322] Shortly before October 6, 2014, Ms. Purcell had seen Mr. Horst and Mr. Johnson digging with an excavator in his hayfield. The excavation damaged the Proudfoot irrigation pipeline. Mr. Proudfoot reported the incident to Water Stewardship. In his letter, he discussed the background to the (urgent) repair including the lower main valve not fully functioning and the concern about freezing water. Mr. Proudfoot attached a diagram to the letter showing the location of the excavation.

[323] Mr. Thompson, the contractor, testified to conducting the part of the repair that involved cutting the Gooseneck riser with a welder close to the bottom of the excavated site, several feet below ground, and then plugging the stub to prevent any water from flowing out of it, on November 7, 2014. In terms of the configuration, Mr. Thompson agreed the severed Gooseneck pipe or stub was about a foot lower than the Proudfoot pipeline.

[324] The Purcells gave evidence the work proceeded with the system "live", meaning the upper main valve remained open, so the Horsts' domestic water supply would not be interrupted. However, the lower main valve was closed as much as possible. The Proudfoot pipeline was to remain open to relieve pressure and, along with plugging the severed Gooseneck, cause any water getting through the lower main valve to flow down the Proudfoot pipeline.

[325] Ms. Purcell said they talked to Mr. Horst about all of this in September 2014 and he was on site every day watching, videotaping, and sometimes yelling except for November 7, 2014.

[326] A few weeks earlier, Ms. Purcell had noticed a lock on the upper main valve that she identified as Mr. Horst's. She also testified he had told her several times

that it was unacceptable to turn off the whole water system because his family needed domestic water all the time.

[327] Mr. Purcell gave evidence about completing live repairs to pipeline systems involving “hard pressure” many times during his career. He saw no risk in doing what they planned, as long as the Proudfoot pipeline was open, to relieve pressure if it built up.

[328] Mr. Horst denied being aware of the plan to use the Proudfoot pipeline, stating had he known he would have told them the line was not designed for that purpose and “you can’t have a 10 inch line go through an eight inch line”, without addressing the effect of closing the lower main valve as much as possible on the flow of water.

[329] Concerned that the Proudfoot pipeline had been dug up and punctured by Mr. Horst and Mr. Johnson, Ms. Purcell said that up to the morning of November 7, 2014, they kept checking with Mr. Proudfoot to ensure he was still receiving water, which he did.

The Flood and the Aftermath

[330] After Mr. Thompson cut the Gooseneck, water began leaking out of the cut. Once it was disconnected, he used his excavator to lift the Gooseneck out of the excavated site and lay it on the ground. Ms. Purcell described him doing all of this carefully and gently. She also recalled it taking a while for Mr. Thompson to plug the stub. Shortly after it was plugged, however, a mass of water started flowing into the site from somewhere upstream. Soil began crumbling into the excavation area where Mr. Thompson’s son was standing. He had to scramble to get himself and the tools out.

[331] Realizing they had to shut off the upper main valve, Ms. Purcell and Mr. Thompson took his truck. Ms. Purcell recounted Mr. Proudfoot’s wife running to meet them with bolt cutters to remove the lock. She estimated they returned to repair

site about 30 minutes later. Photographs show a much larger completely flooded area.

[332] Mr. Purcell had been away since November 5, 2014. After learning about the Flood, he sent an email to Mr. Proudfoot telling him that he had seen Mr. Horst earlier that week load materials including what looked like a valve into the back of his truck; driving to or near where he had excavated the Proudfoot pipeline in his field and he and Mr. Johnson working there all day. Mr. Purcell also referred to these circumstances during this testimony. As a prior consistent statement, what Mr. Purcell said in his earlier email is not admissible for its truth or to bolster his credibility, although the timing of his communication, before the Purcells knew a valve had been installed, can be considered.

[333] In any event, Mr. Horst acknowledged digging up the Proudfoot pipeline in his field with Mr. Johnson and then about a month later, on November 5, 2014, installing a butterfly valve. Mr. Horst gave evidence about a photograph he took November 8, 2014 that depicts the excavated area around the Proudfoot pipeline with the valve installed before back filling the hole. He says it shows the valve in the open position.

[334] Before excavating, Mr. Horst said he was unaware of the exact location of the Proudfoot pipeline and decided to look for it when he did because it was an unauthorized line on his property. Mr. Horst also said he installed the valve to repair the damage to the line caused by the excavation and to control or stop the flow of irrigation water to the Proudfoot property, given his priority or first rights to irrigation water under his licence, having been told by Ms. Purcell that Mr. Proudfoot was moving his valve.

[335] On the morning of November 8, 2014, Mr. Host was back at the property line videotaping. Mr. Thompson was there pumping the water out the site with large hoses and a generator which took an entire day. Ms. Purcell testified about photographs taken on November 9, 2014 after most of the water had been removed. They show more of the lower water system exposed than before, including parts of

the two domestic pipelines, the lower main valve at the bottom, the covered decommissioned Proudfoot valve and the stub of the Gooseneck.

[336] She and Mr. Thompson testified they could see the gasket on the lower main valve, that seals it, had been pushed out or “blown”. Mr. Thompson said he did not find anything else that would explain so much water flooding into the excavation site. The enlarged site did not show, however, where the domestic lines attached to the main pipeline above the lower main valve.

[337] While working on the site, Mr. Thompson accidentally cut the domestic water lines.

[338] Before this, after he and Ms. Purcell shut the upper main valve, she had agreed to provide the Horsts with hotel accommodation although they ended up staying with another family in Fernie.

[339] On November 10, 2014, Mr. Daigle and Mr. Hendricks attended the site in response to a complaint from Mr. Horst. After also meeting with the Horsts, Mr. Daigle sent the November 19 email which I have already referred to: he was satisfied there were four users of the one water system that shared the works up to the point where their individual lines leave the main system.

[340] Ms. Purcell said they never heard again from Water Stewardship about the urgent repair.

[341] Mr. Thompson and Ms. Purcell described the work after the Flood as much more time-consuming because of the winter weather conditions. They brought in large heaters to keep the domestic pipelines from freezing but they froze anyway along with everything else in the site. A temporary fix was devised by connecting cut portions going to each residence to welded provisions and the lower main valve which had to be removed and replaced.

[342] Photographs show the gasket protruding from the lower main valve. Ms. Purcell testified no cracks were visible on the outside of the valve and it was not

leaking externally but inside there were some rough flat spots or rough marks that "you could tell was rock damage".

[343] Mr. Horst remained on the site daily. Ms. Horst was also there sometimes.

[344] Photographs show the Horst irrigation pipeline and the flange fabricated by Mr. Thompson on the ground before it was installed underground.

[345] Ms. Purcells sent regular emails updating the Horsts, Mr. Proudfoot, and Mr. Daigle. In her emails, she asked Mr. Horst more than once to confirm the valve he had placed on the Proudfoot irrigation pipeline would be open again related to relieving the pressure this time during the water restart. He did not respond directly, indicating: "there will be nothing within my control preventing the draining of the system". In addition to posing many questions, he also wrote that it was best to use his irrigation mainline for start up and he wanted to be present.

[346] Given his lack of clarity, the Purcells resorted to installing additional temporary piping to relieve pressure which took time to figure out, weld and put in place.

[347] Throughout this period, Mr. Thompson and Ms. Purcell testified that both Mr. Horst and Ms. Horst would arrive and walk right through the repair site. Ms. Purcell told them not to several times and that it was dangerous. On one occasion, Ms. Horst was wearing only flip flops. She commented that King George had given them the divine right to roam the property in perpetuity.

[348] After an attempted restart of the water system on November 27, 2014, the domestic water supply was restored on December 2, 2014.

[349] The Purcells never heard from Mr. Horst about connecting to the underground irrigation pipeline at the property line.

[350] On May 7, 2015, Ms. Purcell sent him an email expressing surprise that he had not contacted them about connecting to the "access point" constructed "last fall

that enables you to connect your irrigation water". She asked him to let them know if he wanted to connect. He did not respond.

[351] In cross-examination, he indicated that his intention was to return his irrigation system to the way it was in 1996 or after the Gooseneck was installed. He also agreed he did not avail himself of the other option of attaching a Gooseneck to the Proudfoot pipeline on his property.

[352] Not originally part of the plan, the Purcells installed the cement vault referred to earlier that houses the valves. Measuring four feet wide x eight feet deep, Mr. Purcell described it as convenient. Instead of having various sleeves or conduits to open and close the valves, they can go down into the vault and turn them by hand. Valves for the parties domestic water lines as well as the Purcells' irrigation pipeline are inside the vault.

[353] Schedule "E" to these reasons, Mr. Purcell's sketch of the lower water system after the 2014 repair, shows the bottom of the vault at about six feet below ground. Mr. Horst's new underground irrigation pipeline runs underneath the vault through "mouse holes" on their side, with the flange and blind flange, attached one foot from the property line.

[354] The vault is locked for security, Mr. Purcell testified. Ms. Purcell testified it is also locked for safety because of a lack of air. Mr. Purcell testified Mr. Horst would have been free to go into the vault (with their permission). They did not give him a key because of the lawsuit. Mr. Purcell also said Mr. Horst never asked for one.

[355] In the spring of 2015, Mr. Thompson reconnected both domestic water lines properly.

2015 Leak in the Proudfoot Pipeline

[356] Mr. Horst acknowledged that in or about the spring of 2015, a leak developed in the area of the valve he installed on the Proudfoot irrigation pipeline, resulting in a large pool of water, shown in a photograph dated June 17, 2015. Asked to agree it

caused a significant drop in water pressure, he said not in his house and otherwise he did not know. He agreed however, the Purcells told him they were experiencing a drop in pressure. The Proudfoots had no water pressure and no irrigation water at all. Mr. Horst testified to making no effort to repair the leak, although he was asked to, because his lawyer was dealing with Water Stewardship about getting Mr. Proudfoot to comply with his licence.

[357] As well as a drought that summer, there was a wildfire in the area in early July 2015 that required residents to be evacuated. Without any fire service, residents have to mitigate the risk of fire themselves. Ms. Purcell testified that after being on wildfire watch, the evacuation warning was issued. The Purcells moved 12 horses including a newborn foal to Mr. Thompson's property, which was safer. When they returned to their property, the water was still running from the leak in Mr. Horst's field.

[358] Ms. Purcell gave evidence about speaking with another neighbour, Tom Halbar, about the situation as they stood on the road. Mr. Johnson approached them and said he had a gun and threatened to kill Mr. Halbar if he did anything for Ms. Purcell. Aware that Mr. Halbar reported the incident to the RCMP, she testified that police drove up and down the road for several days.

[359] On July 9, 2015, Ms. Purcell sent an email to Mr. Horst, Mr. Proudfoot, Mr. Melling, and Mr. Daigle, advising that she and Mr. Purcell would be conducting an emergency modification to the water system because of the leak and their lack of water and to mitigate the fire risk. In order to conduct the modification, they would be shutting off the domestic water for 12 hours the next day. Both Mr. Proudfoot and Mr. Melling responded favourably. Mr. Proudfoot also reported no water pressure at all and Mr. Melling said they had a drop in pressure. Mr. Horst did not respond.

[360] The modification involved modifying a valve that could be used to turn off the Proudfoot irrigation water.

[361] The Purcells proceeded on July 10, 2015, and their water pressure was restored. Ms. Purcell sent a follow-up email the next day. In the email, she emphasized the leak in the pipeline located on the Horst property continued to prevent the flow of any irrigation water to the Proudfoot property, which impacted fire mitigation as well as irrigation. She urged cooperation.

[362] Testifying the Purcells could have just turned off the lower main valve, Mr. Horst said that he had water at his house, his family was his main concern, and he was not concerned about the risk of fire to neighbouring properties, Mr. Horst expressed the view the repair or modification was unnecessary.

2017 Disconnection of the Purcells' Domestic Water Pipeline

[363] Ms. Purcell testified that on July 30, 2017, Mr. Horst and Mr. Johnson excavated part of the Purcells' domestic water line on the Horst property and disconnected it, after shutting off the water supply at the upper main valve without notice.

[364] Mr. Horst acknowledged digging up and severing the "unauthorized line" on his property and then attaching a water hydrant to it.

[365] His actions followed exchanges between counsel about the issue starting in October 2015.

[366] On January 9, 2017, Mr. Horst's counsel sent a letter to counsel for the Purcells providing them with "final notice" that they must remove their domestic water line on his property within 30 days. The letter indicated Mr. Horst would flag the entrance and exit of the water line from his property and uncover it at those points if required. The letter also stated that Mr. Horst had notified BC Hydro to remove the power line servicing the Purcell property, which was in trespass over his lands.

[367] In a responding letter dated January 12, 2017, counsel for the Purcells reviewed all of the previous correspondence, demanded 180 days notice and

advised it was impractical to remove the line at that time because the ground was frozen. Writing the correspondence started with an email from Mr. Horst's counsel on October 15, 2015, which stated the Purcells' domestic line was on Mr. Horst's property contrary to their licence, the email was to be considered notice pursuant to s. 29 of the *Water Act* and if the trespass was not remedied he would remove the line, counsel for the Purcells noted the last letter dated June 16, 2016 from Mr. Horst's counsel, stated he would take no steps to remove the domestic line while the parties were in "settlement discussions". She also proposed that Mr. Horst mark the location of the water line every 10 feet. Regarding his communication with BC Hydro, she wrote the Purcells had been advised by the company they would not leave a customer without power.

[368] Mr. Horst marked the entrance and exit points of the Purcells' waterline but he did not flag its location on his property. In cross-examination, he acknowledged the estimated length was 1,000 feet. When asked how they could comply with his request without knowing the location, he responded, "you'd have to find some way to locate it" and it was their responsibility to know where "these things are". He also suggested locating the pipeline would not be difficult because he had shown them many times and it was visible in aerial photographs. In a google earth image he referred to, he said the path was shown by slightly different coloured streak, which is not apparent to me.

[369] In a further letter dated June 13, 2017, counsel for the Purcells asserted Mr. Horst's failure to mark the path of the domestic line made his notice under what by then was s. 34 of the *WSA* deficient. She advised his counsel the Purcells would seek damages if their domestic water supply was interfered with.

[370] Ms. Purcell sent an email to Water Stewardship about the need to restore the domestic water supply to their house by installing pipeline entirely on their property which they would connect to the existing "works". Ms. Andrews responded and confirmed Ms. Purcell's understanding that no documents or approvals were

required. In subsequent correspondence, Ms. Andrews asked about the connection location to “the water source for your new domestic line.

[371] Ms. Purcell denied that Mr. Horst ever told them where their domestic line was on his property.

[372] She testified that when a particular contractor and his employee or another contractor came to their property to discuss installing a new domestic line on their property, Mr. Horst told the contractor he would sue them for $100,000 if they did anything on “his works”. Mr. Johnson was also there and told the contractor not to listen to “this f***ing bitch—she is just a woman” and words to the effect of, “she can’t tell you want to do, this isn’t her works; and you are violating the property of Mr. Horst”.

[373] Mr. Horst acknowledged trying to prevent the Purcells from installing a domestic water line on their property, which would have left them with out domestic water, because in his view they were not authorized to connect to the works authorized by his licence, meaning the whole water system.

The Bunker Incident

[374] In September 2017, the Purcells hired Bo-West Construction to install the domestic line. Their worker, Stuart Robinson, testified about Mr. Horst yelling across the fence while he and his boss were going over the job with the Purcells before starting it. Mr. Robinson described Mr. Johnson driving up and also yelling at his boss that he should not be doing the job, he should check his water rights, and then yelling at both of them and the Purcells. The following day, Mr. Robinson saw someone standing on the “water works” while he was working so he told Ms. Purcell. In response, the Purcells drove down to the water system and confronted the person who Mr. Robinson realized was Mr. Horst.

[375] Mr. Robinson said Mr. Horst and Mr. Purcell were yelling at each other. Mr. Horst was standing over what he referred to as a “man hole cover”. The cover was off and a cut lock was on the ground. Mr. Robinson described Ms. Purcell

walking away and calling the RCMP who arrived about 45 minute later. Mr. Horst left before they arrived after picking up some bolt cutters and then getting in his truck.

