

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lebourdais v. British Columbia (Public Guardian and Trustee)*,
2024 BCSC 2369

Date: 20241227
Docket: 55068
Registry: Kamloops

Between:

Corine Lebourdais

Plaintiff

And

**The Public Guardian and Trustee, Administrator of the Estate
of Carlo Rupert Eugene Asquini, otherwise known as
Carlo Asquini, His Majesty the King in Right of the
Province of British Columbia as represented by
The Ministry of Transportation and Infrastructure**

Defendants

Before: The Honourable Justice Hori

Reasons for Judgment

The Plaintiff, appearing in person:

C. Lebourdais

Counsel for the Defendant, The Public
Guardian and Trustee:

S. Besanger

Place and Date of Hearing:

Kamloops, B.C.
August 12–16, 2024

Place and Date of Judgment:

Kamloops, B.C.
December 27, 2024

Introduction

[1] In this action, the plaintiff claims damages for losses she sustained due to the flooding of her property in May 2017. The flooding of the plaintiff's property occurred when the watercourse flowing through her property, known as Cherry Creek, overflowed its banks and changed direction.

[2] The plaintiff claims that Cherry Creek overflowed its banks and changed direction as a result of the negligence of the defendant, the Public Guardian and Trustee ("PGT"). The plaintiff alleges that the PGT negligently installed a culvert under a road crossing over Cherry Creek on its property and failed to maintain the crossing.

[3] The plaintiff also claims that the PGT created a nuisance when the culvert became dislodged and diverted the flow of Cherry Creek, causing it to change direction.

[4] This action had initially included claims against the Thompson Nicola Regional District ("TNRD") and His Majesty the King in Right of the Province of British Columbia, as represented by the Ministry of Transportation and Infrastructure (the "Province"). On February 23, 2022, the court dismissed the plaintiff's action against the TNRD on the basis that the plaintiff's action disclosed no reasonable claim against the TNRD.

[5] On January 17, 2024, the parties filed a consent order dismissing the plaintiff's action as against the Province. As a result, the only remaining claim is the plaintiff's claim against the PGT.

[6] The application now before the court, is a summary trial under Rule 9-7 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 [*Rules*] in which the plaintiff seeks judgment against the PGT. At the outset of the hearing of this application, the parties agreed to proceed only on the question of liability. Therefore, these reasons will address only the question of whether the PGT is liable to the plaintiff for damages from the flooding of her property.

Suitability for Summary Trial

[7] Rule 9-7(11) of the *Rules* provides that the court may dismiss a summary trial application on the ground that either:

- a) the issues raised are not suitable for disposition by summary trial; or
- b) the summary trial application will not assist the efficient resolution of the proceeding.

[8] Further, Rule 9-7(15) provides that on hearing a summary trial application, the court may grant judgment in favour of any party on an issue unless:

- a) the court is unable, on the whole of the evidence, to find the facts necessary to decide the issues of law or fact; or
- b) the court is of the opinion that it would be unjust to decide the issues on the application.

[9] In this case, the parties have presented their evidence with respect to the issue of liability by way of affidavits. At the hearing of the application, the PGT cross-examined the plaintiff. The plaintiff chose not to cross-examine the PGT.

[10] Both parties have presented expert reports to establish the cause of the flooding on the plaintiff's property. The experts disagree on the question of causation. However, both parties cross-examined the opposing experts on their reports.

[11] Accordingly, the parties have adduced the evidence that would be available to the court after a conventional trial. It is unlikely that a full trial on the issue of liability will result in the court being in a better position to decide the liability question.

[12] In these circumstances, I find that the question of liability is suitable for disposition pursuant to a summary trial and that a resolution of the liability issue will assist in the efficient resolution of the proceeding. Based on the evidence presented

in the application, I am also able to find the facts necessary to decide the liability issue. Therefore, I find that it would not be unjust to do so.

The Properties

[13] The plaintiff owns the property located at 5096 Lazy Acres Road, Kamloops, British Columbia (the “Plaintiff’s Property”).

[14] The PGT was the administrator of the estate of Carlo Rupert Eugene Asquini. As the administrator of the estate, the PGT was, at the relevant time, the owner of 5080 Lazy Acres Road, Kamloops, British Columbia (the “PGT Property”).

