IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Norris v. Krief,*
2024 BCSC 2239

Date: 20241210
Docket: S244259
Registry: Vancouver

Between:

Reginald Norris

Plaintiff

And:

Jean Michel Krief, Patricia Benell and Kyle DeConnick

Defendants

Corrected Judgment: The paragraph numbering was corrected on pages 24 and 25 on December 16, 2024.

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Plaintiff:	C. Bush
Counsel for the Defendants:	S. Coblin
Place and Dates of Hearing:	Vancouver, B.C. September 18, 25, October 9, 2024
Place and Date of Judgment:	Vancouver, B.C. December 10, 2024

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Overview

[1] Before me are two applications for injunctive relief. The parties are neighbouring landowners in a heavily forested rural area of Bowen Island. They are involved in a property boundary dispute involving an Easement Agreement.[1] The Easement Agreement provides for access to the plaintiff's property by burdening the defendants' property with two access easements, described as the "Primary Access Easement" and the "Secondary Access Easement" respectively. The core issue in dispute relates to the Secondary Access Easement. The issue for trial is whether the plaintiff has breached terms of the Secondary Access Easement by allegedly creating two new access points off the driveway to facilitate construction of a new house on his property: the "Construction Access Point" and the "Southern Access Point" (as they are referred to in the litigation). The defendants take the position that the plaintiff's "creation" of the Construction Access Point and Southern Access Point, and his intended use of these access points, constitute a trespass and breach of the Secondary Access Easement.

[2] Given that the parties were unable to secure a full day hearing to address their disputes until September 2024, it was agreed that until that time the plaintiff would not:

(a) use the Construction Access Point for the purpose of construction; and

(b) modify or create any new access points from the driveway.

[3] Unfortunately, the plaintiff breached this agreement and attempted to carry on with construction using the Southern Access Point. This led to an urgent hearing before Justice Forth on August 2, 2024. Justice Forth issued an interim injunction prohibiting the plaintiff from using the two access points for construction until the injunction applications were heard.

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[1] When a single parcel of land was subdivided into two parcels, the defendants entered into a series of easement agreements and covenants with the predecessors of the plaintiff.

[4] There is an application by the plaintiff for an interim injunction against the defendants to prevent the defendants from, *inter alia*, entering the plaintiff's property and erecting physical obstructions to block the plaintiff's ability to cross the Secondary Access Easement to access his property.

[5] There is a cross-application by the defendants. The defendants argue they are entitled to injunctive relief preventing the plaintiff from continuing to use the Construction Access Point and the Southern Access Point in breach of the Secondary Easement Agreement. The defendants' cross-application therefore seeks a continuation of the interim injunction issued by Justice Forth enjoining the plaintiff from continuing to use the Construction and Southern Access Points. I note for ease of reference I refer to these two areas as Access Points even though that is the heart of the dispute. I am not accepting they are access points covered by the Secondary Easement Agreement; that question will be left for the trial judge.

[6] The parties agreed the defendants' application for an interlocutory injunction should be heard first. As a result, I begin by addressing the defendants' cross-application. First I describe the background to the dispute.

Background

[7] The plaintiff's and defendants' properties were originally part of a single 16-acre parcel of land which the defendants purchased in the early 1990s. Sometime around 2005 the land was subdivided into Lots A and B. There is an old logging road running through the properties that the defendants had upgraded to provide them with access to their residence at the back of Lot B. In 2005, the defendants made an application to the municipality to adjust the property lines between Lots A and B to trace the path of the logging road. The municipality acceded to the request, resulting in the current configuration.

[8] In terms of the process, in 2005 1321 Adams Road (Lot A) was sold to Saskia Gould and Conrad Whitaker. In 2007, the defendants granted a number of easements and covenants to Mr. Whitaker and Ms. Gould, known as the Easement Agreement. The Easement Agreement provided Mr. Whitaker and Ms. Gould with

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access to their property (as the dominant tenement) by burdening the defendants' property (as the servient tenement) with the Primary and Secondary Access Easements. The plaintiff could thus use the existing logging road to access cabins in the northern/lower portion of their property and to access a water well at the southern/upper part of the defendants' property via the Secondary Access Easement.

[9] In 2016, Mr. Whitaker and Ms. Gould sold their lot to the plaintiff.