[376] In cross-examination, Mr. Horst testified to entering the Purcells' property by removing one board of a fence they had installed, agreeing he felt justified in breaking down the fence at that location. After cutting the lock, he entered the cement vault and went down the ladder to check the valves the Purcells had installed including the valve for his domestic line. He agreed that he told the Purcells he had filed "an expropriation" that allowed him to come in. Mr. Horst denied being angry and upset. He alleged that after picking up a piece of wood, Mr. Purcell came at him holding it like a baseball bat, while threatening to break his head. Mr. Horst also alleged Mr. Purcell picked up the lid to the vault and pushed it into his leg although he was not injured.

[377] Mr. Horst proceeded to tell the Purcells he was looking at the "abortion" they had made of the water lines and the vault. He described pulling out his phone to make a video recording and saying to Mr. Purcell tell me again how you are going to break my head. Mr. Horst referred to Ms. Purcell calling the RCMP at that point and "twirling her hair" as she told them Mr. Horst was threatening them.

[378] Mr. Purcell testified that Mr. Horst seemed quite disturbed, upset, and had a strange look in his eye during the encounter. They found him standing on top of the vault shouting at them, waving his arms, saying he had a right to be there, and quoting the *Water Act*. Mr. Purcell acknowledged picking up a piece of wood, because he was concerned Mr. Horst was going to attack Ms. Purcell. Mr. Purcell denied putting the wood over his shoulder or ever threatening Mr. Horst, stating he would never say words like that although he may have sworn. Rather than picking up the lid, Mr. Purcell said he dragged it because it is heavy. He wanted to put it back in place over the entrance to prevent anyone from falling in.

[379] Five or ten minutes later, Mr. Robinson walked over which made Mr. Purcell feel better, being 70 years old at the time. About 15 minutes after they told Mr. Horst they had called the police, he suddenly left stating it was time for supper.

[380] Ms. Purcell recalled a number of pieces of their wood panel fence were knocked through, although Mr. Horst had easy access to the area without doing so, the lid to the vault open with bolt cutters on top and the chain and lock broken. Mr. Horst climbed out from inside of the vault and made the comments about the "abortion" and being served, he referred to in his evidence. He told the Purcells he had expropriated an easement and he had every right to be there. He also talked about reconnecting to his works and destroying the abortion. Ms. Purcell said Mr. Horst did not seem right and she was really frightened. She adamantly denied that Mr. Purcell came at Mr. Horst with something thrown over his shoulder like a baseball bat or threatened him physically. She did recall Mr. Purcell knocking the side of Mr. Horst's leg when placing the lid back in place. Cross-examined about neither of them appearing stressed or agitated in a photograph Mr. Horst took during the incident, Ms. Purcell said she did everything she could to calm the situation but she felt terrified and stayed awake all night.

[381] After they contacted their counsel about the incident, Ms. Purcell recalled Mr. Johnson parking his excavator right next to the location where Mr. Horst had broken through their fence.

Equine Therapy Business

[382] Ms. Purcell gave disputed evidence about developing an equine therapy business on the Purcell property. I discuss the issue here because they relate to the Purcells' allegations of ongoing trespass, harassment, and intimidation.

[383] Indicating she had been around horses most of her life, Ms. Purcell said along with owning horses, she and Mr. Purcell breed them.

[384] In discussing the method and purpose of equine therapy, she identified it is especially helpful for people with post-traumatic stress disorder who have suffered abuse and other forms of trauma. The Purcells had and have a number of horses on the property. Some of them are specifically trained to participate in the therapy. In addition to fencing the property, they build an outdoor arena, a round pen, and what

Mr. Horst referred to as “corrals and paddocks” where clients can observe and interact with the horses.

[385] Ms. Purcell gave evidence about growing the therapy business over time, stating they made almost no money for the first few years. Also indicating every new business takes time to develop, she emphasized that she found it difficult to facilitate equine therapy on the property because of harassment and a range of stressful circumstances, and many of her clients are traumatized already.

[386] Ms. Purcell stated that Mr. Horst was in the habit of following and taking pictures of her. As she drove past the horses to provide them with hay, he would drive alongside her on his property and stop each time she did. He was also there watching her when she was on her property outside the house with other people, or when she stopped to talk to someone on the road. Ms. Purcell added that other people noticed Mr. Horst’s behaviour and would tell her someone was watching her. She said it seemed as those he always knew where she would be.

[387] Mr. Horst denied following Ms. Purcell around or trying to see what is happening on their property by driving slowly on the EGR. Instead, he said he always drives slowly as many animals are on the road eating hay left there by Ms. Purcell when she feeds her horses from the road.

[388] As I referred to earlier, Mr. Horst acknowledged stopping to watch the Purcells a short time before he was recalled to give additional evidence, because they were doing something very unusual, which involved loading the dead body of one of their horses onto a truck that another horse had killed.

[389] Looking surprised and shaken, Ms. Purcell asked Mr. Horst what he was talking about. He said he was told the horses were fighting and the next morning one was dead. He stopped his vehicle to watch them look after the dead body.

[390] Agreeing he took photos and video recorded the Purcells, Mr. Horst said he started doing this on September 27, 2014, after he called Water Stewardship because they were “digging up my water line”. According to Mr. Horst, Water

Stewardship advised him not to confront the Purcells, but to document with photos and video.

[391] Asked when he stopped photographing or video recording them, he pause for some time before responding that he assumed Ms. Purcell was not referring to inadvertent photos. If so, he said he last recalled taking a photo in September 2017 during the incident at the bunker.

[392] Mr. Horst denied having recording equipment aimed at the Purcells' property or a camera installed on his vehicle.

[393] Ms. Purcell referred to Mr. Johnson engaging in some harassment related to their horses. She said, when she is hanging onto a horse on the road, although everyone else slows down, Mr. Johnson drives as fast as he can. He also drives as close as he can to her on his tractor.

[394] Ms. Purcell testified the interim injunction and COVID-19 helped with the therapy business. She began meeting with clients using video technology or one-on-one. Over time as they developed the property, she also was able to use more areas that are sheltered from being watched.

[395] As part of the therapy business, she also provides counselling one day per week in Fernie and some human resources consulting.

[396] Mr. Horst testified to not believing the Purcells had a "*bona fide*" equine therapy business, stating he had not seen anything that would lead him to believe equine therapy was occurring on the Purcell property. In addition to noticing very few vehicles using the Driveway/HAR, he said he had not seen clients in paddocks or corrals interacting with horses, although he can see the Purcells' horses and the area from his yard and kitchen. Referring to financial and/or tax documents from 2018 and 2019, Mr. Horst commented they showed a loss and no operating expenses relate to care or maintenance of horses. Nor was there revenue from equine therapy listed.

[397] Asked to confirm he was aware that Ms. Purcell was a counsellor, he responded that was what she had claimed. During her testimony, she reviewed some Canada Revenue Agency ("CRA") documents for the counselling business. In the name of R.D. Purcell & Associates Ltd., they show total revenue of almost $151,000 in 2020 and almost $97,000 in 2019. They also specify the principal services provided in 2020 as counselling and consulting and coaching services, with counselling making up 50.9% of those services.

Other Alleged Harassment and Trespass

[398] Along with Mr. Horst's testimony denying he has, there is no contrary evidence he entered the Purcell property after the interim injunction was granted in September 2017. However, the Purcells allege that both Mr. Horst and Mr. Johnson continued to engage in other various forms of ongoing harassment and Mr. Johnson committed further trespasses.

[399] Ms. Purcell testified about dead skunks being thrown onto their horses' hay on their property, contaminating the hay, and Mr. Johnson riding by and pointing to the dead skunks. She also described him coming onto their property in 2021 and admitting to putting the skunks there. When she told him not to, he said, "I hope are getting the message" or "you better be getting the message" and "you stink just like skunks too".

[400] Ms. Purcell gave quite detailed evidence regarding a particularly serious incident on April 8, 2022 that started with Mr. Johnson driving onto the Purcell property. She walked over to the area and saw that he and some of his family members were knocking down a bunch of large trees and cutting them with a chainsaw. Ms. Purcell noticed a stack of cut logs on his side of the property line. They also lit a large fire on the Purcell property. When she told him to stop and leave, he swore at her and told her she had better be afraid of him. Looking at her from his tractor with a smile on his face, he said words to the effect of, "you had better get out of the way, before charging right at her". He also yelled at her to take him to court.

[401] Ms. Purcell called the RCMP but it took a couple of hours for them to arrive. Videos she made during the incident and photographs she took, which she sent to the RCMP, are in evidence. The videos of Mr. Johnson's conduct are disturbing. Both the videos and the photographs confirm her evidence. Among other things, the photos depict a very large unattended fire close to other large trees. A photo of the same area from the previous fall shows a much larger grouping of trees.

[402] Ms. Purcell was informed that Mr. Johnson told the RCMP there was confusion over the property line. She also said the RMCP advised her they could not enforce the interim injunction because it does not contain a police enforcement clause. It is well established that the police do have the authority to arrest a person for breaching an injunction without a specific term to that effect. In other words, police enforcement clauses are legally superfluous: *MacMillan Bloedel Ltd. v. Simpson*, [1996] 2 S.C.R. 1048, 1996 CanLII 165 (S.C.C.), at para. 41. In any event, the evidence indicates Mr. Johnson engaged in criminal conduct and endangered Ms. Purcell's safety, which does not depend on an injunction with or without a police enforcement clause.

[403] Mr. Purcell testified about another incident that occurred at the Canyon Cuff Off Road involving Mr. Johnson and Mr. Horst. Mr. Purcell recalled that he was driving back from the store in Grasmere, a very small nearby community. Mr. Johnson flagged Mr. Purcell down as he stood next to Mr. Horst's car, which was parked. Mr. Johnson told Mr. Purcell to get out of his truck so he could beat him and "let's have it out". Mr. Purcell said he responded with, "would you really beat up a 70-year-old". Mr. Johnson also told Mr. Purcell, "by the time we finish with you, you'll be sorry you moved here". The Purcells reported the incident to the RCMP.

[404] Mr. Purcell described Mr. Johnson threatening him on another occasion during a power failure. Mr. Purcell said their horses began stampeding around the field at high speed all of a sudden and he got on his tractor to investigate. When he reached the EGR, he found Mr. Johnson on his motorcycle taking pictures of the Purcell property. Mr. Purcell asked him to move his motorcycle so he could pass by

and see what was bothering the horses. Mr. Johnson told him to get off the tractor because he wanted to “beat the living s**t out of him”. Mr. Purcell reported the threat to police but he does not know if they followed up.

[405] Similar to Ms. Purcell when she is leading a horse, Mr. Purcell said that Mr. Johnson has a disturbing habit of speeding up his truck whenever he encounters Mr. Purcell driving his tractor on the road, estimating this happens once or twice per month.

[406] As indicated, the Purcells identified Mr. Horst’s complaints and reports to various agencies and organizations, in addition to Water Stewardship, as one aspect of his alleged ongoing harassment of them.

[407] Mr. Horst acknowledged initiating a disconnection of the Purcells’ power line sometime in 2016. He said he took this step because BC Hydro does not have an easement over his land for their line and it was therefore an aerial trespass. He also indicated the powerline was incompatible with planting trees in his orchard. According to Mr. Horst, BC Hydro acknowledged the trespass and offered him the “nominal sum”, $5,000, which he refused. About a year later, they advised him they would have to relocate the hydro pole to Mr. Johnson’s property. Given the “disputes” between Mr. Johnson and the Purcells, Mr. Horst said he told BC Hydro there had to be another way but then he let the matter drop. Asked to agree he gave evidence at his examination for discovery in July 2019 that he was still pursuing it, which the transcript confirmed, Mr. Horst testified he did not recall.

[408] Ms. Purcells’ evidence about Mr. Horst and/or Mr. Johnson making false or frivolous complaints, also included two complaints to the Ministry of Transportation about installing fencing on their property. In one instance, Mr. Horst complained about the Purcells installing a fence on the south portion of the property where he and Mr. Johnson would drive their farm machinery to access the EGR. Mr. Horst also reported them to the regional district for various things such as needing a permit for their horse shed. Ms. Purcell also described the RCMP coming by a couple of times because they had been reported for blocking the road with large amounts of

hay. She emphasized they were never found to have done “anything wrong” and responding to the complaints and reports took up a great deal of time and energy.

[409] Ms. Purcell also testified about an incident in 2016 before the injunction that involved Mr. Horst shooting a grizzly bear in the middle of the night very close to their house. Ms. Purcell was alone on the property at the time. She awoke to the sound of a gun shot and flood lights shining into the bedroom, which faces the Horsts’ house. Not knowing what had occurred, she said she was afraid that this was “it”, meaning Mr. Horst and or Mr. Johnson were “coming” for her. The next day, a compliance officer from Wildlife Management asked her if she heard shooting and told her a grizzly bear had been killed next door. Rather than identify the incident as harassment, Ms. Purcell pointed to the recklessness involved in discharging a firearm in the dark so close to their residence, as another basis for her fear and concern that Mr. Horst poses a risk to their safety.

[410] Mr. Horst was dismissive of the suggestion of risk and Ms. Purcell’s evidence about her intense distress. He said she was well aware there was a grizzly bear in the area because it had been on her porch at some point. Mr. Horst described his dog, who is always outdoors because he refuses to come into the house, alerting him to the presence of the bear right outside the front door around 2 a.m. Mr. Horst shot the bear with his rifle from his house after it ran off and came back. Wounded instead of killed right away, the bear ran off again after being shot. Mr. Horst saw the lights in Mr. Johnson’s house go on. Mr. Johnson then drove to Mr. Horst’s back gate. His dog led him or them to the bear’s dead body.

[411] Cross-examined about restrictions on shooting grizzly, Mr. Horst testified he was entitled to kill the bear to protect his home and family. He also said he is Indigenous and therefore has an absolute right to shoot grizzly bears 24/7.

[412] Mr. Horst said he did not tell Ms. Purcell what happened because they are not on speaking terms.

[413] I am not able to properly consider another allegation that Mr. Johnson attended the courtroom during the trial dates in 2021 dressed in full camouflage hunting gear and stared at the Purcells in a threatening manner, although I do recall the issue being raised, the circumstances are not in evidence.

[414] I reject Mr. Horst's contention the Purcells are fabricating their claims of "constant" harassment in the hope of restricting his access and ability to operate and repair "his" authorized works. Further to my credibility assessment, where the parties' evidence conflicts with respect to the alleged harassment, intimidation (including threats) and trespass, I accept the Purcells' version of events. As I have indicated important aspects of their evidence alleging trespasses and harassment are supported by other evidence, including Mr. Horst's testimony and the testimony of Mr. Thompson and Mr. Robinson as well as objective evidence, such as photographs and video evidence.

[415] My specific findings about Mr. Horst and Mr. Johnson entering the Purcell property related to the lower water system before the proposed repair in September 2014 and he and Mr. Johnson excavating the Proudfoot pipeline and installing and closing of the valve related to the Flood on November 7, 2014 are set out below.

Ownership of the Water System

Crown Grant Proviso

[416] Mr. Horst relies on a proviso in the 1945 Crown grant of the Purcell property that continues to authorize him to enter the Purcell property to maintain, repair, and operate the works authorized under CWL 111880. He argues the right of entry contained in the grant has never been cancelled, the substitution of different works does not affect the underlying right of access, and the Water Stewardship Branch was unaware of the grant when it required substitution of pipes for the ditches (Horst reply to AG at para. 58).

[417] It is clear that CWL 111880 was issued in substitution of FWL 3464, which was issued to Mr. Derosiers in 1921 with a precedence date of October 16, 1900.

CWL 54105, issued to Ms. Phillips in 1980, states it was issued in substitution of FWL 3464 and has the same precedence date. CWL 111880 was then issued to Ms. Phillips in 1997. In addition to the same precedence date, it states that it was issued in substitution of CWL 54105. CWL 111880 then transferred to Mr. Horst with the conveyance of the Horst property and remains current.

[418] Addressing the other issues, including the scope of the exception in the proviso related to maintaining, repairing and operating the works authorized at the date of the grant under FWL 3464, the Purcells argue the exception is "rendered moot" or does not apply because the works authorized from the date of the Crown grant until 1980, namely ditches, no longer exist, having been replaced by the buried pipeline system in 1996.