[15] The Plaintiff’s Property and the PGT Property are adjacent to one another. The Plaintiff’s Property is directly north of the PGT Property. The southern boundary of the Plaintiff’s Property is the northern boundary of the PGT Property.

[16] Cherry Creek runs through both the Plaintiff’s Property and the PGT Property.

History of the Properties

[17] The plaintiff purchased the Plaintiff’s Property in 1999. Since the plaintiff became the owner of the Plaintiff’s Property, she claims not to have experienced any flooding from Cherry Creek until May 2017.

[18] Before the PGT became the owner of the PGT Property, the owner of the property was Carlo Rupert Eugene Asquini. The PGT became the owner of the PGT Property after it became the administrator of Mr. Asquini’s estate.

[19] The PGT was the registered owner of the PGT Property when Cherry Creek flooded in 2011. At that time, the PGT undertook works on the PGT Property to install a road crossing culvert (the “Culvert”) in Cherry Creek under the driveway to the property (the “Crossing”). The PGT notified the Province of the works it intended to undertake on December 16, 2011. The PGT retained a contractor to install the Culvert. A registered professional forester and biologist confirmed and certified the completion of the Culvert installation on March 14, 2012.

[20] The PGT was the owner of the PGT Property when the Plaintiff's Property flooded in May 2017.

The Flow of Cherry Creek

[21] The Cherry Creek watershed is located approximately 20 km west of the City of Kamloops in the Thompson-Nicola Regional District. It has a drainage area of approximately 150 square kilometres upstream of the properties in question.

[22] Cherry Creek flows generally from south to north. Cherry Creek enters the PGT Property at the south-east corner of the property. The creek flows along the eastern border of the PGT Property until it approaches the north-east corner of the property.

[23] Prior to the 2017 flood, Cherry Creek turned slightly to the west before reaching the north-east corner of the PGT Property and it flowed through the Culvert. Once through the Culvert, the flow in Cherry Creek continued generally in a north-westerly direction until it entered the Plaintiff's Property.

[24] Prior to the 2017 flood, Cherry Creek entered the Plaintiff's Property near the south-east corner of the property. Cherry Creek then carried on in a north-westerly direction through the Plaintiff's Property until it left the Plaintiff's Property at its northern boundary.

The Events of May 2017

[25] In early May 2017, the Thompson-Nicola region experienced a significant flood event which resulted from a high snow pack, warmer than normal temperatures and higher than normal precipitation. As a consequence, Cherry Creek experienced high flow levels of water in its channel.

[26] On May 4, 2017, the Culvert became dislodged. The flow of water transported the dislodged Culvert downstream until it became lodged in the channel of Cherry Creek before it entered the Plaintiff's Property.

[27] The plaintiff alleges that the dislodged Culvert became stuck in the Cherry Creek channel on the PGT Property and obstructed the flow of Cherry Creek. The plaintiff alleges that the dislodged Culvert caused the Plaintiff's Property to flood.

[28] The plaintiff further alleges that the obstruction caused by the Culvert diverted the flow of water in Cherry Creek to the west which caused the formation of a secondary channel at the foot of a bank on the Plaintiff's Property. The plaintiff claims that the secondary channel has eroded the bank and caused the bank to become unstable.

Issues

[29] The plaintiff claims damages against the PGT in negligence and in nuisance. The main issues in the negligence claim are:

- a) whether the PGT breached the relevant standard of care; and
- b) whether any breach of the standard of care caused the flooding of the Plaintiff's Property or the diversion of Cherry Creek.

[30] The main issue in the nuisance claim is whether the dislodged Culvert on the PGT Property caused the diversion of Cherry Creek to the west.

[31] In order to address these issues, both parties have retained experts to provide opinions with respect to the flow of water in Cherry Creek and the cause of the flooding on the Plaintiff's Property in 2017. The parties' experts disagree on the material issues in this action.

[32] The parties have also tendered the evidence of professionals who prepared reports for other agencies after the May 2017 flood event. Those professionals are not qualified as experts in these proceedings so I will not consider their opinions. However, their observations of how the flooding of Cherry Creek in May 2017 affected the surrounding properties will form part of the evidence that I consider.

Evidence of Bob Costerton

[33] Bob Costerton is a hydrotechnical engineer who attended at Cherry Creek and reported upon the damage he observed from the flooding event on May 4 and 5, 2017. Mr. Costerton reported his observations to the TNRD on May 21, 2017.