<u>The Road and the Historical Access Points</u>

[10] At this stage I am considering an application and a cross-application for interim injunctions. As a result, I must refrain from making factual findings as that will be within the purview of the trial judge. Rather, I must undertake a preliminary assessment, without delving too deeply into the merits, to determine whether an interim injunction should be granted to the defendants.

[11] The Road, also known as the Access Driveway, was paved by the defendants in the 1990s. It runs through the Primary and Secondary Access Easement Areas, winding up a slope to the Covenant Area at the top of the plaintiff's property. The Covenant Area is a portion of the plaintiff's property upon which nothing can be built or stored.

[12] The Easement Agreement defines the Road as:

> "Road" means the road within the Primary Access Easement Area and the Secondary Access Easement Area constructed for the purpose of providing access to the Dominant Tenement and the Servient Tenement.

[13] The plaintiff is unable to access his property via a vehicle except as provided in the Easement Agreement. This has created tension between the parties. This tension escalated when the defendants returned from their annual winter vacation earlier this year and discovered that, in their absence, the plaintiff had begun using the Construction Access Point off the existing Road, as well as the Southern Access Point at the top end of the property, for the plaintiff's construction project.

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The Defendants' Application

Issues

[14] There is no dispute that there are at least three "Historical Access Points" that allow vehicular entry onto the plaintiff's property from the Road. The ultimate question is whether the Construction Access Point and the Southern Access Point are also historical, and, if not, whether their use by the plaintiff for these purposes is allowed by the Easement Agreement.

[15] This question requires an assessment of the historical use of these two access points, as well as interpretation of the Easement Agreement. While I canvass the evidence provided to me on these questions below, the ultimate determination of these questions is a matter properly left to the trial judge. I also note that whether the Easement Agreement applies to the plaintiff, as the successor to the two individuals to whom the easements were granted in 2007, will be for the trial judge to determine. The defendants have asked me to assume the Easement Agreement is applicable for the purposes of this application.

[16] The question I must decide is whether to extend Justice Forth's injunction or to allow the plaintiff's work to continue pending trial.

Parties' Positions

[17] The defendants' position is that in 2007, when the easements were granted to the previous owners, neither the Construction Access Point nor the Southern Access Point – or any iterations thereof – existed as vehicular access points. There were only three vehicular access points from the Road onto the plaintiff's property at the time the easements were created, known as the Historical Access Points. The Easement Agreement did not contemplate the creation of new access points on the Secondary Access Easement. The defendants say that neither the Construction Access Point nor the Southern Access Point are historical vehicular access points and are not access points recognized under the Easement Agreement. Lastly, the defendants contend that the definition of the Road and the grant of the Secondary Access Easement disentitle the plaintiff from modifying the current easements.

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[18] The plaintiff deposed that since his purchase of the property in 2016, there have been numerous historical access points. Ms. Gould, who still lives on the property, states that the historical access points pre-date her and Mr. Whitaker's purchase of the property. The plaintiff claims that both the Construction and Southern Access Points were always there and that he did nothing but make changes to his own land.

[19] Both parties originally agreed that the Southern Access Point could not be used to facilitate construction on the plaintiff's property without significant modification. The plaintiff appears to now take the position that the Southern Access Point can be used for construction with "workarounds" in place, such as using smaller vehicles.

[20] The defendants argue that if the Secondary Access Easement does not permit this type of activity, the plaintiff's conduct constitutes a continuing trespass; each time a vehicle uses these access routes at the plaintiff's invitation, it constitutes a trespass.

The Construction Access Point

[21] The first question before me is whether the Construction Access Point is a historical access point and, if not, if access points beyond the three Historical Access Points are contemplated under the Easement Agreement.

[22] I am not attempting to resolve this conflict on the evidence. That will be for the trial judge. The defendants took photos of the Construction Access Point which the plaintiff denies are taken in the correct areas. Photos taken in 2021 of what the defendants state is the Construction Access Point show, *inter alia*, the following:

(a) there appears to be a natural boundary of trees, shrubs, and grass within the easement area between the Road and Lot A;

(b) there is no path or opening in the natural boundary; and

(c) damage to the asphalt.[2]

[23] Mr. Krief emailed the plaintiff to complain about this “new” opening. Photos of the same area in 2022 show:

(a) there is an opening in the natural boundary and trees and shrubs have been cleared;

(b) in the small opening between the trees, the ground between the two lots slopes off into what appears to be some sort of shallow ditch; and

(c) there appears to be no road or vehicular access at this point.