General Interpretive Principles

[419] *Bonavista Energy Corporation v. Fell*, 2020 BCCA 144 and *British Columbia v. Friends of Beacon Hill Park*, 2023 BCCA 83, discuss the approach to interpreting Crown grants.

[420] Not factually comparable, *Bonavista Energy* involved an appeal from the judicial review of a decision of the Surface Rights Board of British Columbia. At issue was who had title in fee simple to a right-of-way corridor: was the corridor included in the grant of land that the right-of-way traversed, or was fee simple in the right-of-way corridor retained by the Crown through provisos and "excepting and reserving" clauses in the Crown grant?

[421] Fee simple title to the land covered by the right-of-way was found to have passed with the Crown grant, based on the Court of Appeal's interpretation of the grant: at paras. 44, 57, 63. Indicating the principles of statutory interpretation provide helpful guidance and the principles of contractual interpretation apply, the decision also referred to specific rules for Crown grants, such as they should be constructed in favour of the grantee who provides valuable consideration:

> [37] […] [The Surface Rights Board] set out the well-established test that the words of an enactment must be read in their entire context, and in their

> grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament: *Rizzo and Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27.
>
> [38] I pause to observe that, while the Crown grant is not itself an enactment, it is an "instrument" as defined under section 1 of the *Land Title Act*, RSBC 1996, c 250, and was enacted in the exercise of the power conferred under the *Land Act*. On this basis, the common-law principles of statutory interpretation are a helpful guide. On the interpretation of Crown grants specifically, further guidance is provided by Anne Warner La Forest, *Anger & Honsberger Law of Real Property*, loose-leaf (2019-Rel. 22), 3rd ed. (Toronto: Thompson Reuters, 2006) at §31:90:10:
>
> > Much of the law that relates to the interpretation of contracts applies to Crown grants. There are, however, certain specific rules that have evolved in respect of these grants. Where the Crown is the grantor, the grant is generally to be interpreted in favour of the Crown. This rule will not apply when it would be necessary to give a forced construction in favour of the Crown. It will also not apply when a grantee gave valuable consideration. Where this is the case, the grant will be construed, where possible, in favour of the grantee. Lastly, this rule will not apply where the result would be to avoid the grant.
> >
> > Where possible, Crown grants are to be interpreted so that they are upheld. Crown grants are also to be interpreted so as to give effect to the plain meaning as set out in the grant. …

[422] The Court of Appeal commented further on Crown grant interpretation in *Friends of Beacon Hill Park* at para. 38:

> [38] […] A Crown grant is neither a statute nor (necessarily) a contract. The interpretation of a grant will depend on the circumstances, and may require consideration of principles of statutory interpretation or contractual interpretation depending on those circumstances. Context will be relevant in either case. For example, a Crown grant of land to a grantee who has paid consideration for the grant after a negotiated transaction, such as the disposition of Crown land by way of purchase pursuant to s. 45 of the *Land Act*, R.S.B.C. 1970, c. 17, will attract a contractual analysis. […] The specific question at issue may also influence the interpretive technique. A dispute about the geographical scope of the grant may require extrinsic evidence not needed to interpret a condition of the grant.
>
> [Emphasis added.]

[423] Here, the proviso in the Crown grant clearly created an exception from the grant. The question is the meaning or scope of the exception and in particular, whether it includes the works in their current form under the current water licences.

[424] Decided well before *Friends of Beacon Hill Park and Bonavista Energy*, *Baird v. Salle*, 2008 BCSC 1232, has some factual similarities to this case.

[425] In *Baird*, the plaintiffs had a lake on their land. Both the defendants and the plaintiffs held various water licences in relation to the lake. The plaintiffs asserted that the defendants were required to expropriate the land to use their licences and pay them reasonable compensation. The defendants asserted that the original Crown grants precluded the plaintiffs from requiring expropriation or seeking compensation. The plaintiffs' land was two parcels for which separate Crown grants had been issued at different times. One of the grants stated:

> [34] […]
>
> Provided nevertheless that it shall at all times be lawful for [the holders of particular water licences, and their heirs and assigns] to maintain pipe lines, ditches, flumes, and works within the boundaries of the said lands hereby granted necessary for the proper direction, storage, conveyance and us of the water acquired under said licences and for the proper carrying out of the objects of the said licences and to enter into and upon the said lands at any and all times for the purpose of maintaining and repairing the same during the existence of the licences.

[426] The other grant stated:

> [35] […]
>
> PROVIDED also that it shall be lawful at all times during the currency of [particular water licences] for the licensees there under to enter upon the lands hereby granted and to maintain, repair and operate thereon and therein the works authorized under the said Final Water Licences.

[427] Justice Powers found that the pre-existing water licences, and the licences which superseded them, were exceptions to the original grant, and the defendants could exercise their rights under those licences without the payment of compensation to the plaintiffs: *Baird* at para. 41.

[428] In *Baird*, the issue was the substitution of licences, not a change in works. The plaintiffs in *Baird* argued that the effect of the original licences on the Crown grant was lost when those licences were substituted for other water licences. Neither Crown grant in *Baird* explicitly contemplated licences issued in substitution. Justice Powers categorized the substitutions as technical or administrative as opposed to

substantial in nature, meaning they did not go to the core of the licences. Therefore, they did not result in the loss of any rights relating to the water licence holders in relation to the present owners: *Baird* at paras. 44–49.

[429] *Baird* indicated then it is the core of the "works" that matters when determining whether the exception to the Crown grant continues to apply.

[430] Of course *Baird* is subject to the principles of interpretation identified in *Bonavista Energy* and *Friends of Beacon Hill Park*.

Discussion

[431] In this case, the Crown grant states that Mr. Dodge paid $200 for the west half of sublot 16, which is valuable consideration, invoking a contractual (interpretative) analysis and "where possible" one that favours the grantee.

[432] Considering the plain language of the proviso in the grant in the context of the grant as a whole, clearly "the works authorized at the date of this Grant under the said Final Water Licences", refer to the works authorized at the time of the Crown grant.

[433] The works authorized under FWL 3464, consisted of "ditch".

[434] Ditches have not been authorized under the licences issued in substitution since 1980. The authorized works under CLW 54105 were (the construction of) pipe, as well as a diversion structure and a division tank. Similarly, after construction of the underground pipeline system in 1996, CLW 111880 authorized works that included pipe and a diversion structure, division tank, pump and sprinkler system.

[435] The maps attached to FWL 3464 which form part of the grant or at least its contextual whole, as well as the CLWs, also show the authorized ditches in a different location or orientation from the authorized pipe on the Purcell property.

[436] Interpreting the plain meaning of the words in the proviso in the context of the Crown grant as a whole, I am satisfied the exception does not apply to the works

authorized by Mr. Horst's current licence, and has not since the underground pipeline system was first constructed in 1996.

[437] Invoking *Baird*, the Purcells also argue there are significant difference between ditches and buried pipes, in terms of maintenance, repair and operation requirements, as well as a different location for the pipeline from the original ditches.

[438] On this analysis, I agree the change in the nature and location of the works is properly characterized as substantial or affecting the core nature of the works.

[439] I conclude therefore that the proviso in the Crown grant does not authorize Mr. Horst to enter the Purcell property to maintain, repair and operate the works authorized under CWL 111880.

Ownership under the *WSA*

[440] Mr. Horst argues a water licence authorizes ownership of related works under s. 7 of the *WSA*, or at least a right to enter private land to use the works as authorized in the licence (*i.e*., construct, maintain, and operate), even in the absence of a statutory right of way, easement, equitable right, or some other source such a proviso in the Crown grant.

[441] I note that in *Spur Valley (Improvement District) v. Csokonay*, [1998] B.C.J. No. 1488 (S.C.), much the same argument was dismissed. Both parties claimed to own the water system, which serviced the improvement district (a subdivision with 86 lots). As in this case, most of the water system was located on the defendant's property. The improvement district had a water licence to draw water from the creek. A development company had previously owned the defendant's property and the subdivision lands. Justice McEwan rejected the plaintiff's argument that the authorization under the licence-determined ownership, which he then resolved based on property law and equitable principles.

[442] Section 7 of the *WSA* reads:

Rights acquired under authorizations

> **7** (1) A licence entitles its holder to do the following in a manner provided in the licence:
>
> (a) Divert and beneficially use the quantity of water specified in the licence;
>
> (b) Construct, maintain and operate the works authorized by the licence and related works necessarily required for the proper diversion or use of the water …;
>
> (c) Make changes in and about a stream necessary for the construction, maintenance or operation of the works referred to in paragraph (b) or to otherwise facilitate the authorized diversion;
>
> […]
>
> (2) A use approval entitles its holder to do anything described in subsection (1) for the period or at the times and in the manner specified in the use approval.

[443] As the AG submits, s. 7 is properly interpreted as not providing for or addressing ownership of works authorized under a licence, grant any interest in the land on which the works are located where that land is not owned by the licensee, or grant access to that land.

[444] The modern approach to statutory interpretation requires the words of an enactment to be read in their entire context, in their grammatical and ordinary sense, and harmoniously with the scheme and object of the act and the intention of the legislator. Although legislation is paramount, legislation is also presumed not to intend to interfere with common law rights: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada Inc., 2014) at 538. There is a specific presumption that the legislature does not intent to expropriate, or otherwise take away property rights, without compensation and due process of law: *Sullivan* at 502. Similarly, legislation should not be read as adversely affecting property rights unless those rights have been limited expressly or by necessary implication: Bruce Ziff, *Principles of Property Law*, 6th ed. (Toronto: Thompson Carswell, 2014).

[445] Section 7 of the *WSA* does not expressly grant an interest in land where the works are located on private property, any ownership interest in the works themselves or the right to enter, use or occupy privately owned land. Further, s. 7

does not identify the licence holder's right to construct, maintain and operate works authorized under the licence as exclusive.

[446] Addressing the scheme of the *WSA*, the AG points out that various provisions also recognize that owners of land have the right to interfere with or remove works on their land, subject to specific restrictions set out in those provisions. Section 34 recognizes that a land owner has the right to alter, remove, or otherwise interfere with works on their land on six months notice to the licence holder. Contrary to the notion a licence grants any interest in land, s. 32 permits a licensee to expropriate land owned by another person, *if* they pursue an expropriation proceeding in accordance with ss. 22–30 of the *Water Sustainability Regulation*, B.C. Reg. 36/2016 [*WSR*]. Other provisions recognize a licence in itself does not grant any rights to enter onto or construct works on private land without authorization. Section 35, for example, permits the comptroller or water manager to authorize a licensee to enter on, occupy or use land for constructing works if certain conditions are met. After exercising the granted authority, the licensee must promptly take steps to expropriate the required land.

[447] In addition, the *WSA* defines "owner" only in relation to land (mine or an undertaking), not works authorized under a licence. Although the term appurtenant is not defined, it is used consistently to describe or refer to the land (mine or undertaking) to which the licence attaches and not the authorized works.[2]

[448] Satisfied the *WSA* plays no role in determining ownership of the shared water system on the Purcell property, I note at this stage the AG and Mr. Horst's counsel in reply to the AG only, addressed proprietary estoppel and equitable easement principles. Mr. Horst did not plead any such claim related to the water system. His only pleaded claim for an equitable easement based on proprietary estoppel

[2] Some time ago in *Van Oyen v. Kelowna Industries Ltd.*, [1979] B.C.J. No. 393 (S.C.), Justice Macfarlane observed, with respect to now repealed *Water Act,* that the comptroller by issuing a water licence does not authorize the entry on to privately owned land or grant any easement in respect of it.

involved the Driveway/HAR. Nor did his counsel raise proprietary estoppel or equitable principles in his original submissions, despite the evidence showing shared payment for the construction of the pipeline system in 1996 and shared use of it since that time.

[449] Consequently, I cannot properly consider the principles in this context.

[450] The remaining claims related to ownership and rights in relation to the water system on the Purcell property are the Purcells' request for a declaration of ownership and the expropriated easement sought by Mr. Horst under the *WSA*. I discuss the proposed expropriated easement after the parties' damages claims, because in dealing with those claims, I make findings relevant to the Purcells' arguments opposing an expropriated easement.

Fixture versus Chattel

[451] The Purcells seek a declaration that they own the buried water system infrastructure on their property, because it was a fixture to the land when they purchased the property.

[452] Mr. Horst's only submissions on this issue were made in response to the AG's submissions regarding case law.

Legal Framework

[453] *ADC Projects Ltd. v. Jeana Ventures Ltd.*, 2022 BCSC 1837, at para. 10, recently confirmed the test for determining whether something is a fixture or chattel identified in *La Salle Recreations Ltd. v. Canadian Camdex Investments Ltd.* (1969), 4 D.L.R. (3d) 549 (B.C.C.A.) at para. 16, based on *Stack v. T. Eaton Co*., [1902] 4 O.L.R. 335 at p. 338:

> [10] […]
>
> […]
>
> **I take it to be settled law**
>
> (1) That articles not otherwise attached to the land than by their own weight are not to be considered as part of the land, unless the

> circumstances are such as shew that they were intended to be part of the land.
>
> (2) That articles affixed to the land even slightly are to be considered part of the land unless the circumstances are such as to shew that they were intended to continue chattels.
>
> (3) That the circumstances necessary to be shewn to alter the *primâ facie* character of the articles are circumstances which shew the degree of annexation and object of such annexation, which are patent to all to see.
>
> (4) That the intention of the person affixing the article to the soil is material only so far as it can be presumed from the degree and object of the annexation.

[454] Essentially, the question is whether the items are annexed for better use of the chattels or better use of the lands, informed by all the relevant circumstances including the objective intention with respect to the duration of the annexation and the use of the lands: *Zellstoff Celgar Limited v. British Columbia*, 2014 BCCA 279 at para. 40.

[455] I was referred to some cases dealing with ownership of water systems and whether they were chattels or fixtures.

[456] In *Engemoen Holdings Ltd. v. 100 Mile House (Village)*, [1985] 3 W.W.R. 47 (B.C.S.C.), a water main (underground pipe) located under shopping centre was found to be chattel owned by the defendant village. The plaintiffs owned the shopping centre and the defendant village supplied it with water through the pipe. The trial judge concluded the pipe was intended to remain a chattel, dealt with by the village. He accepted it was buried for better use of the pipe as a pipe, in order to protect it from damage, and not for better use of the shopping centre as a shopping centre, noting the water line existed before the building was constructed.

[457] In *Spur Valley*, McEwan J. found that the portions of a water system on the defendant's land, which included a pumphouse and other affixed parts, were fixtures, although he went on to conclude the equities between the parties should be resolved by way of an easement (or other reasonable means) to protect the water rights of the plaintiff. On the issue of equity, I would note that, unlike here, both

parties had acted for years in reliance on the mistaken belief that the plaintiff owned the water system. The plaintiff's action included creating the subdivision and marketing lots, paying maintenance fees and providing volunteers to maintain the system.

[458] In *Pilgrim v. Milner*, 1997 CanLII 14652 (N.L.C.A.), which involved ownership of a water pipeline that ran under a public road, the Newfoundland and Labrador Court of Appeal relied on its attachment to the land, its purpose, and the fact that it could not be moved without injury to the real property as establishing it was a fixture.

[459] Applying the test set in *LaSalle* to the circumstances here, it is clear to me the water system on the Purcell property is a fixture. Not merely annexed to the land, but permanently buried underground, clearly the water system was installed underground for the better use of the land. The water system has no purpose other than to provide water to the Purcell and Horst properties. The fact that it was always intended to benefit the Horst property, as well does not change the analysis, given the location of the underground water system on the Purcell property.

Damages Claims

[460] Both parties claim for damages against the other. Mr. Horst's claim is based on his estimate of lost lease revenue and the cost to rehabilitate his fields due to the lack of irrigation water after the 2014 repair. The Purcells' claims relate to the cost of the urgent repair and what they identify as the increased cost related to the Flood in 2014, as well as Mr. Horst's refusal to repair the leak on the Proudfoot irrigation pipeline in 2015, and his removal of their domestic water line from his property.

Mr. Horst's Claim

[461] Mr. Horst seeks damages of approximately $110,000 due to a lack of irrigation water since 2015, based on his estimate of income for a tenant farmer each year and the costs he says will be incurred to rehabilitate his field.