[34] Mr. Costerton was not qualified as an expert witness in this case. However, he confirms his observations in an affidavit sworn in these proceedings.

[35] Mr. Costerton makes the following observations of significance:

- a) The flood that occurred on or about May 5, 2017, was a relatively rare event;
- b) In the May 2017 flood, the culvert crossings on Cherry Creek were no match for the flow of water and woody debris resulting in all culverts being overtopped without any known exceptions;
- c) Only a few culvert crossings survived the flood;
- d) No roads crossing the creek were safely passable during the peak flow, except for Highway No. 1, which was spared even though the flood water was ponded 4.0 metres above the top of the culvert inlet;
- e) Two private road bridges were large enough to pass the peak flow and four private foot bridges functioned well. All other bridges and culverts became part of the problem as the water was forced out of the channel and over-bank by undersized, largely jammed culverts. Many culverts failed and were washed downstream, sometimes jamming the next bridge/culvert and exacerbating flooding there. Many culverts ponded significant water upstream of the road fill prior to failure, and sent an even larger flood peak downstream when the road crossing washed out;
- f) Greenstone Road was partially washed out with loss of access and significant sediment deposition upstream and loss of channel capacity;

- g) At several locations, the main channel was blocked and the stream created a new channel;
- h) The culvert road crossings at Rodeo Drive were overtopped or washed out. The culverts at the Highway #1 crossing of Rodeo Drive consisted of two pipes with a diameter of 1,500 millimetres each.

Report of Northwest Hydraulic Consultants Ltd.

[36] After the May 2017 flood event, Northwest Hydraulic Consultants Ltd. (“Northwest”) prepared a report for the Ministry of Transportation and Infrastructure (the “Ministry”) dated February 1, 2018. Both the plaintiff and the PGT include that report in their evidence.

[37] The report from Northwest describes the Greenstone Road crossing as consisting of a 1,200 millimetre diameter corrugated steel pipe culvert. The report indicates that the culvert became plugged with sediment and subsequently overtopped during the flood event in May 2017.

PGT’s Expert

[38] The expert retained by the PGT is Dr. Robert Millar. Dr. Millar has 30 years of consulting and applied academic experience in hydrologic design, river engineering, mine water management, dam safety, erosion and sedimentation.

[39] When Dr. Millar prepared his report for this action, he was the principal hydrotechnical engineer for BGC Engineering Inc. He received his PhD in hydrotechnical engineering from the University of British Columbia (“UBC”) in 1994. He completed his Master’s in applied science in hydrotechnical engineering at UBC in 1991 and his Bachelor of Science in geology at the University of Queensland in 1984.

[40] From 1996 to 2011, Dr. Millar was a professor of hydrotechnical engineering at UBC. From 2012, Dr. Millar has been an adjunct professor of hydrotechnical engineering at UBC.

[41] Dr. Millar visited the Plaintiff's Property and inspected Cherry Creek on April 18, 2021. In order to prepare his report, Dr. Millar reviewed documents presented to him by the parties and also reviewed publicly available resources, such as climate data, waterflow records of relevant watersheds and Google Earth images.

[42] After his review, Dr. Millar produced an initial report dated January 17, 2022, and a subsequent report dated October 12, 2023.

[43] Dr. Millar observes that during May 2017, the interior of British Columbia experienced widespread flooding due to high temperatures and above average snowpack. According to Dr. Millar, the maximum flow of water in Cherry Creek at the PGT Property and the Plaintiff's Property on May 4, 2017, was 5.9 cubic metres per second. Dr. Millar estimates that the return period for the flooding on Cherry Creek on May 4, 2017, to be approximately 1 in 75 years.

[44] The weakness in the conclusions made by Dr. Millar is that since 1995 Cherry Creek has not had a hydrometric gauge to measure the flow of water in the creek. Therefore, there is no direct information about the flow rates in Cherry Creek from 1995.

[45] In order to address the absence of actual flow data from Cherry Creek, Dr. Millar used the long-term hydrometric readings from Guichon Creek which is located approximately 22 kilometres west-southwest of the Plaintiff's Property. Dr. Millar's opinion is that the hydrology of the Guichon Creek watershed is similar to that of the Cherry Creek watershed.