[24] Photos of the same area in September 2023 show:

(a) the level of the land appears to have been raised by Mr. Norris on his property and possibly within the easement area; and

(b) there appears to be a grassy path rather than a road.

[25] By 2024 the photos in evidence of the Construction Access Point show:

(a) an approximately 47-foot wide opening;

(b) the natural boundary between the two properties has been largely removed (the orange line being the property line); and

(c) it appears a vehicular access road has been constructed and connected to the existing Road.

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[2] The defendants say the damage was caused by the plaintiff when he started to make an opening in the natural barrier.

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The Southern Access Point

[26] The second question before me is whether the Southern Access Point is a historical access point and, if not, if access points beyond the three Historical Access Points are contemplated under the Easement Agreement.

[27] The evidence tendered by the plaintiff for the initial hearing was that the Southern Access Point was unsuitable for construction access without significant modifications. The plaintiff tendered an affidavit from Paul McGillivray, the contractor the plaintiff has retained to build his house. Mr. McGillivray explained why the alleged Southern Access Point was unsuitable for construction access. He asserted the only suitable access point was the Construction Access Point. However, in his second affidavit Mr. McGillivray stated that the Southern Access Point could be used for construction access, with modifications made such as the use of smaller vehicles on a more frequent basis. Consistent with the plaintiff's earlier concern about the Southern Access Point, the defendants emphasize that the route to the Southern Access Point is narrow. The route has a ditch on one side and a steep drop off, at various points, on the other side.

[28] The defendants argue the plaintiff's evidence has changed and the plaintiff now takes the position that the Southern Access Point can be used as an access point. In the defendants' opinion, the only reasonable inference is that the plaintiff now recognizes that his use of the Construction Access Point is a trespass that will likely be enjoined. Accordingly, he now purports to rely upon a right to use the Southern Access Point to facilitate the construction.

[29] The environmental report that the plaintiff commissioned for his building permit application (the "Environmental Report") contains pictures of the area in 2022 showing:

(a) a solid fence with no gate; and

(b) trees and tall grass in the area.

[30] Photographs 1 and 2 of Appendix D of the Environmental Report capture the area from the opposite way. As these images show, it is a narrow grassy ridge cutting through a rock bluff. This, the defendants argue, is why Mr. McGillivray said the Southern Access Point is not suitable for access. I note the Environmental Report states the plan was to use the Southern Access Point as a parking pad.

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[31] The defendants took me to photos demonstrating the plaintiff has now removed the solid fence, replaced it with a gate, and cleared the area. The location of the property line markers indicate it is possible (but I make no finding) that the plaintiff was cutting trees and removing other foliage located on the defendants' property to facilitate the creation of this access point. The defendants argue:

(a) the plaintiff encroached upon the easement area to create or to modify the Southern Access Point;

(b) the plaintiff has altered the status quo of the Road as it has existed for almost 40 years; and

(c) the plaintiff altered and removed portions of the natural boundary between the Lots that ran alongside the Road and he changed the topography of parts of the easement area itself.

Preliminary Issue

[32] There is a preliminary issue I address at the outset. Both parties say the other is not coming to court with clean hands. The plaintiff raises the fact that the defendants undertook several self-help remedies, including erecting blockades to stop the plaintiff from using the access points. The defendants raise the fact that the plaintiff breached their previous agreement to cease using these points until the injunction applications could be heard, leading to the injunction put in place by Justice Forth.

[33] Given that both parties have engaged in questionable behaviour related to this litigation, I am unable to decide the dispute on this issue. They basically cancel each other out. As a result, I do not address this issue any further.

Legal Principles

[34] As set out in *RJR-MacDonald Inc. v. Canada (Attorney General),* [1994] 1 S.C.R. 311, 1994 CanLII 117, to succeed on an application for interlocutory injunctive relief, an applicant must satisfy this Court:

(a) that there is a serious question to be tried;

(b) that the applicant will suffer irreparable harm in the event the injunctive relief is not granted; and

(c) that the balance of convenience favours the granting of an injunction.

[35] The first matter, whether there is a serious question to be tried, involves this Court making a preliminary assessment of the merits of the case brought by the applicant. Where an applicant seeks prohibitory interlocutory injunctive relief, the first branch of the *RJR-MacDonald* test is a low threshold. The applicant must simply demonstrate that the claim is neither frivolous nor vexatious: *R. v. Canadian Broadcasting Corp.,* 2018 SCC 5 at para. 12; *RJR-MacDonald* at 337.