[462] He also seeks an order that he be at liberty to enter the Purcell property to connect to the new piping they installed, at their expense.

[463] Mr. Horst's pleadings does not identify a cause of action in support of his claim for damages. In submissions, he simply argued there is no evidence the Purcells were "even prepared to permit" him to enter their property to restore his irrigation "system".

[464] Leaving aside the need for a pleaded cause of action to ground the Purcells' liability for damages, which he must prove, Mr. Horst's characterization of the evidence or the absence of evidence is inaccurate.

[465] There is no dispute the Purcells removed the above ground Gooseneck pipeline and replaced it with an underground irrigation pipeline to service Mr. Horst's property as part of the 2014 repair. The flanged end of that pipeline was located almost at the property line. I am confident the Purcells would have allowed Mr. Horst access to their property to connect to the underground irrigation pipeline, had he asked. Again, Ms. Purcell sent Mr. Horst an email in May 2015 expressing surprise over the fact he had not contacted them to arrange to connect to his irrigation pipeline and inviting him to let them know if he wanted to do so arrangements could be made. Had Mr. Horst chosen to pursue connecting, his supply of irrigation water would not have been interrupted, let alone stopped. Once connected, I am also confident the Purcells would not have interfered with Mr. Horst receiving irrigation water as permitted by his licence.

[466] Mr. Horst also acknowledged the Proudfoot pipeline was capable of providing irrigation water to his property and was located fairly close to his irrigation sprinklers, but he never considered accessing this supply. He suggested the cost would be in the thousands and expressed the view that using the Proudfoot pipeline would not be in accordance with his licence so "water management" would not have allowed it, although he never asked. He also agreed he simply preferred to file a lawsuit.

[467] Absent a pleaded cause of action and any submissions identifying and addressing the legal basis for his claim, I dismiss it.

The Purcells' Claims

[468] The Purcells' general damages claims include the following:

- $4,502 for Mr. Horst's share of the total cost of the urgent repair in the amount of $14,410;
- $18,275 for Mr. Horst's share of the total cost of the emergency repair (Flood related) in the amount of $28,250;
- $829 as for Mr. Horst's share of the $1,229 spent to reinstate the domestic water lines in 2015;
- $3,417 for the total cost of repairing the 2015 water leak in the Proudfoot pipeline on the Horst property; and
- $24,817 for the total cost of replacing their domestic water line in 2017.

[469] Their damages claims also include $3,000 for Mr. Horst's trespasses and damage to their fences, and $7,500 in punitive damages.

[470] Like Mr. Horst, aside from trespass, the legal basis for the Purcells' damages claims were really addressed in their submissions. Their second amended counter claim however pleads trespass, negligence in the alternative, and unjust enrichment in the further alternative. Nuisance is also pleaded and identified as the legal basis for the Purcells' claim for damaging the water system.

[471] Trespass to land is committed by entering, remaining on, placing or projecting any object onto land in the possession of the plaintiff, without lawful justification. The three elements of trespass were outlined in *AM Gold Inc. v. Kaizen Discovery Inc*., 2021 BCSC 515 at para. 337: 1) direct intrusion onto the land; 2) negligent or intentional interference with the land; and 3) the interference with the land must be physical.

[472] Trespass is actionable *per se*, that is without the requirement to prove actual damages: *Gibson v. Sun*, 2018 BCSC 1277 at para. 109.

[473] A private nuisance is a substantial and unreasonable interference with the plaintiff's right to the use and enjoyment of property. Nuisance may include actual

physical damage to the property, as well as interference with the health, comfort or convenience of the owner. A substantial interference is one that is non-trivial, amounting to more than a slight annoyance or trifling interference. When this threshold is met, the inquiry proceeds to the reasonableness analysis by balancing the gravity of the harm experienced by the plaintiff against the utility of the defendant's conduct in all the circumstances: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at paras. 19–20.

[474] Factors to consider in relation to the gravity of the harm may include the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff. Nuisance may include not only physical damage to the property but also interferences with the health, comfort and convenience of the owner/occupier: *Antrim* at paras. 23 and 26.

[475] The Purcells' authorities include *Suzuki v. Munroe*, 2009 BCSC 1403, where the defendant's surveillance cameras, which captured the entrance areas to the neighbouring property, were found to be an intolerable interference with the use and enjoyment of that property constituting a nuisance. The court explained:

> [100] Acts done with the intention of annoying a neighbour and actually causing annoyance will be a nuisance, although the same amount of annoyance would not be a nuisance if done in the ordinary and reasonable use of the property […] Activities designed to annoy one's neighbours and having little or no redeeming social utility are unreasonable and should be discouraged by the law.

[476] The elements of negligence and unjust enrichment are well established.

[477] To establish negligence, a plaintiff must prove several elements:

- the defendant owed them a duty of care;
- the defendant breached the applicable standard of care;
- the plaintiff sustained damage; and
- the damage was caused in fact and in law by the defendant's breach.

[478] Causation is a significant issue in this case.

[479] The principles of causation were articulated in *Athey v. Leonati*, [1996] 3 S.C.R. 458. Expressed in the context of personal injuries, they include:

1) the basic test is the "but for" test requiring the plaintiff to show their injury and loss would not have occurred but for the negligence of the defendant;
2) the but for test must not be applied too rigidly. Causation is not required to be proven with scientific precision; it is essentially a practical question of fact best answered by ordinary common sense;
3) the plaintiff does not have to prove that the defendant's negligence was the sole cause of the injury and damage. As long as it is it is part of the cause of an injury or loss, the defendant is liable; and
4) apportionment between tortious causes and non-tortious causes of the injury or loss is not permitted. The law does not excuse the defendant from liability merely because causal factors for which they are not responsible also helped to produce the harm.

[480] The intersection of causation and assessment of damages principles is another issue that arises from the evidence here.

[481] The most fundamental principle of damages is the plaintiff must be returned through compensation to their “original position”. At para. 32, *Athey* explained:

> [32] […] The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant’s negligence (“the original position”). However, the plaintiff is not to be placed in a position <u>better</u> than his or her original one. It is therefore necessary not only to determine the plaintiff’s position after the tort but also to assess what the “original position” would have been. It is the difference between these positions, the “original position” and the “injured position”, which is the plaintiff’s loss […]
>
> [Emphasis in the original.]

[482] *Blackwater v. Plint*, 2005 SCC 58, discussed the distinction between causation (as to liability for damage) and damage assessment principles in this way:

> [78] It is important to distinguish between causation as the source of the loss and the rules of damage assessment in tort. The rules of causation consider generally whether "but for" the defendant's acts, the plaintiff's damages would have been incurred on a balance of probabilities. Even though there may be several tortious and non-tortious causes of injury, so long as the defendant's act is a cause of the plaintiff's damage, the defendant is fully liable for that damage. The rules of damages then consider what the original position of the plaintiff would have been. The governing principle is

> that the defendant need not put the plaintiff in a better position than his original position and should not compensate the plaintiff for any damages he would have suffered anyway […]

[483] Other doctrines related to the impact of pre-existing conditions on the assessment of damages may come into play. The "crumbling skull" rule, for example, recognizes that a pre-existing condition is part of the plaintiff's original position. Not required to put the plaintiff in a better position than their original position, the defendant is liable for the additional damage but not the pre-existing damage. Similarly, if there is a measurable risk that the pre-existing condition would have negatively impacted the plaintiff in the future, this will be taken into account in reducing the overall award: *Athey* at para. 35.

[484] The basic requirements for unjust enrichment include: an enrichment of one party; a corresponding deprivation of the other party; and an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co*., 2004 SCC 25 at para. 30.

[485] The approach to the requirements or elements was helpfully discussed in *Jesson v. Tanaka*, 2023 BCSC 1313:

> [150] The first two elements of the framework contemplate a "straightforward economic approach", thus requiring a value neutral determination based on evidence of the services or benefits conferred by the one party upon the other: *Peter v. Beblow*, [1993] 1 S.C.R. 980 at 990, 1993 CanLII 126 (SCC).
>
> [151] The absence of a juristic reason "means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention 'unjust' in the circumstances of the case": *Kerr v. Baranow*, 2011 SCC 10 at para. 40. This element is considered under two stages, and calls for a measure of judgment in which the various interests at stake must be considered: *Peter* at 990–91. Under the first stage, the party claiming unjust enrichment has the burden of showing that no juristic reason from an established category exists to deny recovery. The established categories are a contract; a disposition of law; a donative intent; and other valid common law, equitable, or statutory obligations: *Kerr* at para. 43.
>
> [152] In *Garland,* the Court applied the established categories at the first stage and then proceeded to the second stage, where the onus shifts to the other party to rebut any *prima facie* case of unjust enrichment by showing another reason to deny recovery and showing why the enrichment should be

> retained, having regard for the reasonable expectation of the parties and other public policy considerations.
>
> [153] However, in *Kerr*, Cromwell J. writing for the Court stated that:
>
> > [44] … if the case falls outside the existing categories, the court may take into account the legitimate expectations of the parties… and moral and policy-based arguments about whether particular enrichments are unjust (*Peter*, at p. 990). For example, in *Peter*, it was at this stage that the Court considered and rejected the argument that the provision of domestic and childcare services should not give rise to equitable claims against the other spouse in a marital or quasi-marital relationship (pp. 993-95). Overall, the test for juristic reason is flexible, and the relevant factors to consider will depend on the situation before the court (*Peter*, at p. 990).
>
> [154] Accordingly, the reasonable expectations of the parties may be considered as supporting an unjust enrichment claim or rebutting a *prima facie* unjust enrichment claim.

2014 Urgent Repair

[486] As I have indicated, the Purcells characterize this repair as urgent because once they learned in September 2014 that the lower main valve was not closing properly, in their view, it was necessary to put the above ground parts of the lower water system under ground before the winter to prevent further damage to the lower water system from frost.

[487] Absent submissions addressing the specific cause of action, I would identify the potential bases as negligence and unjust enrichment.

[488] The Purcells appear to contend that Mr. Horst was negligent because he played a role in the lower main valve's failure to close which in turn led to the need for the urgent repair.

[489] Before addressing the question of liability, I will make some findings about the underlying circumstances for the purposes of the damages claim and more broadly.

[490] Applying the common-sense approach to causation affirmed in *Athey* and accepting Mr. Proudfoot's evidence there was some previous damage, I find that frost damage caused the crack in the Proudfoot valve, discovered in August 2015. Buried closer to the surface than the balance of the lower water system, it was more

susceptible to frost damage from water pooling on the surface and seeping into the ground above the lower water system. I do not accept Mr. Horst's assertion the rather tiny drain valve offered sufficient protection from water entering the lower water system and freezing at least in the upper below ground portions, given the lower main valve was no longer closing properly.

[491] I find Mr. Johnson accessed irrigation water on the Purcell property after the September 30 deadline to water his cattle at the edge of the Horst property and perhaps for other purposes. Prior to the valve on the Gooseneck pipeline being removed he could have accessed the water by opening that valve and separating the sections of the Gooseneck pipeline as shown in photographs.

[492] I have no doubt Mr. Horst was well aware that Mr. Johnson entered onto the Purcell property to access irrigation water outside of the irrigation season. Believing it was his right, Mr. Horst also entered the Purcell property to deal with the Gooseneck pipeline, other above ground piping, the valve on the Proudfoot pipeline and perhaps the lower main valve. He acknowledged reducing or stopping the flow of irrigation water to the Proudfoot pipeline, which prior to August/September 2014, would have involved closing the Proudfoot valve on the Purcell property.

[493] I accept the Purcells believed the 2014 repair was urgent. I also accept their belief was reasonable based on the timing of their discovery that the lower main valve was not closing properly in September 2014, soon after the leaking, and cracked Proudfoot valve was found, and in light of the above ground valve-less Gooseneck pipeline, as well as the history of the frost related damage to the Gooseneck valve and water pooling over the buried lower water system. I say this recognizing the Purcells also took the opportunity to install a horse watering system that was not urgent.

[494] Aware of all these circumstances and the details of the proposed urgent repair, Mr. Horst opposed it and refused to participate. I would not reject his evidence that he did not believe the proposed repairs were necessary or urgent given his rigid and self-serving perspective, including his outsized view of his own

rights and his disregard for views of others and the Purcells in particular. Certainly he did not want to give up control over the flow of irrigation water through the Proudfoot pipeline.

[495] Mr. Johnson is not a party. Having received no legal submissions to support the Purcells' argument he acted as Mr. Horst's agent, I am left to consider Mr. Horst's conduct in determining whether he is liable in negligence for the cost of the urgent repair. Absent better evidence if not expert opinion evidence, I am not able to infer that opening and closing the lower main valve off season caused its failure to close all the way. Further, even if I were able to draw that inference, I am not able find that Mr. Horst as opposed to Mr. Johnson engaged in this conduct.

[496] Accordingly, I would dismiss a claim for damages in negligence related to the urgent repair.

[497] Turning to unjust enrichment, again, the Purcells made no submissions about its application although it is pleaded.

[498] Applying the straightforward economic approach to the elements of a benefit and corresponding deprivation, clearly, the Purcells incurred the cost of removing the Gooseneck pipeline and replacing it with an underground irrigation pipeline that ends close to the property line. That cost is the measure of Mr. Horst's benefit.

[499] Determining the issue of an absence of a juristic reason is difficult in this context. Assuming the Purcells could establish this element at the "first stage", shifting the burden to Mr. Horst, would be unfair, absent an opportunity to make submissions.

[500] Further, although I have found they own the underground water system located on their property because it is a fixture, Mr. Horst's licence provides him with a right to irrigation water through the shared system, making it arguable the Purcells had an obligation to replace the removed Gooseneck that had provided his property with irrigation water. The Purcells proceeded with the urgent repair knowing Mr. Horst was opposed and unwilling to contribute to the cost. Having volunteered in

this way and absent any specific submissions to address the effect of doing so, I am left unpersuaded there is no juristic reason for Mr. Horst's apparent benefit.

[501] Accordingly, I would also dismiss the Purcells' claim for damages related to the 2014 urgent repair based on unjust enrichment.

Flood-Related (Emergency) Repair

[502] As I have stated, the Purcells contend Mr. Horst caused the Flood on November 7, 2014 by deliberately closing the valve he and Mr. Johnson installed on the Proudfoot pipeline, which prevented it from relieving pressure in the system and allowing water to flow out, while the Gooseneck pipeline was being removed from the lower water system and the remaining stub plugged.

[503] Referring to the allegation that Mr. Horst and Mr. Johnson deliberately caused the Flood by closing the valve as completely unfounded, he alleged it was the Purcells and Mr. Thompson, through his negligent construction, who were at fault.

[504] In addition to stating that the upper main valve should have been closed and the system drained or "depressurized" before any work was done on the Gooseneck, Mr. Horst commented nobody asked him to open the valve on the Proudfoot pipeline or to confirm it was open. At the same time, he relies on a photograph he took on November 8, 2014 showing the valve in an open position.

[505] Having received Mr. Purcell's detailed plans and drawings, engaged in repair related discussions with the Purcells and been at the property line everyday monitoring the work being done, I find Mr. Horst was not only well aware of the plan to remove the Gooseneck and replace it with an underground pipeline but also how the plan would be executed—the Gooseneck would be removed without closing the upper main valve but instead closing the lower main valve as much as possible and relying on the Proudfoot pipeline to relieve pressure and drain water. Knowing the plan, after digging up the Proudfoot pipeline in October 2014, he installed the valve in or about November 5, 2014, the day after Ms. Purcell sent him an email advising him they planned to proceed, which was well passed the September 30 irrigation

water deadline and when there would have been no supply of irrigation water to the Proudfoot property but for the lower main valve not closing completely.

[506] Mr. Horst was also notably absent from the sidelines throughout the day on November 7, 2014. The photograph he took the following day is nakedly self-serving. Obviously, nothing prevented Mr. Horst from opening the valve after the Flood for the purpose of manufacturing this evidence.