[46] Dr. Millar establishes a correlation between the known Guichon Creek flow data and the known Cherry Creek flow data for the years that both hydrometric gauges were operating simultaneously. Dr. Millar then uses that correlation to estimate the flow rates for Cherry Creek at the time relevant to this action based on the rates of flow recorded on Guichon Creek.

[47] Using this method, Dr. Millar concludes that Cherry Creek experienced higher than normal flow rates between May 4 and May 7, 2017. The evidence that the flow

of water in Cherry Creek in early May 2017 washed out or “over topped” numerous crossings along Cherry Creek, including the crossing on the PGT Property, supports this conclusion.

[48] The plaintiff challenges Dr. Millar’s conclusions on the basis that Guichon Creek is a different watershed than Cherry Creek. However, Dr. Millar accounts for the difference between the Guichon Creek watershed and the Cherry Creek watershed by correlating the known data from Guichon Creek with the known data from Cherry Creek and using that correlation to assess the flow in Cherry Creek in May 2017. In addition, Dr. Millar adjusts his figures to account for the different catchment areas associated with selected locations along Cherry Creek, including the subject properties.

[49] In any event, the evidence of washed out and damaged crossings along Cherry Creek in May 2017 is evidence of the unusually high and damaging flows in Cherry Creek at that time. In addition, the videos presented by the plaintiff show significant waterflows on the Plaintiff’s Property on or about May 4, 2017.

Plaintiff’s Expert

[50] The plaintiff retained Jamie Stirling as her expert in this case. Mr. Stirling obtained a Master’s degree in physical geography from the University of Toronto in 1998. He received a Bachelor of Arts degree in geography from York University in 1994. Mr. Stirling is a geomorphologist specializing in fluvial systems, including flood and erosion assessments, hydrological processes, mitigative design, construction services, sediment transport and risk assessments.

[51] It is of note that Mr. Stirling is not a professional engineer and holds no degrees in applied sciences. Therefore, Mr. Stirling has chosen to use the services of a sub-consultant, Dr. Adrian Chantler, P.Eng. Dr. Chantler is a hydrotechnical engineer with 45 years of experience in civil engineering hydrology and hydraulics. However, Mr. Stirling does not provide the details of Dr. Chantler’s involvement in Mr. Stirling’s analysis other than to say that Dr. Chantler reviewed his report. Mr.

Stirling does not indicate the purpose of Dr. Chantler's review or what input, if any, Dr. Chantler had in the analysis.

[52] Mr. Stirling carried out an assessment of Cherry Creek and the properties which are the subject of this action on July 8, 2023. He reviewed information provided to him by the plaintiff. He reviewed publicly available information, such as aerial photographs of the subject properties, and historical records from the Ministry. Before preparing his report, Mr. Stirling also had an opportunity to review the initial report of Dr. Millar. After reviewing the relevant information, Mr. Stirling produced a report dated August 28, 2023.

[53] It is Mr. Stirling's opinion that the Culvert was undersized and that the volume of water flowing in Cherry Creek on May 4, 2017, would have exceeded its capacity. However, Mr. Stirling does not provide any analysis of the level of flow in Cherry Creek on May 4, 2017. He also does not provide any analysis of the capacity of the Cherry Creek channel.

[54] Mr. Stirling is also of the view that the Crossing constructed on the PGT Property should have been, but was not, designed by an engineer.

[55] What is missing from Mr. Stirling's report is an opinion about what size culvert would have been adequate to accommodate the flow rates experienced on May 4, 2017, and whether such a culvert is within a reasonable standard.

[56] Mr. Stirling opines as well that the dislodged Culvert embedded itself perpendicular to the flow in Cherry Creek which diverted the creek to the west and created a secondary channel towards the foot of an embankment.

[57] In support of this proposition, Mr. Stirling has produced aerial photographs of Cherry Creek flowing through the Plaintiff's Property and the PGT Property both before and after the May 2017 flood event. By comparing these photographs and based on his personal observations of the dislodged Culvert, Mr. Stirling concludes that the dislodged Culvert diverted the flow of Cherry Creek to the west.

Negligence

[58] The plaintiff claims that the PGT was negligent in the construction and maintenance of the Crossing on the PGT Property. In particular, the plaintiff alleges that the PGT installed the Culvert in 2012 contrary to the provisions of the *Water Act*, R.S.B.C. 1996, c. 483 and the *Water Act Regulation*, B.C. Reg. 204/88 (the “*Regulation*”).