[36] At the second stage, this Court must determine whether the applicant will suffer irreparable harm. “Irreparable” refers to the nature of the harm, not its magnitude. The harm must be grounded in an evidentiary foundation. Irreparable harm is harm which cannot be quantified monetarily, or which cannot be cured, usually because one party cannot collect damages from the other: *RJR-MacDonald* at 341.

[37] At the third stage, an assessment must be made regarding the balance of convenience. This typically starts with consideration of which of the parties would suffer greater harm from the granting or refusal of the remedy, pending a decision on the merits. The Court must examine the relative impact on each of the parties. The

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ultimate focus is whether granting an injunction is just and equitable in all the circumstances of the case: *Google Inc. v. Equustek Solutions Inc.,* 2017 SCC 34 at para. 25.

[38] Justice Voith (as he then was) noted in *Cermaq Canada Ltd. v. Stewart*, 2017 BCSC 2526 that these three matters are not inflexible considerations; they do not give rise to a series of independent hurdles that the applicant must meet. The three stages are simply guides to coming to a just and equitable result: para. 53.

[39] In cases of trespass, the general test from *RJR-MacDonald* has been said not to apply: *Fraser Health Authority v. Evans,* 2016 BCSC 1708 at paras. 49–50, 52. Where a *prima facie* case of trespass is made out, the natural remedy <u>is an injunction</u>: *British Columbia Hydro and Power Authority v. Boon,* 2016 BCSC 355 at para. 59 (emphasis added). If there is no arguable case against a party's [here the defendants'] right of possession, an injunction will not normally require consideration of the second and third parts of the *RJR-MacDonald* test: *Foster v. British Columbia (Ministry of Forests, Lands, Natural Resource Operations and Rural Development),* 2023 BCSC 1898 at paras. 25–26; *Claxton v. Claxton,* 2023 BCSC 665 at para. 31.

[40] In other words, if the defendants establish a *prima facie* case of trespass, then the burden shifts to the plaintiff to establish that they have an arguable case against the defendants. If the plaintiff establishes they have an arguable case, then the court must determine the next two criteria of the *RJR-MacDonald* test: whether there is irreparable harm and with whom the balance of convenience lies.

[41] *Supreme Court Civil Rule* 10-4(5) requires that unless this Court otherwise orders, an order for a pre-trial (interim) injunction must contain the applicant's undertaking to abide by any order the court makes regarding damages. Since the Rule provides the court with discretion, the undertaking is not mandatory: *Fountain v. Parsons* (1994), 92 B.C.L.R. (2d) 358 at para. 31, 1994 CanLII 1117 (BC CA).[3]

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[3] Discussing the previous Rule 45(6) of the *British Columbia Rules of Court*, which is nearly identical to the current *Supreme Court Civil Rule* 10-4(5).

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Analysis: the defendants' application

[42] Before me is an application for an interim injunction, not a trial addressing a permanent injunction. I may only undertake a preliminary investigation of the merits of the parties' positions. I must not make a final determination of the parties' respective rights: *Canadian Broadcasting Corp.* at para. 12; *RJR-MacDonald* at 337–338.

[43] I address each of the three *RJR-MacDonald* factors, as modified for cases of trespass, below. In brief overview, I reach the following conclusions:

a) I find that although the defendants have established a *prima facie* case of trespass, due to the easement, the plaintiff has established it has an arguable case against the defendants' right of possession.

b) I find that there is a risk of irreparable harm.

c) I find that the balance of convenience lies with the defendants.

There is a Serious Question to Be Tried

[44] Under the modified test for situations of trespass, the defendants must first demonstrate a *prima facie* case for trespass. This analysis is properly considered under the first branch of the *RJR-MacDonald* test: *OSED Howe Street Vancouver Leaseholds Inc. v. FS Property Inc.,* 2020 BCSC 1066 at para. 14.

[45] It is not in dispute that the defendants own the land on 1291 Adams Road, including the areas covered by the Easement Agreement. The defendants argue that the Construction Access Point and Southern Access Point are not historical access points, and that the Secondary Access Easement, properly interpreted, does not permit the use of these access points by the plaintiff. As such, they contend that the plaintiff's conduct constitutes a continuing trespass.

[46] The defendants rely on authorities which suggest that the plaintiff is allowed reasonable access to his property, not access along the whole easement: *Duncan v. Sherman,* 2006 BCCA 14 at para. 17; *Birch v. Brenner,* 2015 BCSC 466 at paras.