[507] Although he was not present when the Gooseneck was removed, Mr. Horst alleges that by yanking or ripping it out of the lower water system with the excavator, Mr. Thompson put pressure on the shut off valve (lower main valve) and caused the pipe to break loose on the upstream side. In making this allegation Mr. Horst relies on a photograph which does not depict these circumstances. I accept the evidence of Ms. Purcell and Mr. Thompson that he severed the Gooseneck pipeline by cutting it as described before carefully removing the severed portion with his excavator from the excavated area of the lower water system and placing it on the ground above.

[508] Mr. Horst also disputed the suggestion that leaving the Proudfoot pipeline open was sufficient to relieve the pressure in the system, because the Gooseneck stub was below the level of the Proudfoot pipeline, meaning further underground.

[509] Returning to the expert opinion evidence of Mr. Ford, Mr. Horst argued that he was not qualified to provide an opinion on the cause of the Flood because he is not a hydrologist or water engineer, and that he never attended the site or examined the photographs. In my view, Mr. Ford does have the necessary expertise. The other issues are not relevant to qualifications. Cross-examined about his expertise, Mr. Ford readily acknowledge he could only provide an opinion based on his experience and training rather than an analysis of the actual materials that failed under pressure, or as he put it “why a crack happens in a piece of steel”.

[510] It is well established that an expert may be qualified by practical experience rather than through academic or professional training: *R. v. Mohan*, [1994] 2 S.C.R.

9 at 25. The only requirement for admission is the expert possess special knowledge going beyond that of the trier of fact.

[511] Mr. Ford's opinion, expressed briefly, is based on his review of the before and after schematics of the lower water system prepared by Mr. Purcell and factual assumptions that are correct: water was flowing through the water system to the Proudfoot property the day before the repair; the new valve on the Proudfoot pipeline on the Horst property was closed on the day of the repair and moments after the (Gooseneck) pipeline was plugged off, the excavated area quickly flooded with water coming from somewhere underground, later determined to be upstream of the lower main valve.

[512] In his report, Mr. Ford opined that if water was flowing out the 8" Proudfoot pipeline to sublot 10, plugging the 8" Gooseneck on the Purcell property would have no negative effect on the pipeline system. However, if the water flow to sublot 10 was shut off because the new valve was closed, and the water in the pipeline system had nowhere else to go, pressure in the system would built up. He identified the elevation difference or the drop in elevation from the intake screen to the Gooseneck as creating water pressure of approximately 90 psi or greater, which combined with the compression of any air in the pipeline, as causing the lower main valve to dislodge and the resulting flooding.

[513] In cross-examination, Mr. Ford made it clear he also assumed that the lower main valve was closed but some water was still passing through. Asked whether he would shut down the water system before installing "a bunker system", Mr. Ford said if he was working on the water system below the lower main valve, he too would have closed the lower main valve, and let everything drain out the Proudfoot irrigation pipeline. He also indicated he would not excavate the lower main valve first to ensure its integrity. But Mr. Ford also stated he would also want to be able to close the lower main valve and if it closed, he would not be taking any risk.

[514] He gave additional evidence about working on lots of water pipelines instead in 1995/1996. Asked if he would expect the integrity of a gasket in the ground for

25 year to have weakened, he commented he has seen 25-year-old gaskets in poor condition and others in next to new condition.

[515] Although there was no dispute about the necessity for expert opinion evidence to assist the court in determining the cause of the Flood, apart from Mr. Ford's opinion that plugging the Gooseneck (stub) would have no negative affect on the pipeline system and his estimate of the pressure in the water system, in my view, understanding the other circumstances does not really, require special or technical knowledge.

[516] Based on my own assessment of the fact evidence and those aspects of Mr. Ford's opinion, and applying the but for test, I am satisfied that closing the valve on the Proudfoot pipeline caused the gasket on the lower main valve to "blow", which in turn caused the Flood. With the valve closed, water passing through the lower main valve was initially able to escape through the Gooseneck pipeline, the cut in the Gooseneck and then the stub of the Gooseneck until it was plugged. Given the drop in elevation, once the stub of the Gooseneck was plugged, all of the water passing through the not completely closed lower main valve was forced to flow into the Proudfoot pipeline filling the system between the closed valve and the lower main valve and building pressure.

[517] At the same time, the other side of the mostly closed lower main valve was subject to the volume/pressure of the water in the larger main pipeline that was prevented from passing through.

[518] Once the gasket "blew" there was nothing to stop all the water in the main pipeline from flowing through the lower main valve and into the excavation site.

[519] Although the evidence related to the lower main valve after the Flood indicates it was not cracked in addition to the gasket being pushed out, there is no expert opinion evidence that addresses the precise mechanics of the lower main valve failure. More than 25 years old and not closing properly before the Flood, pre-existing damage may have contributed to the gasket blowing out. Whether the

volume and or pressure of the water on the other side of the lower main valve too was a cause of the Flood, I am satisfied all of these circumstances were non-tortious.

[520] Mr. Horst bears the burden of proving that the Purcells were negligent for failing to shut down the whole water system before removing the Gooseneck pipeline and plugging the stub. Although shutting down the system certainly would have prevented the Flood, the question is did proceeding as they did breach the standard of care? Generally speaking, to avoid liability a person must exercise the standard expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the particular facts, including the likelihood of a known or foreseeable harm, the gravity of that harm, and the burden or cost which would be incurred to prevent the loss or injury. In addition, one may look to external indicators of reasonable conduct: *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28.

[521] Mr. Ford's modest equivocation on the point is the only evidence that could offer support for what Mr. Horst says the Purcells ought to have done. This is far from sufficient to establish a breach of the standard of care. There is also the critical issue of Mr. Horst's misconduct in closing the valve. Although the harm that materialized was serious, absent the closed valve, I am not satisfied it was foreseeable. Further, as he did before and after the Flood, Mr. Horst certainly would have refused to agree to closing down and draining the water system, a process that would have left the Horsts and Purcells with no domestic water for a period of time.

[522] Further and to be clear, I firmly reject the notion Mr. Horst closed the valve on November 7, 2014, at a time when no irrigation is permitted or required, to simply stop the flow of water getting through the lower main valve to the Proudfoot property. I do not know what harm Mr. Horst intended to cause by closing the valve. I am confident, however, that he knew or ought to have known that he was creating a significant risk. Having owned the Horst property since 2004, and given his practical skills and knowledge and his keen focus on the lower water system, Mr. Horst was

well aware of its components and configuration and the basic “physics” involved in its operation. The risk he chose to create was without any justification. I conclude that closing the valve was at least negligent.

[523] Although the parties did not address this, the question that logically arises at this stage is what would have happened had the valve on the Proudfoot pipeline on the Horst property been left open and the Flood not occurred, after the urgent repair was completed, once the valve for the Proudfoot pipeline on the Proudfoot property was turned off but the lower main valve still unable to close all the way.

[524] It strikes me the valve configuration and the volume and pressure of water on both sides of the lower main valve would have been the same as they were on November 7, 2014, when the valve on the Proudfoot pipeline on the Horst property was closed and the Gooseneck stub was plugged.

[525] I am left to infer the gasket on the lower main valve could have become compromised at some later point, without Mr. Horst’s negligence.

[526] Again, the fundamental principle of damages requires me to return the Purcells to their original position. A defendant is not required to compensate a plaintiff for damages they would have suffered anyway.

[527] In the event of a blow out or rupture after the urgent repair was completed and the site had been re-filled, there would have been no excavated site to flood and it is not possible to predict the timing, nature and scope of the damage.

[528] There are many other unknowns: when would the underground irrigation pipelines have been installed absent the Flood? how or would their installation have affected the pressure on the lower main valve? how long would it have been before excavated site have been filled? would being buried underground have had an impact?

[529] The Purcells provided detailed largely unchallenged evidence related to the cost of labour and materials related to the urgent repair as opposed to the

"emergency" or Flood related repair. Their estimate of Mr. Horst's share of the emergency or Flood related repairs costs, $18,275 includes $10,963 in labour and $7,312 in materials. Spread sheets record and identify the nature of the costs by date.

[530] Required to estimate the probability or relative likelihood of damage occurring subsequently, absent Mr. Horst's negligence is particularly challenging. Attempts at precision would be inaccurate. Doing the best I can in these circumstances, I assess the relative likelihood at approximately 30 percent. Also recognizing the different but unknowable damage that would flow in the absence of Mr. Horst's negligence, I award the Purcells $19,500 in damages.

2015 Repair to Mitigate Leak

[531] The Purcells seek an award for the total cost of mitigating the significant water leak in the Proudfoot pipeline on the Horst property in June and July 2015. There is no dispute the leak occurred in the location where Mr. Horst (and Mr. Johnson) dug up the Proudfoot pipeline, damaged it, and installed the valve in the fall of 2014. There is really no dispute the prior conduct of Mr. Horst played a causal role in the development of the leak. I accept Ms. Purcell's evidence regarding the negative impact of the leak on the supply of irrigation water and risk arising from the absence of irrigation water on the Proudfoot property during wild fire season. Mr. Horst refused to repair the leak even after the evacuation of the area which was followed by a period of drought. The Purcells were left to modify the water system on their property, which restored their water pressure and the supply.

[532] I have no difficulty finding Mr. Horst's refusal to repair the leak and its impact on the Purcells' water supply constituted a private nuisance. His refusal was a substantial and unreasonable interference with the Purcells' use and enjoyment of their property. There was no utility to Mr. Horst's refusal to balance against the negative impact of the inadequate supply of water that otherwise would have been available, particularly in dry hot summer weather conditions.

[533] I accept the cost of mitigating the leak is an appropriate measure of damages. The Purcells' evidence includes invoices supporting labour costs of $2,417 and $1,000 in materials. According, I grant them damages of $3,417.

2017 Domestic Water Reinstatement

[534] The Purcells seek an award of $24,817 for the cost of replacing their domestic water pipeline in 2017, again based on the cost of labour and materials.

[535] The Purcells assert that when Mr. Horst and Mr. Johnson excavated and severed their domestic waterline on the Horst property on July 30, 2017, he did so in breach of an agreement reached between counsel in March 2016, June 2016, and July 2017 that he would not do so while they were attempting to negotiate a settlement.

[536] Although a June 2016 letter indicates there was an agreement, the letter from Mr. Horst's counsel in January 2017 would suggest any settlement discussions had ended.

[537] In any event, without an easement over the area of the Horst property where the Purcells' domestic pipeline was located, Mr. Horst had the right to demand that it be removed, which he did a number of times or to remove it himself. With or without proper notice and whether he or they removed the trespassing waterline, the Purcells would have incurred the cost of replacing it on their property in any event.

[538] I can see no legal basis for awarding them damages for those costs in these circumstances.

Trespass Damages

[539] In submissions, the Purcells asked for $3,000 in damages for Mr. Horst's trespasses based on his repeated entries onto their property and placing above-ground pipes there, the damage he did to their fence(s), and the concrete vault incident, which in addition to breaking some fence panels involved entering their

property, cutting the lock on the concrete vault and entering the vault. To be clear, I accept Mr. Horst committed all of those trespasses.

[540] The purpose of damages for trespass is compensatory. Returning the plaintiff to their original position is the animating principle. In my view, $3,000 is fair and reasonable compensation for the remedial work involved in removing above-ground piping, repairing the fence, and replacing the lock on the vault, which I infer from the evidence actually occurred. I therefore award the Purcells $3,000 in damages for trespass.

Aggravated Damages

[541] The Purcells seek $7,500 in punitive damages but did not provide any legal submissions in support of the claim. Although pleaded, I cannot properly decide the claim without submissions regarding the legal framework and its application, in contrast to some of the well-established and straightforward causes of action I have discussed and applied. Accordingly, I decline to grant such an award.

WSA Easement

Legal Principles

[542] At common law, an easement is a non-possessory interest in the land of another. It is a proprietary right, not a personal right. There are four characteristics of an easement:

1) There must be a dominant and a servient tenement, meaning there must be a property that enjoys the easement and a property that is burdened by it;

2) An easement must accommodate the dominant tenement;

3) The dominant and servient owners must be different persons, and

4) A right over land cannot be an easement unless it is capable of forming the subject-matter of a grant.

[543] Although an easement affects the servient owner’s exercise of their own property rights over the easement land, an easement does not provide the

dominant owner with exclusive occupation or unrestricted use of the easement land. Citing *Banville v. White*, 2002 BCCA 239, the Court in *Gardiner v. Robinson*, 2006 BCSC 1014 explained:

> [24] […]
>
> … while the easement constitutes a charge on the servient tenant's land, the servient tenant retains all residual property rights to the area affected by the easement, and is entitled to the use and enjoyment of the land so long as such use and enjoyment do not impair the right of passage in a substantial way or impair any other right granted by the easement.

[544] Where the dominant tenant acts beyond the easement grant, he acts in trespass or became an excessive user.

[545] As indicated under s. 32 of the *WSA*, a licensee has the right to expropriate any land reasonably required for the construction, maintenance, improvement, or operation of works authorized or necessarily required under their water licence.

[546] Section 24(1) of the *WSR* provides that a licensee who has a right under s. 32 of the *WSA* to expropriate land, may commence expropriation proceedings, if the licensee intends to exercise the right and is unable to reach an agreement with the owners of the affected land as to:

(a) The land reasonably required to be expropriated;

(b) The amount of compensation; or

(c) The terms of the required conveyance or other legal instrument.

[547] Section 24(2) requires the licensee to file with the "comptroller and the registrar" and serving the affected property owner with particular documents including:

(a) A notice of intent to acquire the affected land;

(b) A plan showing the area the licensee wishes to acquire;

(c) A draft of the legal instrument necessary to vest the licensee the title to or right over that land […]; and

(d) A statement of the amount of compensation offered.

[548] Mr. Horst's evidence in support of the *WSA* easement includes documents filed with the Land Title Office in December 2017. Among them is a survey plan certification and a survey plan that sets out the proposed easement area or corridor across the Purcell property. Although the width of the corridor is difficult to make out from the survey plan, there is no dispute it is 20 metres.

[549] The Purcells did not challenge Mr. Horst's compliance with the filing and serving requirements.

[550] The proposed terms of the draft easement provide for a "full, free and uninterrupted right […] and easement over and upon" the easement area, "as may be necessary" for:

> the construction, operation, maintenance, inspection and removal, replacement, reconstruction and repair of a domestic and irrigation water system, together with all equipment and appurtenances as may be necessary or convenient in connection with any such operations […] together with the right to ingress, egress, and regress over the Easement area for the Grantees, their servants, agents and contractors, with vehicles supplies and equipment, and for all purposes useful or convenient in connection with or incidental to the exercise and enjoyment of the said right and privileges herein granted, and for the benefit of the Dominant Tenement.

[551] The terms would also require the Purcells or owners of the Purcell property to not do or permit to be done anything that would interfere with any of the works to be constructed, operated, maintained, inspected, removed, replaced, reconstructed, or repaired in conjunction with or pursuant to the rights in the proposed easement.

[552] Those rights are also defined as including the right to construct, maintain and operate, and remove and replace pipes, valves, fittings, meters and other equipment that may be necessary.

[553] The Purcells would be prohibited by the proposed terms from constructing or maintaining any structure that would interfere with Mr. Horst's rights under the proposed easement.

[554] In terms of compensation, Mr. Horst offers $1.00 or alternatively $600.

[555] Heard in a *voir dire*, Mr. Horst adduced what he identified as expert opinion evidence from Glen Yuen, a retired real estate lawyer, about whether the proposed terms accord with what is typical or "generally accepted" for inclusion in rural water system easements, based on Mr. Yuen's experience drafting and reviewing such easements. Mr. Yuen's evidence was vague. It lacked context apart from being related to rural water system easements in the Kootenays. I do not know the extent to which or how any of his easement "work" involved contested outcomes or any of the particulars about the underground water systems involved such as their buried depth, terrain, etc.

[556] The Purcells argued Mr. Yuen's expert opinion evidence is inadmissible.

[557] To be admissible, expert opinion evidence must satisfy four threshold requirements: relevance; necessity to assist the trier of fact; the evidence is not subject to any other exclusionary rule; and as I have indicated, it is offered by a properly qualified expert. If these preconditions are satisfied, the trial judge must go on to balance the potential risks and benefits of admitting the evidence in deciding whether it is sufficiently beneficial to warrant: *R. v. Abbey*, 2009 ONCA 624 at para. 79; *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23 at para. 24. At the second gatekeeping stage, legal relevance and necessity are again considered along with the potential probative value and reliability of the proposed evidence.