[59] Further, the plaintiff alleges that the PGT was negligent in its maintenance of the Crossing.

[60] The onus is on the plaintiff to prove each of the elements of negligence on a balance of probabilities. There is no burden on the PGT to prove that it was not negligent.

[61] In order to establish negligence on the part of the PGT, the plaintiff must prove the following elements:

- a) that the PGT owed the plaintiff a duty of care;
- b) that the PGT’s conduct breached the requisite standard of care
- c) that the plaintiff suffered damage; and
- d) that the damage was caused, in fact and law, by the PGT’s breach

(*Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581 at para. 193; *Jorgensen v. Kamloops (City)*, 2020 BCSC 864 at para. 87).

Duty of Care

[62] The court in *MacKay v. Brookside Campsite Inc.*, 2021 BCSC 1304 summarized the duty of care of an upstream property owner to an owner of property downstream. At para. 132 of the reasons for judgment in *MacKay*, the court held that upslope owners are generally not liable for water naturally flowing from their property. In order to be liable, upslope owners must take positive steps that cause a

change in the direction, volume, or velocity of the natural flow of water that interferes with another owner's property.

[63] In this case, if the PGT altered the natural flow of the water in Cherry Creek, it owed a duty of care to the plaintiff to do so without interfering with the Plaintiff's Property.

[64] In addition, s. 21 of the *Water Act* or, subsequent to 2014, s. 29 of the *Water Sustainability Act*, S.B.C. 2014, c. 15, impose a duty to exercise reasonable care on a person who, in accordance with the *Regulation*, makes changes in and about a stream.

Breach of the Standard of Care

[65] In order to prove that the PGT breached its duty of care, the plaintiff must:

- a) establish the standard of care against which the court is to measure the PGT's conduct; and
- b) prove that the PGT failed to meet that standard.

Installation of the Culvert

[66] The plaintiff alleges that when the PGT installed the Culvert the standard of care was established by s. 44 of the *Regulation*. The relevant portions of the *Regulation* are s. 44(1)(a)(vii) to (x) which read as follows:

44 (1) For the purposes of section 9 (2) of the Water Act, the following changes in and about a stream may be made without obtaining an approval or licence for that change, provided that the change is made in accordance with this regulation and in accordance with the terms and conditions, described in section 42, specified by a habitat officer:

- (a) the installation, maintenance or removal of a stream culvert for crossing a stream for the purposes of a road, trail or footpath, provided that
 - (vii) the culvert capacity is equivalent to the hydraulic capacity of the stream channel or is capable of passing the 1 in 200 year maximum daily flow without the water level at the culvert inlet exceeding the top of the culvert,
 - (viii) the culvert has a minimum equivalent diameter of 600 mm,

- (ix) a culvert having an equivalent diameter of 2 metres or greater, or having a design capacity to pass a flow of more than 6 cubic metres a second, is designed by a professional engineer and constructed in conformance with that design,
- (x) the culvert is installed in a manner which will permit the removal of obstacles and debris within the culvert and at the culvert ends.

[67] Section 9 of the *Water Act*, provided as follows:

9 (1) The comptroller, a regional water manager or an engineer may grant an approval in writing authorizing on the conditions he or she considers advisable

- (a) a person to make changes in and about a stream,
- (b) a minister of the Crown, either in right of Canada or of British Columbia, to make changes in and about a stream, or
- (c) a municipality to make changes in and about a stream.

[68] If I accept that s. 44 of the *Regulation* establishes the standard of care for the installation of the Culvert, I find that the plaintiff has not proven that the PGT failed to meet the standard for the following reasons:

- a) With respect to s. 44(1)(a)(vii) of the *Regulation*, I may infer that the capacity of the Culvert on the PGT Property was not capable of passing the 1 in 200-year maximum daily flow because Dr. Millar estimates the return period for the flooding on May 4, 2017, to be approximately 1 in 75 years. However, the plaintiff did not establish the hydraulic capacity of the Cherry Creek channel which s. 44 establishes as an alternate standard. Without the hydraulic capacity of that channel, it is not possible to determine whether the PGT met the standard or not;
- b) The Culvert had a diameter of 3 feet or 914 mm. Therefore, the Culvert exceeded the minimum diameter of 600 mm established by s. 44(1)(a)(viii) of the *Regulation*;
- c) Section 44(a)(1)(ix) of the *Regulation* requires an engineer to design a culvert crossing where the culvert has a diameter of 2 metres or more or the culvert is designed to pass a flow of more than 6 cubic metres a second. The

diameter of the Culvert on the PGT Property was less than 2 metres and the plaintiff has not established the design capacity of the Culvert. As a result, the plaintiff has not established that the PGT failed to meet this standard;

- d) With respect to s. 44(1)(a)(x), the plaintiff has not tendered any evidence that the Culvert was installed in a manner that did not permit the removal of obstacles and debris within the Culvert and at the Culvert ends.