53, 55. In *Duncan*, the Court interpreted an easement and its addendum, concluding that it “would be contrary to the agreement” to allow the dominant tenement to create new access points beyond the two existing historical access points. Other courts have held that a grant of easement cannot usurp the property rights of a servient owner: *Macdonald v. Grant,* (1993) 85 B.C.L.R. (2d) 180 at 22; 1993 CanLII 1164 (BC SC); *Granfield v. Cowichan Valley Regional District* (1996), 16 B.C.L.R. (3d) 382 at para. 37; 1996 CanLII 356 (BC CA). Moreover, in *Birch* the Court concluded that while an easement may require giving the dominant tenement access to the certain points along the easement area, this does not mean that a dominant tenement can expect to access their property at all points along the easement: paras. 53–55. They are entitled to reasonable access; they are not -- at least without explicit language -- entitled to vehicle access to the entire easement area: *Duncan* at para. 17.

[47] The defendants also rely on the *Trespass Act*, R.S.B.C. 2018, c. 3. The *Trespass Act* provides that a person trespasses when they enter onto a premise and/or engage in activity on the premises without the consent of the owner. The defendants contend that unless the Easement Agreement grants the plaintiff the right to come onto the Secondary Easement, remove the natural boundary, and create a new access point to the Road, then the plaintiff’s actions constitute a trespass.

[48] Based on the above, and making no finding on the interpretation of the Easement Agreement, I find that the defendants have established a *prima facie* case for trespass. As a result, the burden shifts to the plaintiff to persuade me they have an arguable case against the defendants’ right of possession: *Claxton* at para. 31.

[49] The plaintiff makes the following arguments:

1) Both Access Points were always able to accommodate vehicular traffic.

2) The Road is the only means of accessing the plaintiff’s property.

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3) The Secondary Easement runs to the end of the plaintiff's property implying access to the top of the property. An email from Mr. Krief to the plaintiff supports this point:

> I really want to stop your guests from coming over our property. The easement states that your guests can't be on or use the upper driveway (even crossing it) and it is your responsibility to make sure of that. The easement is designed to give access to the top part of the property from the bottom. This still gives me the right to block or fence along the road as long as the access to the top remains accessible and open.

4) The original owners, Ms. Gould and Mr. Whitaker, had a trailer at the top of their property and they say they access the property using the Southern Access Point. An email from Ms. Benell to Mr. Whitaker indicates that guests are not allowed to access the top of the plaintiff's property from the driveway but it says nothing to prevent the plaintiff from doing so:

> …
>
> 3. The trailer on your property is visible each and every time we use our driveway. It has now been there for more than a couple of years in contravention of Bowen Island by-laws. Please confirm when it will be moved to a location that is not visible from our property.
>
> 4. Be reminded that guests from the cottages are not permitted to use our driveway to access the top of your property. …

Further, an email from Mr. Whitaker to Mr. Benell states:

> … As always I will continue to tell my customers they are not allowed to drive on the driveway. …

5) The defendants have had large vehicles on the Secondary Access, at their request.

6) On July 10, 2018 one of the defendants wrote to the predecessor to the plaintiff stating:

> Again, I would like to stress that our access agreement specifically excludes cottage guests whether driving or walking their dogs. You may have to fence the property at the access points if this keeps going on.

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The plaintiff argues that the defendants were talking about the viewpoint at the top of the property. The defendants wanted a fence erected which eventually was erected. The plaintiff concludes that both parties thought an access or entry point beyond the three historical access points.

7) Similarly, an email dated October 16, 2019 from one of the defendants asks the predecessor to the plaintiff to erect a fence to exclude guests whether driving or walking:

> **Opening your view point to your guests created this situation and this is where it began. Inviting them to trespass to access the trail also didn't help as well as driving them to the view point. There is only one conclusion: we need to erect a fence/gate on the entry points to my property used by your guests to trespass or stop advertising your view point. I would contribute to it if we agree on some reasonable solution.**
>
> [Emphasis in original]

The plaintiff assumes this was at the Southern Access Point as this is where a fence was erected (prior to it being removed by the plaintiff). I note the defendants refer to entry points on their property.

8) The plaintiff points out that the Easement Agreement does not require the access points to the plaintiff's property to be of any particular form or of any particular material, i.e. grass, gravel, or paved. Rather, it's simply a point of ingress to and egress from the plaintiff's property.