[558] The Purcells argue Mr. Yuen's opinion evidence fails to meet the relevance and necessity requirements.

[559] Relevance at the threshold stage refers to logical relevance to a material issue, which in a civil case is determined by the pleadings. Logically relevant evidence is evidence that tends to make the existence or non-existence of a fact more or less likely.

[560] To be necessary, expert evidence must be more than merely helpful. The standard will be met when:

1) The proposed evidence provides information likely outside the experience and knowledge of the trier of fact;

2) It enables the trier of fact to appreciate the matters in issue due to their technical nature; or

3) The average person is unlikely to form a correct judgment without it, because they are unlikely to understand the subject matter: *Sidhu v. Hiebert*, 2020 BCSC 418 at para. 29.

[561] Mr. Horst argues the opinion evidence of Mr. Yuen is relevant to whether the proposed terms are reasonably required; and it is necessary because the generally accepted or customary terms of rural water easements are not generally within the knowledge of judges of the court.

[562] Assuming logical relevance, it is clear that Mr. Yuen's proposed evidence about what terms are customary or generally accepted is not necessary. The court does not require the assistance of a lawyer to make decisions about domestic law matters which include an application to expropriate an easement under the *WSA*. The fact that rural water system easements may be rarely dealt with by any of the judges of this court is immaterial.

[563] Were I to find both threshold relevance and necessity were established, in light of the fact specific inquiry that is required and given the general nature of Mr. Yuen's proposed expert opinion evidence, I would conclude it has essentially no probative value.

[564] Consequently, I find the proposed expert opinion evidence about "generally accepted terms" for inclusion in a water system easement of Mr. Yuen inadmissible. If it is better characterized as fact evidence, which the parties did not suggest, I would admit it, but give it essentially no weight for the same reason, that is its lack of probative value.

[565] The Purcells assert the proposed width of 20 metres is excessive.

[566] On this point, I have considered Mr. Yuen's fact evidence that in his experience 20 metres is wide but not unusually wide.

[567] Mr. Horst expressed the view that 20 metres is required to safely dig down 10 feet with a large excavator, based on the same make and model of excavator that Mr. Thompson used to do the urgent and emergency repairs, the manufacturer's manual, the size of the 2014 excavation site (after the Flood), and his own opinions about how to safely position and operate the excavator. On the last issue, Mr. Horst also opined that an excavator must be set up perpendicular to the pipeline instead of parallel, which requires more space. Mr. Horst is a heavy equipment operator and has considerable experience operating a similar excavator, but as a party, his opinions in this regard are not admissible.

[568] In his report, Mr. Ford offered the opinion that if using an excavator that is ten feet wide, 20 feet provides plenty of space for installing an underground water pipeline, assuming a depth of six feet and parallel placement of the excavator. During his testimony, he agreed that if the pipeline is buried at nine feet, 20 feet would not be sufficient and expressed the view another ten feet would be required to dig or service a trench in accordance with the regulations.

[569] Mr. Horst said he recalled actually observing the pipeline being installed ten feet or nine to ten feet underground in 1996. He also relies on photographs of the excavated lower water system taken during the repair in 2014.

[570] Mr. Horst also emphasized that Mr. Proudfoot proposed a width of 20 metres in an easement plan related to the Proudfoot pipeline on the Horst and Purcell properties that he submitted as part of a water licence amendment application, which is really of no moment.

[571] Mr. Bossio's evidence again is the average depth of the buried pipeline was seven feet. Schedule E, Mr. Purcell's sketch of the lower main water system after the 2014 repair, shows an approximate depth of eight feet leading up to the lower main valve and an approximate depth of six feet for Mr. Horst's under ground

irrigation pipeline leading to the property line, all of which I prefer to the evidence of Mr. Horst.

[572] Although the Purcells argue Mr. Horst's licence does not authorize any part of the works on the Purcell property, I am satisfied CWL 111880 entitles him to expropriate an easement of land related to the water system on their property as provided for in s. 32 of the *WSA* and ss. 22–30 of the *WSR*.

[573] As the AG submits and Ms. Andrews' evidence and some of the Water Stewardship documents establish, the *WSA* decision makers take a purposive if not flexible view of authorization of works in water licences. Consist with the purpose of the statutory regime—to enable access to and beneficial use of water—and the wording in the parties' licences, works may be viewed as authorized by the licence when constructed approximately as shown on the map or plan. Water Stewardship accepted that CWL 111880 authorized the works that made up the underground water system constructed in 1996 when the licence belonged to Ms. Phillips. Mr. Shaw of Water Stewardship who was involved in issuing that licence and attended the site during construction of the underground water system in 1996, expressed the view during his testimony that the location of works was compliant with the licence. CWL 111880 became Mr. Horst's when he purchased the Horst property.

[574] Since 2014, if not before, Water Stewardship has taken the position both expressly and through a lack of action in response to complaints from Mr. Horst (and others) that the Purcell licence as well as his (as well as the Mellings and Proudfoots) are "on" the same water system and share the works up to the points where individual lines leave the "main" system.

[575] If I were to interpret Mr. Horst's and the Purcells' licences which include the authorized works being "approximately as shown on the attached map", in light of the purpose of the *WSA*, I would conclude both authorize the same works and to use the same water system. In reaching this conclusion, I would interpret the reference to construction of a diversion structure and "pipes" in the Purcell licence not literally,

or as mandating construction of a new water system, but instead as reflecting the change from the construction of ditches authorized in the preceding licence, CWL 25791 issued in 1960.

[576] In any event, the right to expropriate is based not just on the works authorized by the licence, but also on the works necessarily required under the licence.

[577] The original underground water system was subsequently added to and modified over time, and the Purcells reconfigured the above ground aspects of the lower water system underground in 2014, without objection from Water Stewardship.

[578] Again, the Purcells' main arguments are two-fold. First, they argue there is no need for Mr. Horst to inspect, maintain, or repair the water system on the Purcell property, except perhaps in an emergency. Second, they argue that allowing Mr. Horst or Mr. Johnson in his role as tenant access to their property would put them at risk personally, place the water system at risk, and create risk for their equine therapy business based on the history of Mr. Horst and Mr. Johnson misusing the water system and trespassing in general as well as harassing and intimidating them.

[579] Apart from monitoring and maintaining the intake structure in Maguire Creek, the Purcells gave evidence the water system as a whole has not required any repairs or other maintenance. The same is true of the parts of the water system on the Purcell property, since the urgent and Flood related repairs in 2014 (and 2015 related to the accidental cutting of the domestic water pipelines after the Flood).

[580] All of the pipeline is made from PVC.

[581] Mr. Ford testified that the maintenance required for "properly installed PVC", should be almost zero. He also testified that water pipeline buried at 6 feet does not need to be inspected unless there is an issue with no water, that suggests a blockage, which he has experienced. Cameras can and are used to inspect pipelines.

[582] The Purcells emphasize the right to expropriate under the *WSA* is not absolute or unfettered. Section 32 limits the right to what is reasonably required in respect of the works authorized by the licence and the works necessarily required under the licence.

[583] In *Denault v. Barclay* (2002), 78 L.C.R. 288 (BCEBC) considered the meaning of what is "reasonably required" in s. 32 of the *WSA*:

> [66] In my view the determination of what land is "reasonably required" imports among other things, the notion of weighing the balance of convenience or inconvenience as between the expropriating licensee on the one hand and the owner whose land is intended to be the subject of the expropriation of the other.

The Board found the claimant had not established it required the proposed access, based in part on evidence that the need for ongoing maintenance was relatively rare.

[584] In *Hollander v. Wormell*, 2017 BCSC 1207, what is reasonably required was discussed briefly in relation to two parts of the proposed route. In rejecting one part as not required, the court stated:

> [67] […] I find that the proposed upper arm would be unreasonably disruptive to the use and enjoyment of the Wormell Property, and it is not necessary to the exercise of Mr. Hollander's water rights. It is, therefore not reasonably required.

[585] Whether the proposed expropriation was reasonably required for the construction, maintenance, improvement, or operation of works authorized or necessarily required under the licence was also at issue in *Dhaliwal v. HB Land Company Ltd.*, 2023 BCSC 1574. The plaintiff relied on s. 32 to expropriate an easement over the defendant's property in order to facilitate the diversion of irrigation water from sources on or adjacent to the defendant's property, in accordance with three water licences. The defendant argued the easement was not reasonably required because the plaintiffs had a well on their property that provided sufficient water. The court found this not relevant because of the plaintiff's licences that authorized the diversion of water across the defendant's property. In finding the plaintiff had a right to expropriate an easement, the court also considered that

absent the easement, the defendant was not willing to allow the plaintiffs access to the property for construction, maintenance, improvement or operation of the works authorized by the licence.

[586] Except for, as I have said, the Purcells allowing for Mr. Horst to connect to the irrigation pipeline near the property, this is also true here, which returns me to the reasons for their refusal.

[587] Accepting their evidence and the other evidence about the durability of properly installed underground PVC pipeline, I agree with the Purcells that Mr. Horst does not require an easement to construct, maintain, improve, or operate the works authorized under his licence at this time. The underground pipeline does not require maintenance or inspection. Since the urgent repair and the Flood related repairs, apart from a minor modification in 2015 to mitigate the leak in the Proudfoot pipeline on Mr. Horst's property that he had refused to fix, the lower water system has not required any repairs, improvements or even maintenance. The lower main valve, which was replaced after the Flood, along with the rest of the buried lower water system are fully protected from the risk of frost damage and the PVC pipeline should remain problem free for the foreseeable future. Significantly, the Purcells have been and will remain, I am confident, responsible and attentive stewards of the water system both on their property and on Crown land. I note that only they have maintained the intake structure in Maguire Creek and ensured the supply of water in the pond area around it is sufficient.

[588] Once Mr. Horst arranges to connect to the irrigation pipeline located near the property line, he will receive his licensed volumes of irrigation water, as well as domestic water, without the need to access the proposed easement area the purposes listed in s. 32.

[589] As I have indicated, the Purcells also rely on Mr. Horst's history of tortious conduct generally and his misconduct with respect to the water system specifically in opposing the easement. I share their concern that if granted Mr. Horst would not use the easement reasonably or responsibly. At the least, Mr. Horst would do what he

said he would, that is he would remove the changes the Purcells made to the lower system since the start of the urgent repair, and return it to how it was configured before. In particular, he would restore the Gooseneck pipeline, which I take it would mean, he would remove the underground pipeline they installed for him and reattach the Gooseneck pipeline with it extending above ground on the Purcell property and perhaps without a valve. This is an utterly senseless plan. In addition to serving no useful purpose, it would re-introduce the risk of frost damage as well as his otherwise unnecessary occupation of the easement area.

[590] At the same time, the future is never certain. Nothing lasts forever, unforeseen events can and do occur and change is inevitable. Certainly, the Purcells could sell their property to a far less responsible owner or lease it and return to Calgary, leaving Mr. Horst without their stewardship to ensure his water supply. Further any number of other circumstances, including but not limited to an emergency when the Purcells are not available, could arise that would create the need to inspect, repair or maintain part of the lower water system or the valve for his domestic water housed in the locked bunker.

[591] In my view, what is reasonably required encompasses the long-term, given that an expropriated easement under the *WSA*, like all easements, runs with the land. Leaving aside Mr. Horst's past misconduct, his plan to remove and replace the work the Purcells have done to the lower water system with what was there before the urgent repair, and the likelihood he will engage in further misconduct on the Purcell property if an easement is granted, I am satisfied, based on the long-term, that some land is reasonably required for the construction, maintenance, improvement, or operation of the works authorized or necessarily required by his licence and therefore he is entitled to expropriate an easement.

[592] Based on this entitlement and the availability of permanent injunctive relief to restrain Mr. Horst in his use of an easement area to protect the integrity of the current water system on the Purcell property and the property itself, I conclude that an easement on narrower terms than proposed, along with a permanent injunction

that significantly limits his rights as the dominant tenant to the easement area strikes the requisite balance.

[593] I say much narrower terms not only because of the nature and state of the water system, but also because I have found that the Purcells own the water system on their property, not just the land that lies under, beside and above it. Further, they too have a valid licence that authorizes works that are part of the same water system. In these circumstances, the terms of the expropriated easement must not limit their rights in relation to the lower water system and the easement area.

[594] I require the parties to propose revised terms that accord with my reasons.

[595] Addressing the dispute over the width of the proposed easement, I agree with the Purcells that 20 metres is wider that what will reasonably required for future repairs, or maintenance, barring a catastrophe, which, in my view, is not the appropriate guidepost for width. Giving weight to Mr. Ford's evidence that up to 30 feet may be required assuming a depth of nine feet and accepting the maximum depth of the lower water system is eight feet but also allowing for some additional width, I conclude a width of 10 metres is sufficient.

[596] In addition to revised terms, a revised proposed plan of survey will be required to reflect the narrower width.

[597] I am not able to address the question of compensation pending receipt of the revised terms. I certainly do not accept that no compensation should be paid. I would grant the parties leave to obtain additional evidence addressing appropriate compensation in light of my related findings.

Permanent Injunction

[598] The Purcells seeks a permanent injunction based on the history of alleged harassment, intimidation, trespass, as well as damage to the water system on their property prior to the repairs in 2014 and other circumstances. They propose

restraining and enjoining Mr. Horst, Ms. Horst, and Mr. Johnson (and all persons with notice) from:

1) In any manner directly or indirectly threatening, harassing, swearing at, or yelling at either Mr. or Ms. Purcell or anyone on the Purcell property;

2) Trespassing or otherwise entering onto or placing anything on the Purcell property; and

3) Causing any damage to or otherwise altering the Purcell property or anything on the Purcell property, including any damage to or altering in anyway the water infrastructure on the Purcell property or that services the Purcell property.

[599] They also ask for a police enforcement clause.

Test for Granting a Permanent Injunction

[600] To grant a permanent injunction, the Court must be satisfied:

1) the moving party has established its legal rights, and

2) injunctive relief is appropriate.

See: *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396; *Vancouver Coastal Health Authority v. Adamson*, 2020 BCCA 145 at para. 34.

[601] The principles governing the criteria and permanent injunctions more broadly were discussed in *Grosz v. Guo*, 2020 BCSC 997:

> [73] Final or permanent injunctions are an extraordinary remedy, and the court must exercise its discretion to grant such relief cautiously. Because of their potentially broad and restrictive scope, and the potential consequences of their breach (including being found in contempt of court), injunctive orders must be tailored to the specific circumstances of the case in which they are ordered, and they must not go beyond what is reasonably necessary to effect compliance: *Cambie Surgeries* at para. 39.
>
> [74] In *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46 at para. 72, the Newfoundland and Labrador Court of Appeal held that the question of whether to grant a permanent injunction may be resolved by answering the following questions:

(i) Has the claimant proven that all the elements of a cause of action have been established or threatened? (If not, the claimant's suit should be dismissed);

(ii) Has the claimant established to the satisfaction of the court that the wrong(s) that have been proven are sufficiently likely to occur or recur in the future that it is appropriate for the court to exercise the equitable jurisdiction of the court to grant an injunction? (If not, the injunction claim should be dismissed);

(iii) Is there an adequate alternate remedy, other than an injunction, that will provide reasonably sufficient protection against the threat of the continued occurrence of the wrong? (If yes, the claimant should be left to reliance on that alternate remedy);

(iv) If not, are there any applicable equitable discretionary considerations (such as clean hands, laches, acquiescence or hardship) affecting the claimant's prima facie entitlement to an injunction that would justify nevertheless denying that remedy? (If yes, those considerations, if more than one, should be weighed against one another to inform the court's discretion as to whether to deny the injunctive remedy.);

(v) If not (or the identified discretionary considerations are not sufficient to justify denial of the remedy), are there any terms that should be imposed on the claimant as a condition of being granted the injunction?

(vi) In any event, where an injunction has been determined to be justified, what should the scope of the terms of the injunction be so as to ensure that only actions or persons are enjoined that are necessary to provide an adequate remedy for the wrong that has been proven or threatened or to effect compliance with its intent?