[69] The plaintiff relies on the opinion of her expert, Mr. Stirling. Mr. Stirling's opinion is that the PGT did not follow the requirements of s. 21 of the *Water Act* or s. 44 of the *Regulation*.

[70] The opinion of Mr. Stirling is that the 3-foot Culvert on the PGT Property was undersized. However, he provides no explanation for this opinion other than the volume of water flowing during the May 2017 flood exceeded the capacity of the Culvert. Mr. Stirling does not give an independent opinion as to the required size of the Culvert on the PGT Property. He relies upon the provisions of s. 44 of the *Regulation*. Just because the May 2017 flood exceeded the capacity of the Culvert does not mean that the Culvert was undersized for the purposes of establishing the requisite standard of care in negligence.

[71] Mr. Stirling does not provide an assessment of the hydraulic capacity of the Cherry Creek channel and relate that capacity to the 3-foot Culvert. In my view, without such an assessment, it is not possible for Mr. Stirling to conclude that the Culvert was undersized when measured against the standard set by s. 44 of the *Regulation*.

[72] Mr. Stirling is also critical of the PGT's installation of the Crossing because an engineer was not involved in its design and construction. Mr. Stirling opines that if an engineer had designed the Crossing, the engineer would have "almost certainly" recommended an alternative alignment and/or a bridge. There are two problems with Mr. Stirling's opinion.

[73] The first problem is that Mr. Stirling is not an engineer. Therefore, his opinion about what an engineer would have recommended is outside the scope of his expertise.

[74] The second problem is that Mr. Stirling ignores the provisions of s. 44 of the *Regulation* even though he purports to apply the *Regulation* as the standard of care. Section 44 of the *Regulation* expressly provides that a professional engineer must design a culvert crossing when the culvert diameter is 2 metres or greater. Since the Culvert on the PGT Property was less than 2 metres in diameter, s. 44 of the *Regulation* does not require an engineered design.

[75] Accordingly, the plaintiff has failed to prove that the PGT breached the standard of care with respect to the installation of the Culvert or the Crossing on the PGT Property.

Maintenance of the Crossing

[76] The plaintiff presented no evidence that the condition of the Crossing was in such a state that it needed maintenance prior to the flood event in May 2017. However, the PGT produced no evidence that it took steps to maintain the Crossing on its property.

[77] In effect, the plaintiff submits that I should infer a breach of the PGT's duty to maintain the Crossing from the absence of evidence that it maintained the Crossing. I am not able to make such an inference without some evidence that the Crossing required maintenance. The absence of maintenance work on the Crossing could have been the result of the Crossing not requiring any maintenance work.

[78] The PGT has also not presented any evidence that it had inspected the Culvert prior to the flood of May 2017. On the other hand, the plaintiff has presented no evidence that had the PGT inspected the Culvert, the inspection would have revealed a need to do maintenance work. Without some evidence to conclude that an inspection would have reasonably revealed a need to conduct maintenance work, I cannot conclude that the PGT breached its duty to inspect the Culvert.

[79] Accordingly, the plaintiff has not satisfied me that the PGT has breached its duty to inspect or maintain the Culvert.

Water Act s. 21

[80] Section 21 of the *Water Act* provides:

21 (1) The following persons must exercise reasonable care to avoid damaging land, works, trees or other property, and must make full compensation to the owners for damage or loss resulting from construction, maintenance, use, operation or failure of the works:

- (a) an applicant;
- (b) a licensee;
- (c) a holder of an approval;
- (d) a person who, in accordance with the regulations or an order, makes changes in and about a stream or diverts or uses water.

(2) Subject to subsection (1), a holder of a licence for power purpose, waterworks purpose or irrigation purpose may fell and remove any tree and remove any rock or other thing that endangers the holder's works.