9) The Easement Agreement does not state where the access points are. In addition, there is no *explicit* provision in the Easement Agreement which prohibits commercial or construction traffic on the Road.

[50] The defendants focus on the wording of the Primary and Secondary Easements. The defendants do not seek to, and have not purported to, exclude the plaintiff, its owners, agents, or employees from their land. Rather, they simply dispute the Construction and Southern Access Points are historical points of access. The defendants rely on authorities that this Court must consider the contract at the

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time of contracting, not what has subsequently happened: *Birch*; *Duncan*. The defendants say that the plaintiff wants subsequent conduct or subjective intentions to be taken into account. While generally post-contract evidence is irrelevant absent ambiguity, I leave it to the trial judge to sort out these differences of opinion regarding post-2007 conduct.

[51] The Road does continue beyond the three historical access points. The plaintiff argues that the emails contradict the defendants' position that there is no access point at the top of the property. There is no doubt the Road runs to the top of the property. However, I note this may just be because the easements follow the former logging road and were never intended, at the time the easements were entered into in 2007, to grant the plaintiff access to the top of his property. I do not read the emails as clarifying anything about the Southern or Construction Access Points.

[52] There are clearly a number of disputed points that will need to be determined at trial, starting with whether the Easement Agreement applies to the plaintiff and, if so, what is the breadth and proper interpretation of the Primary and Secondary Easements. While I leave these live issues for the trial judge to determine, based on the above I find that the plaintiff has established an arguable case against the defendants' possession.

[53] Accordingly, I must consider the second and third branches of *RJR-MacDonald*.

Irreparable Harm

[54] The defendants must establish that they will suffer irreparable harm if the injunction is not granted.

[55] To establish irreparable harm, the defendants emphasize the safety risk with having multiple vehicles using the Road when there is no space for two vehicles to pass. The defendants argue the Road is treacherous and that it cannot be used for

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the purpose of residential construction. To use it as such would put the drivers of the vehicles at serious risk.

[56] The plaintiff argues that the defendants' position is based on a subjective and non-expert opinion that the Road is dangerous. The plaintiff contends there are a number of pullouts along the Road which minimizes any danger. The plaintiff, and his contractor, strongly object to the defendants' safety concerns, saying that the defendants have had large trucks on their property which have used the Road. Further, the plaintiff proposes to coordinate the passage of large construction traffic in consultation with the defendants. The plaintiff argues that the defendants have been living on the property for more than 25 years, and the plaintiff is unaware of any modifications being made to the Road during that time to try and make the Road less treacherous. The plaintiff further deposed that Ms. Gould informed him that she has no knowledge of any modifications to the Road since she first purchased the property in around 2007.

[57] The defendants respond that the plaintiff's unsafe conduct exposes the defendants to liability under the *Occupiers Liability Act*, R.S.B.C. 1996, c. 337, if someone were seriously injured, or worse, died. In addition, the defendants raise a risk of damage to the Road and point to cracked pavement of the Road, arguing that damages have already occurred: *Homestead Development Ltd. v. Lehman Resources Ltd.* (1988), 40 B.L.R. 1 at para. 29; 1988 CanLII 3292 (BC SC). The cause of these cracks to the Road are disputed by the plaintiff. Either way, I do not think that cracks in the pavement constitute irreparable harm; this is damage that can be quantified monetarily.

[58] Without deciding the merits, I accept the defendants' position that allowing the plaintiff to continue with construction could potentially cause a safety risk to users given the increase in traffic due to the construction, as well as poor weather for much of the year.

[59] Conduct that causes a safety risk can establish irreparable harm: *Marine Harvest Canada Inc. v. Morton,* 2018 BCSC 1302 at para. 164. The most serious

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concern is the potential risk to drivers, passengers, and pedestrians (if any), along the single-lane Road at the same time as large construction trucks are pulling in and out of the site. In the plaintiff's favour, there is a dispute regarding whether there are cliffs on one side of the Road. In addition, the plaintiff has proposed what appears to be a reasonable plan to minimize the danger and disruption of having so many trucks on the Road during the construction. While the issue of road safety and the potential risks can be thoroughly canvassed at trial, it is the potential risk which, in my view, makes the defendants' loss irreparable.

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[60] Based on my reasoning above, the defendants will suffer an irreparable loss if someone is injured – or worse, dies – due to the increase in traffic on the Road. The defendants have established irreparable harm.