[602] *In Willow Beach Developments Ltd. v. Silverstone*, 2017 BCSC 2562, a permanent injunction was granted in a trespass case that restrained the defendants from entering or interfering with a particular site in a mobile home park owned by the plaintiff, applying the two-part test from *Cambie Surgeries*.

[603] One of the defendants had previously entered into an agreement to vacate the site, but later threatened to renege on that agreement, and ultimately counselled, aided, or was otherwise a party to the other defendant's continued unlawful occupation. The other defendant had been informed multiple times of her continued trespass. Both defendants continued to have belongings on the site.

[604] In that case, Justice Riley commented that the injunctive relief must be not just appropriate but necessary:

> [40] […] [E]ven where the moving party establishes interference with its rights, injunctive relief will not be granted automatically or as a matter of routine. The court must be satisfied that it is appropriate and necessary to impose an injunction. And because injunctive relief is prospective, it will only be granted where the court is satisfied that "the enjoined conduct is likely to occur": *Acquila Networks Canada (B.C.) Ltd. v. Borgnetta*, 2004 BCCA 188 at para. 13.

Police Enforcement Clause

[605] In discussing police enforcement clauses in *MacMillan Bloedel,* Justice McLachlin observed:

> [41] […] the inclusion of police authorization appears to follow the Canadian practice of ensuring that orders which may affect members of the public clearly spell out the consequences of non-compliance. Members of the public need not take the word of the police that the arrest and detention of violators is authorized because this is clearly set out in the order signed by the judge. Viewed thus, the inclusion does no harm and may make the order fairer.

[606] Her decision also seems to indicate that police enforcement clauses can be included in permanent injunctions. In more recent cases involving

[607] In recent years, this court has taken a more restrictive approach to including police enforcement terms in injunctions. For example, in both *Pagedped v. Singh*, 2020 BCSC 236 and *Vancouver Fraser Port Authority v. Brett*, 2020 BCSC 876, Chief Justice Hickson expressed the view police enforcement terms should be only be issued in extraordinary circumstances, emphasizing the police have a public duty and a duty to the court to enforce its orders without further direction.

Discussion

[608] I have already accepted the Purcells' allegations of trespass, harassment, and intimation.

[609] They rely on private nuisance as grounding liability for the acts of harassment and intimidation that occurred while they were on their property.

[610] There is a tort of intimidation. *Central Canada Potash Co. Ltd. et al. v. Government of Saskatchewan*, [1979] 1 S.C.R. 42 at 81, identified its elements:

> The tort of intimidation is defined in *Clerk & Lindsell* on *Torts* (14th ed.) para. 802, p. 414, as follows:
>
> > A commits a tort if he delivers a threat to B that he will commit an act or use means unlawful as against B, as a result of which B does or refrains from doing some act which he is entitled to do, thereby causing damage either to himself or to C. The tort is one of intention and the plaintiff, whether it be B or C, must be a person whom A intended to injure.

[611] The tort of harassment has yet to be recognized as a cause of action, although in some cases its existence has been assumed in assessing whether the defendant intentionally or recklessly caused the plaintiff to suffer severe or extreme emotional distress: *Gokey v. Usher*, 2023 BCSC 1312 at paras. 209 to 211.

[612] Mr. Horst's conduct in following and photographing or videotaping the Purcells also engages the tort of breach of privacy under the *Privacy Act*, R.S.B.C. 1996, c. 373.

[613] Mr. Johnson's threats to harm the Purcells and attempt to harm Ms. Purcell in April 2022 are captured by the torts of assault and battery.

[614] It is clear Mr. Horst and Mr. Johnson have engaged in repeated tortious conduct directed at the Purcells and their property. They routinely trespassed on the Purcell property before the urgent repair in the fall of 2014. During the urgent repair, in an intentional act of negligence, Mr. Horst turned off the valve they installed on the Proudfoot pipeline, causing the Flood. He and Ms. Horst yelled and harassed the Purcells and others on their property during the urgent repair and in response to their efforts to block the Driveway/HAR. Mr. Johnson also threatened Mr. Purcell and others in Ms. Purcell's presence with violence. Mr. Horst, along with Mr. Johnson, harassed and threatened contractors on the Purcell property. Mr. Johnson threatened the life of another neighbour in Ms. Horst's presence. Mr. Horst broke parts of the Purcells' wooden fencing and trespassed on their property also destroying the lock on the concrete vault and then refusing to leave.

[615] Since the interim injunction granted in September 2017, it appears that Mr. Horst has stopped trespassing. But he as well as Mr. Johnson have continued to

harass and intimidate the Purcells. Mr. Horst's harassment and intimidation has involved watching, following, and recording the Purcells on and off their property. When he does so off their property, his conduct may not be tortious. I accept it has caused Ms. Purcell, in particular, significant distress and fear but I cannot say it has resulted in the extreme emotional distress contemplated by the case law. Mr. Johnson's trespasses have included throwing dead skunks on the feed for the Purcells' horses, which threatens their health and safety. While trespassing in April 2022, he intentionally caused damage to the Purcell property and very significantly attempted to harm Ms. Purcell when he charged at her on his tractor.

[616] I am confident the objective of Mr. Horst and Mr. Johnson has been to drive the Purcells from their property, which is deplorable.

[617] I have already indicated a permanent injunction is required to restrain Mr. Horst's conduct in relation to the easement area. To be clear, without one, I accept that Mr. Horst's misconduct would continue and include harming the lower water system by reversing the repairs and excessive and improper uses of the easement area. I have no difficulty concluding that the permanent injunction is also necessary to restrain him from engaging in other tortious conduct outside the easement area.

[618] The Purcells have done nothing that would diminish their entitlement to an injunction.

[619] My only concern, and it is a significant one, is whether the law permits me to impose a final injunction on Mr. Johnson as a non-party. The Purcells characterize him as an agent or "attack dog" for Mr. Horst, who they say and I accept, plays on Mr. Johnson's aggression and volatility to his advantage. Certainly, a party's legal "servants or agents" can be restrained and enjoined in a permanent injunction, which would include Mr. Johnson if he were to again assume the role of Mr. Horst's farming tenant and while on the Horst property.

[620] Appreciating the interim injunction extends to all persons with notice, a term that is not uncommon in interim injunctions to restrain trespassing protesters or encampments for example, the parties' submissions did not deal with the difference between interim and permanent injunctions or the significance of Mr. Johnson's non-party status. When asked for proposed terms, Mr. Horst's counsel also included Mr. Johnson.

[621] Like other court orders, when injunctions are breached, the court's contempt powers are engaged. Civil and criminal contempt can be punished by imprisonment. Enforceable by the police with or without one, a police enforcement clause makes it clear they are authorized to arrest and detain an alleged contemptor. However absent a charge of criminal contempt, a civil contempt application process then unfolds.

[622] I am more than satisfied that if permitted, permanent injunctive relief restraining Mr. Johnson is necessary. His sometimes dangerous and, otherwise, harmful tortious conduct shows that he poses a risk to the Purcells' personal safety and the integrity of their property. The risk is heightened by the remoteness and isolation of their rural location—emergency services are some distance away and the area is sparsely populated. Although Mr. Johnson's serious breaches of the interim injunction suggest he has been undeterred, he has not been exposed yet to the prospect of punishment for contempt.

[623] Because of the safety concern I have for the Purcells, I am directing that these reasons be provided to the officer in charge of the nearest RCMP detachment. This may impact the Purcells' decision about pursuing the inclusion of Mr. Johnson in the permanent injunction.

[624] If they wish to, I require further written submissions from the parties addressing the legal issue about whether permanent injunctions can apply to non-parties in a context like this one, and whether a police enforcement clause is required, on notice to Mr. Johnson, starting with the Purcells. Their submissions must be filed and delivered within 21 days of the date of these reasons. Mr. Johnson

should also be provided with these reasons. Mr. Horst and Mr. Johnson will then have 21 days to respond if they want to, and the Purcells will have seven days to reply to any submissions either of them file and deliver. Delivery will be effected by email only.

[625] In the meantime, the interim injunction remains in place.

[626] Subject to addressing whether Mr. Johnson can be included as a person with notice, and adjustments to the terms of the easement and compensation that also require further submissions, the terms of the final injunction that I have contemplated would restrains and enjoins Mr. Horst and Ms. Horst and their agents and servants from:

1) Entering any part of the West Half of Sublot 16 District Lot 361 Kootenay District Plan X40, PID: 016-313-232 (the “Purcell property”), without the prior written permission of the Purcells, or in the event of an emergency related to the water system on the Purcell property defined below;

2) Causing any damage to any aspect of the Purcell property including without limitation their animals and any part of the water system on the Purcell property, from outside the Purcell property, or while on the Purcell property with the Purcells’ written permission or in the event of an emergency related to the water system;

3) Altering any part of the water system on the Purcell property from outside the Purcell property or while on the Purcell property except as permitted by the Purcells’ or subsequent owners of the Purcell property in writing;

4) Engaging in any repairs or alterations to the water system on the Purcell property in the event of an emergency that are not strictly necessary to address the emergency;

5) Following, monitoring or recording the Purcells and others on the Purcell property by any means; and

6) Threatening or behaving in a threatening manner towards the Purcells or anyone on the Purcell property; and

7) Yelling or swearing at the Purcells when they are on the Purcell property or anyone on the Purcell property.

[627] I have distinguished yelling and swearing from threatening or behaving in a threatening manner because it is possible to yell or swear without being threatening or behaving in a threatening manner. As drafted, yelling and swearing at the Purcells is only prohibited while they are on their property. Threatening or behaving in a threatening manner is always prohibited. This protects the Purcells and anyone on their property from potential harassment while on their property without exceeding the boundaries of the tort of private nuisance.

[628] I would also include terms requiring Mr. and Ms. Horst to communicate with the Purcells by email, absent an emergency, in which case they may communicate by phone and providing for the termination of the permanent injunction in the event the Horst property is sold to an arm's length third party, which the parties may also wish to address.

[629] I invite the parties to propose a definition for an emergency, language for an exception that would require the Purcells to allow Mr. Horst to enter the easement area for the purpose of connecting to his irrigation pipeline and in certain circumstances to access "his" valves locked in the bunker. The terms may include for example supervision by an approved third party.

Order Summary

1) Mr. Horst's claims that the Driveway/HAR is a public highway is dismissed.

2) Mr. Horst's claim for an equitable easement over the Driveway/HAR is dismissed.

3) Mr. Horst's historical trail claim is dismissed.

4) I declare that the underground water system on the Purcell property is a fixture on the Purcell property and is therefore owned by the Purcells.

5) Mr. Horst's damages claim is dismissed.

6) The Purcells' claim for damages related to the 2014 urgent repair and their domestic water reinstatement are dismissed.

7) I award the Purcells $19,500 in damages against Mr. Horst for the emergency or Flood-related Repair; $3,417 in damages against Mr. Horst for the 2015 leak mitigation; and $3,000 in trespass damages against Mr. Horst.

[630] Again, I require the parties to propose revised easement terms that accord with my reasons, Mr. Horst to provide a revised proposed plan of survey to reflect the narrower width, and the parties to address compensation to the Purcells for the easement with leave to adduce further evidence related to compensation.

[631] The Purcells have 20 days to deliver and submit written submissions regarding the issue of any person with notice, or Mr. Johnson being subject to the permanent injunction, on notice to Mr. Johnson. He and Mr. Horst will have 20 days to deliver and submit response submissions, if they wish. The Purcells will have seven days to deliver and submit reply submissions.

[632] Delivery and notice will be by email only.

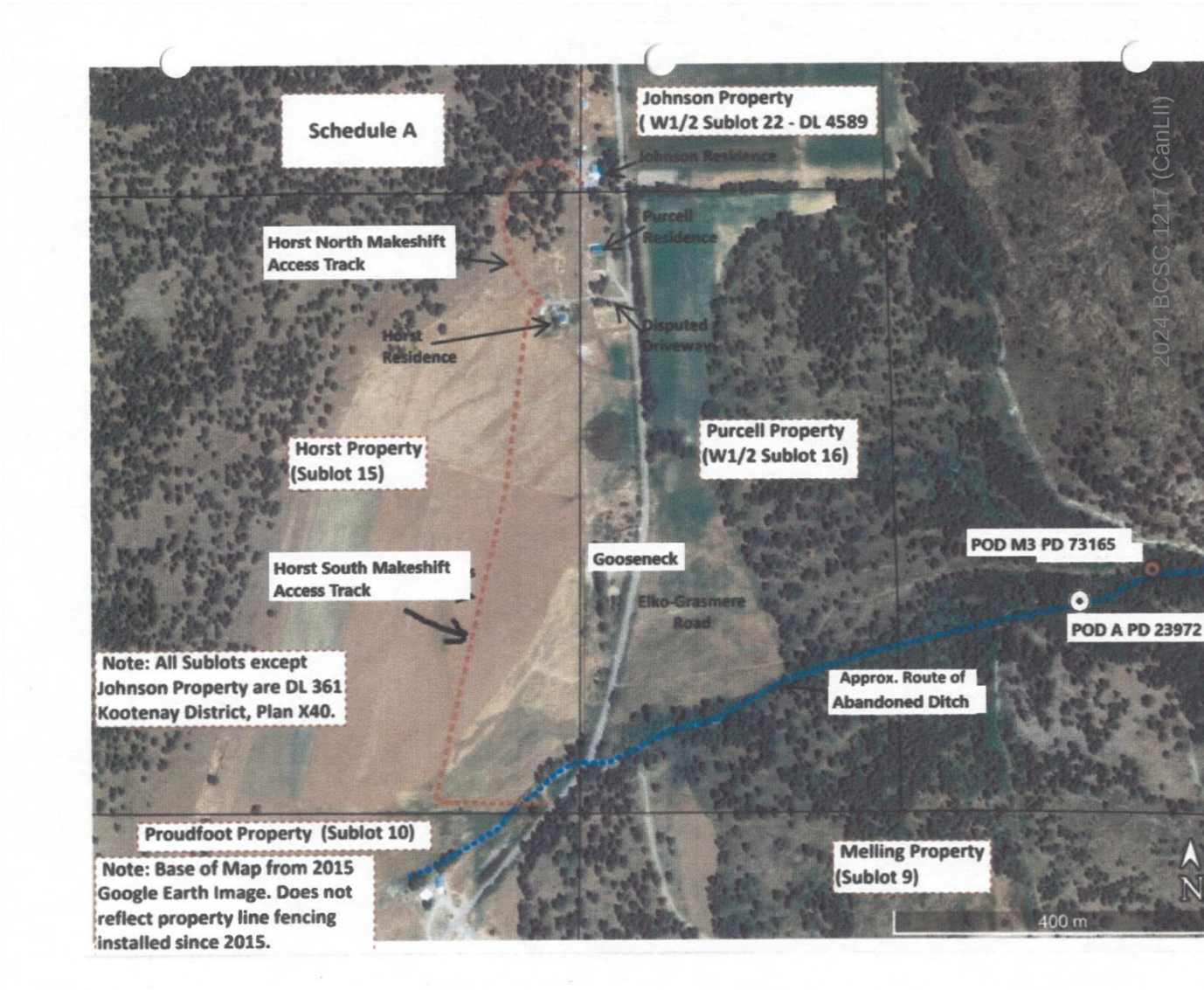
[633] In the meantime, the interim injunction remains in force.

[634] I direct a copy of these reasons be provided to the Officer in Charge of the RCMP detachment nearest to the parties' properties. I would ask the Purcells to fulfill this direction.

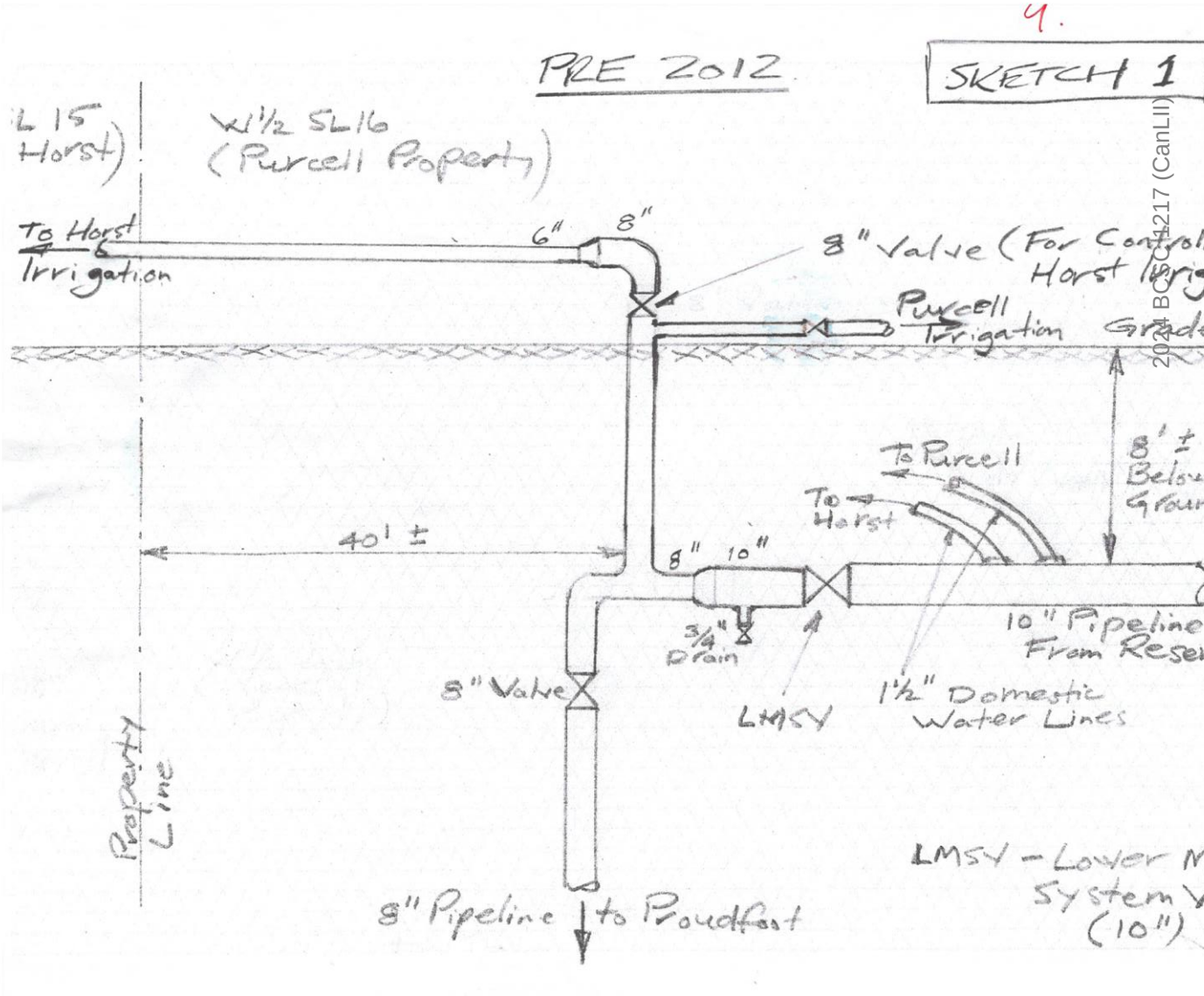
[635] As the substantially successful party, the Purcells are entitled to their party/party costs. In the event they wish to seek a different costs order, they have leave to schedule a costs hearing once the other outstanding issues have been determined. I am not seized of the issue of costs.

"Justice M. Fleming"

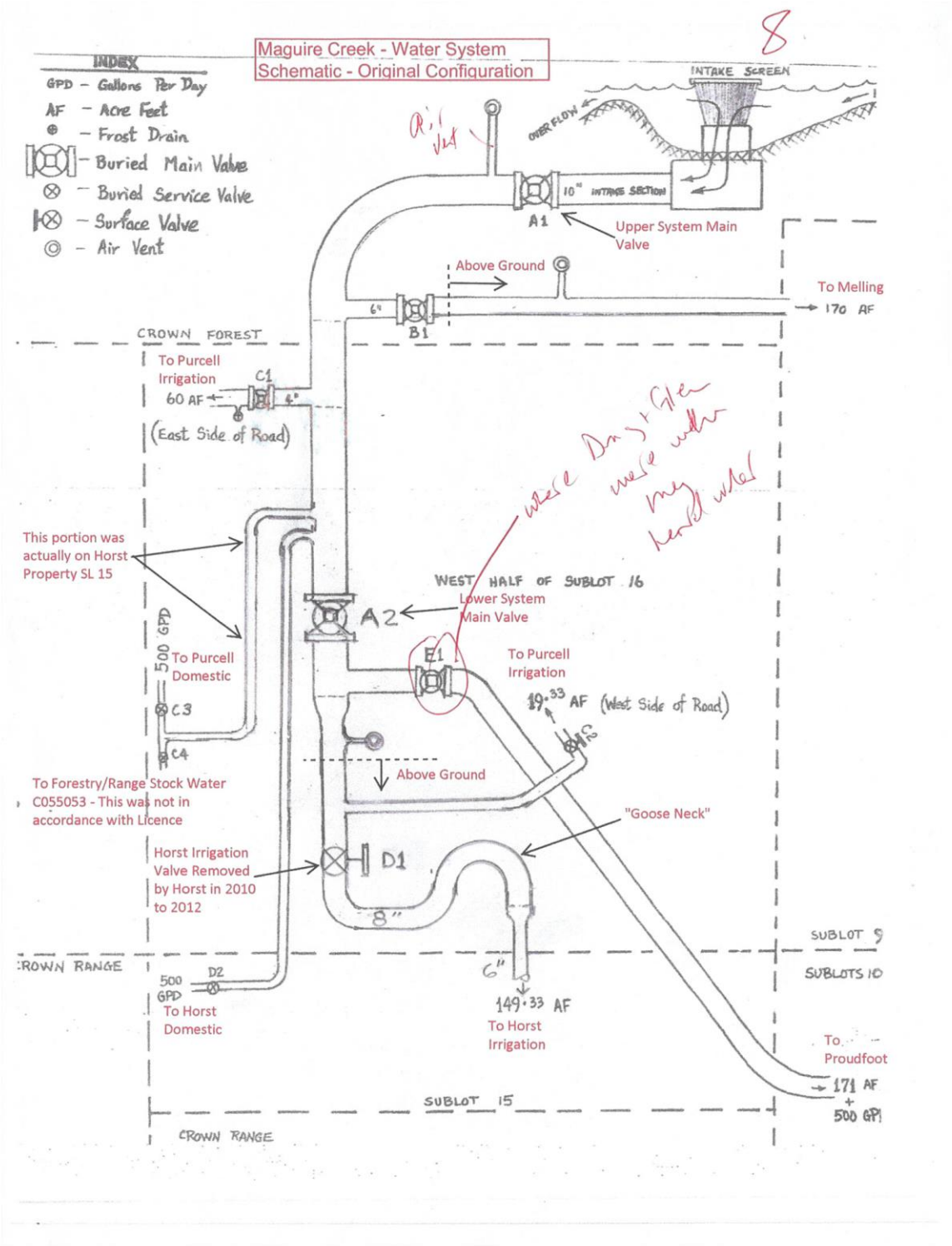
Schedule "A"


Schedule A
Johnson Property
(W1/2 Sublot 22 - DL 4589
Johnson Residence
Purcell Residence
Horst North Makeshift Access Track
Disputed Driveway
Horst Residence
Purcell Property (W1/2 Sublot 16)
Horst Property (Sublot 15)
POD M3 PD 73165
Gooseneck
Horst South Makeshift Access Track
Elko-Grasmere Road
POD A PD 23972
Note: All Sublots except Johnson Property are DL 361 Kootenay District, Plan X40.
Approx. Route of Abandoned Ditch
Proudfoot Property (Sublot 10)
Melling Property (Sublot 9)
Note: Base of Map from 2015 Google Earth Image. Does not reflect property line fencing installed since 2015.
400 m
2024 BCSC 1217 (CanLII)

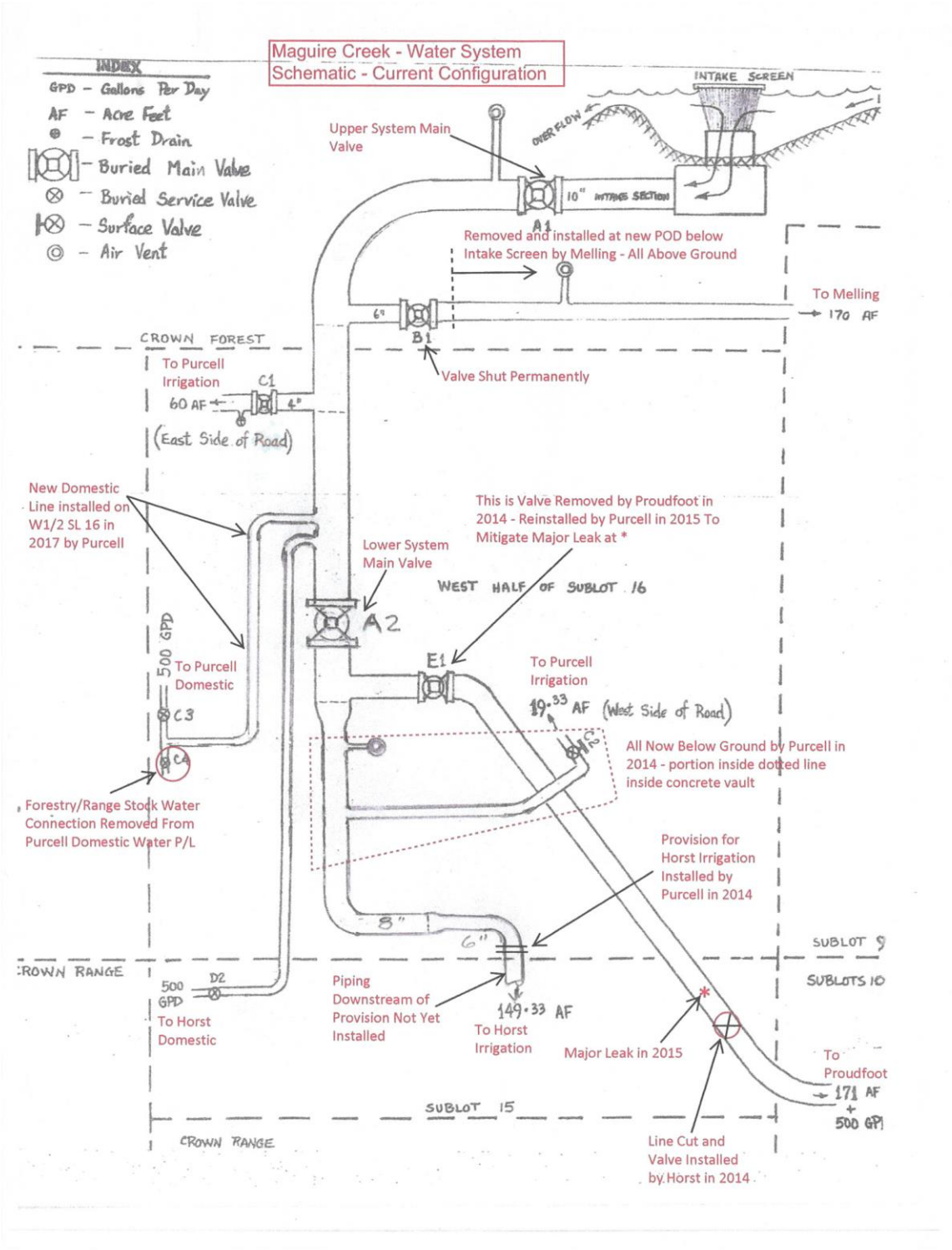
Schedule "B"



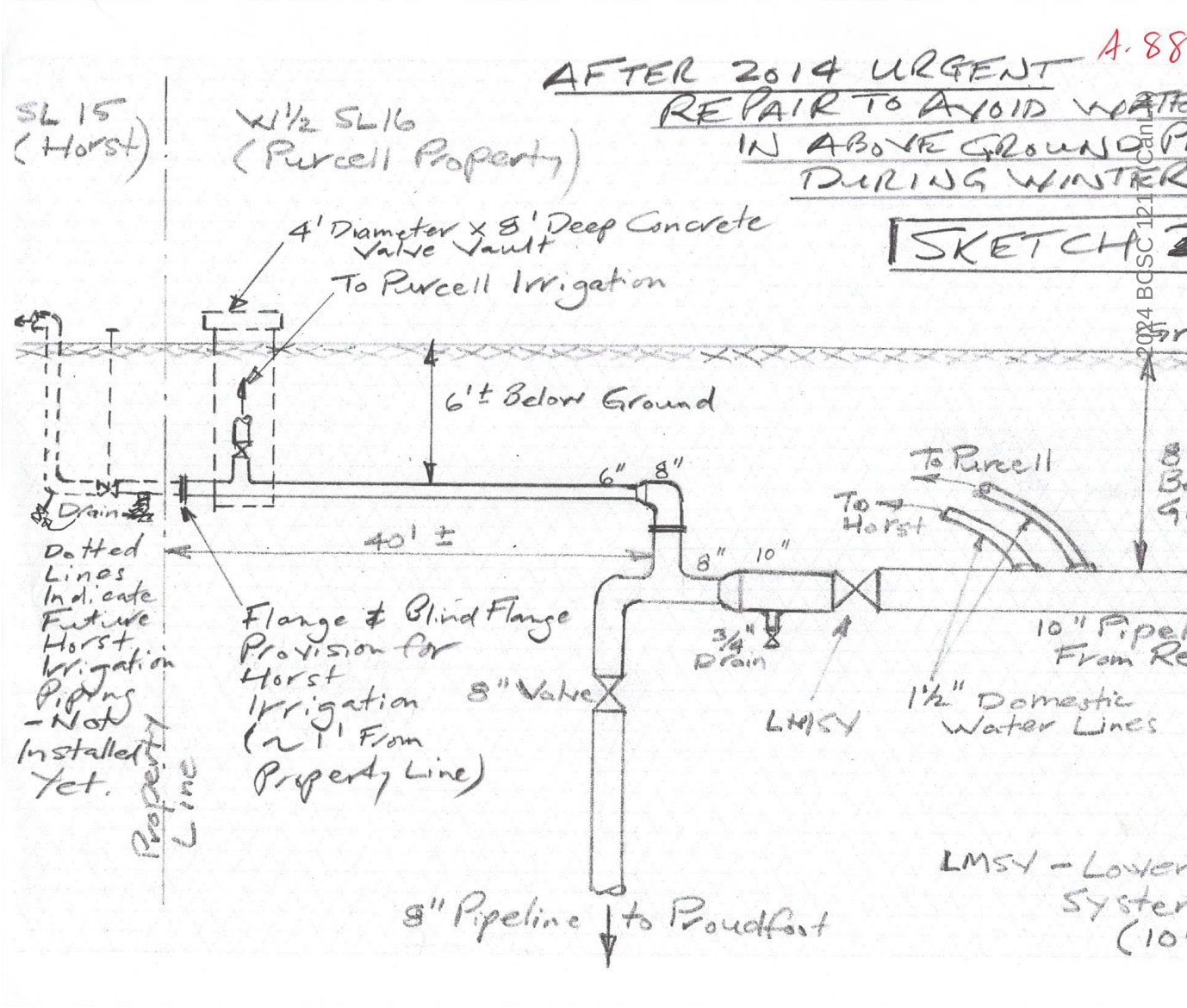
Schedule "C"



Schedule "D"



Schedule "E"


A-88
AFTER 2014 URGENT
REPAIR TO AVOID
IN ABOVE GROUND
DURING WINTER
SKETCH
SL 15
(Horst)
W1½ SL16
(Purcell Property)
4' Diameter x 8' Deep Concrete Valve Vault
To Purcell Irrigation
6'± Below Ground
6"
8"
To Purcell
To Horst
Drain
40'±
8"
10"
Dotted Lines Indicate Future Horst Irrigation Piping - Not Installed Yet.
Flange & Blind Flange Provision for Horst Irrigation (~1' From Property Line)
3/4" Drain
8" Valve
LMSV
1½" Domestic Water Lines
10" Pipe From Re
Property Line
LMSV - Lower
Syster
(10
8" Pipeline to Proudfoot
2024 BCSC 1211 (CanLII)