Balance of Convenience

[61] The balance of convenience assessment involves a consideration of the potential impact of the injunction on each party. I must weigh the irreparable harm to the defendants described above with the harm to the plaintiff in not allowing him to use the Construction Access and the Southern Access Points to continue with construction on his property.

[62] In *Canadian Broadcasting Corp. v. CKPG Television Ltd.* (1992), 64 B.C.L.R. (2d) 96 at 10; 1992 CanLII 560 (BC CA), the Court of Appeal set out the following factors to consider in assessing the balance of convenience:

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

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

c) the preservation of contested property;

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

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

f) the strength of the applicant's case;

g) any factors affecting the public interest; and

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

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[63] Considering the most applicable factors from this list to the case at hand, I conclude that the balance of convenience favours the defendants.

[64] First, I find that the plaintiff’s submissions on the harm that he will suffer overstates his case. We are talking about a construction delay if the plaintiff is successful at trial. I accept that the plaintiff’s cabin rental business could be disrupted and monetary losses may occur. Business losses may be complicated to assess, but the Court nonetheless routinely assesses such losses. The plaintiff’s business losses, as well as the added costs to the construction project due to the delay, can be quantified. In summary, if the plaintiff succeeds at trial his damages can be determined by the Court.

[65] Balancing the interests of the plaintiff against those of the defendants, I find that the loss to the plaintiff, if proven at trial, is calculable. In terms of the plaintiff’s business interests, the evidence of the defendants is that they have a special card-reader indicating the total revenue from the ticket booth on CCR North. Presumably, those figures will provide a basis for the calculation of the plaintiff’s damages if he is successful in trial.

[66] The defendants argue that the plaintiff altered the status quo because he wants to avoid the expense of building his own access road from Adam Road, the road adjacent to the plaintiff’s property. They contend that an injunction will preserve the status quo until the property dispute can be resolved at trial.

[67] I note that there is some uncertainty as to the utility of the status quo as a consideration in the balance of convenience analysis. As described by Dean and

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Justice Robert Sharpe, in his authoritative text, *Injunctions and Specific Performance*, (Toronto: Thomson Reuters) (loose-leaf updated 2022):

> Properly understood, the phrase merely restates the basic premise of granting an interlocutory injunction, namely, that, the plaintiff must demonstrate that, unless an injunction is granted, his or her rights will be nullified or impaired by the time of trial. In many ways status quo is an inappropriate, and potentially misleading, description of this principle. It has been described by the Supreme Court of Canada as being of limited value in private law cases and as having "no merit" in constitutional cases. A literal application of the status quo principle would suggest that a plaintiff who sues *quia timet* should always succeed. Similarly, if the defendant has already embarked upon the course of conduct of which the plaintiff complains, the status quo at the time of the application would preclude relief. Plainly, neither of these propositions can stand: interlocutory *quia timet* injunctions are frequently and properly refused, and the status quo has been defined as relating to the situation before the defendant commenced his or her course of conduct. The proper application of the status quo factor, then, merely rephrases the basic question the plaintiff must answer: does the situation meet the basic test for interim relief.
>
> [footnotes omitted]

[68] As mentioned in the passage above, some of this uncertainty arises from what period should be taken as the status quo. It has been held that the status quo should be interpreted as the circumstances that prevail at the time the application is brought, not when the original cause of action accrued: *Pacific Northwest Enterprises Inc. v. Ian Downs & Associates Ltd.* (1982), 42 B.C.L.R. 126 (CA) at para. 29; 1982 CanLII 519. Thus, in other injunction applications which opposed construction projects, the current, in-progress, status of the construction project was taken to be the status quo: *West Moberly First Nations v. British Columbia*, 2018 BCSC 1835; *Boon* at paras. 71-73.

[69] However, as described by Justice Sharpe, this precludes relief when the defendant has “already embarked upon the course of conduct of which the plaintiff complains”. This is particularly difficult to apply when an infringement of property rights is alleged. Simply because a respondent has commenced an activity – an activity that is creating irreparable harm – should not favour the respondent on the balance of convenience. A party should not succeed on an injunction application simply due to momentum.

[70] In this case, the fact that there was an agreement in place between the parties, then an interim injunction by Justice Forth, as well as the defendants' blocking of the Access Points through their self-help remedies, complicates this question even further. Due to all these reasons, I put very little weight on the factor of preserving the status quo.

[71] I find that the balance of convenience tilts in favour of extending the injunction to the date of trial.

Disposition

[72] The defendants' interlocutory injunction is granted, pending trial of this matter. The plaintiff, his agents, guests, and invitees, shall not:

a) use the Construction Access Point or the Southern Access Point, including but not limited to purposes relating to construction;

b) create any new access points anywhere along the Primary Easement Area or the Secondary Easement area; or

c) modify or alter the Construction Access Point, the Southern Access Point, or any of the Historical Access Points.

[73] An undertaking provides an assurance to this Court of proper intention in the obtaining of the injunction, protects to some degree against abuse of the remedy, and provides a commitment to make right any harm done as a result of the granting of the order: *Premium Weatherstripping Inc. v. Ghassemi*, 2016 BCCA 20 at para. 9. In this case, an undertaking by the defendants is appropriate for these purposes. The defendants will provide an undertaking to abide by any order that the Court may make as to damages pursuant to Rule 10-4(5) of the *Supreme Court Civil Rules.*

Plaintiff's Application

[74] In June 2024, the defendants pursued self-help remedies to stop what they believed was the plaintiff's wrongful use of the easement. They put a series of boulders at the side of the easement blocking access to the Construction Access

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Point, parked a vehicle and distributed other debris to block portions of the Secondary Access Easement, and put logs and branches to block the Southern Access Point.

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[75] The defendants, likely after receiving legal advice, recognized that they were wrong to engage in self-help remedies. They promptly removed the boulders and other materials blocking the Construction and Southern Access Points.

[76] The plaintiff argues the defendants' conduct is ongoing. He concedes that the defendants removed boulders and other blockades that were placed to block the plaintiff's access to the Construction Access Point and therefore the self-help remedies have stopped. Nevertheless, the plaintiff points to an incident that occurred in August 2024, and a statement made by Mr. Krief, to argue that the defendants' harmful conduct will continue in the future.

[77] First, the plaintiff raises an incident which occurred on August 31, 2024, where the defendants hired Mr. DeConnick to cut down a tree on the defendants' property, which fell onto the plaintiff's property, damaging a small portion of the plaintiff's fence on the property line. As a result, Mr. DeConnick crossed onto the plaintiff's property to remove the fallen tree.

[78] There is some dispute as to whether the plaintiff was permitted to construct a fence in this location in the first place, and whether the Easement Agreement allowed the defendants onto the plaintiff's property for the purposes of cutting down and trimming trees. Regardless, even to the extent that this could be considered a trespass, I do not see it as an ongoing issue or a revival of the defendants' self-help remedies.

[79] Second, the plaintiff deposed in his first affidavit that on June 13, 2024, Mr. Krief was in the course of moving the boulders when he told the plaintiff, "you're going to have to sit down and negotiate with us. Otherwise, this silliness is going to carry on."

[80] Even putting aside the issue of whether this hearsay evidence should be admitted and considered, I do not find this incident to be sufficiently indicative of a future resumption of the self-help remedies. While some further actions were taken by the defendants following this statement, the defendants have since ceased their self-help remedies and recognized they were wrong. There is no evidence of further threats to resume their activities.

[81] The defendants submit the case law is clear that if the offending activity has ceased, the application for an injunction becomes moot. In other words, that the wrongful conduct complained of is not ongoing and has been cured is determinative of the plaintiff's application: *JTT Electronics Ltd. v. Farmer*, 2014 BCSC 2413 at para. 71.

[82] I agree with the plaintiff that his circumstances differ from the applicants in *JTT* as there was no significant delay in the filing of the present injunction application after the defendants' wrongdoing. Nevertheless, like in *JTT* there is minimal evidence for the proposition that the defendants are engaging or will engage in any activity that would cause the plaintiff irreparable harm, beyond a history of previous wrongdoing which has now ceased.

[83] For a *quia timet* injunction order, in addition to the *RJR-MacDonald* analysis, an applicant must satisfy the Court that there is a "high degree of probability that if the injunction is not granted, the anticipated activity will occur imminently or in the near future": *Wilson v. Hunt,* 2023 BCSC 492 at para. 35. I do not find the incidents described above to be sufficient evidence to demonstrate a "high degree of probability" that the defendants' self-help remedies will continue imminently or in the near future.

[84] As a result, I need not go further and address the *RJR-MacDonald* factors.

[85] The plaintiff's application is dismissed.

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Costs

[86] Costs are in the cause.

"D. MacDonald J."

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