[81] Section 21 of the *Water Act* is the provision that was in force when the PGT installed the Culvert. However, by 2017, when the Plaintiff's Property flooded, s. 21 of the *Water Act* had been replaced by s. 29 of the *Water Sustainability Act*. While the format and wording of s. 29 of the *Water Sustainability Act* differs from that of s. 21 of the *Water Act*, in my view, the effect of both provisions is the same.

[82] The sections provide that a person who makes changes in and about a stream in accordance with the *Regulation*, must do so by exercising reasonable care to avoid damaging the property of others. If that person fails to exercise reasonable care, then the person must compensate the other property owners for damage or loss resulting from the construction, maintenance, use, operation or failure of the works.

[83] For the reasons I have stated above, the plaintiff has not proven that the PGT failed to exercise reasonable care to avoid damage to the Plaintiff's Property. Accordingly, I find no breach of either s. 21 of the *Water Act* or s. 29 of the *Water Sustainability Act*.

Plaintiff's Damages

[84] Given my conclusion that the plaintiff has not proven that the PGT breached the requisite standard of care, it is not strictly necessary for me to assess whether the plaintiff suffered damage or whether any breach of the standard of care by the PGT caused damage to the plaintiff. However, it may be helpful to the parties to have my assessment of whether the washout of the Crossing and the relocation of the Culvert caused damage to the Plaintiff's Property.

[85] Therefore, for the purposes of this analysis I will assume, without specifically deciding the question, that the plaintiff has sustained damages from the flooding.

Causation

[86] The Supreme Court of Canada in *Clements v. Clements*, 2012 SCC 32, at paras. 8–11, confirmed that the test for causation is the “but for” test. The Court in *Clements* also considered a rare exception to the “but for” test which it labelled as the “material contribution” test.

[87] The Supreme Court of Canada in *Resurface Corp. v. Hanke*, 2007 SCC 7 at paras. 24–28, held that under the “material contribution” test, tortfeasors may be liable if their actions or their inaction materially contributed to the risk of injury or loss to the plaintiff. However, the Court limited the “material contribution” test to those situations where:

- a) it is impossible to prove that the defendant's conduct caused the plaintiff's loss using the “but for” test; and
- b) it is clear that the defendant breached a duty of care owed to the plaintiff and thereby exposed the plaintiff to an unreasonable risk of loss

[88] In *Clements*, the Court expressed the “but for” test as follows:

[8] The test for showing causation is the “but for” test. The plaintiff must show on a balance of probabilities that “but for” the defendant's negligent act, the injury would not have occurred. Inherent in the phrase “but for” is the requirement that the defendant's negligence was *necessary* to bring about

the injury — in other words that the injury would not have occurred without the defendant’s negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails.

[89] The Court in *Resurfice*, held that the “but for” test recognized that compensation for tortious conduct should only be made where a substantial connection between the injury and the defendant’s conduct is present. The test ensures that a defendant will not be held liable for the plaintiff’s injury where the injury may very well be due to factors unconnected to the defendant and not the fault of anyone: *Resurfice* at para. 23.

[90] In the context of this case, the onus is on the plaintiff to prove, on a balance of probabilities, that had it not been for the PGT’s conduct with respect to the Crossing or the Culvert, the plaintiff would not have sustained the losses she claims from the flooding event on May 4, 2017. Based on the analysis in *Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581 at para. 383 (reversed on other grounds by 2020 BCCA 378) I would frame the question as: even if the PGT had done what the plaintiff claims it should have done, would it have made any difference?

[91] It is Dr. Millar’s opinion that the flooding, washout and blockage of the PGT Culvert and Crossing on May 4, 2017 occurred during climate conditions that produced widespread flood damage and the highest flows in several decades across the region.

[92] Dr. Millar also concludes that the washout of the Crossing would not have affected the flow on Cherry Creek. He states further that the presence or absence of the PGT Crossing, and whether the Culvert remained intact or washed out, was immaterial with respect to the flood flows on the Plaintiff’s Property.

[93] Dr. Millar’s conclusions are supported by the failure of numerous other crossings along Cherry Creek during this flood event including:

- a) the failure of the Greenstone Road crossing which was the partial washout of a 1,200 millimetre culvert; and
- b) the overtopping of the twin 1,500 millimetre culverts at Rodeo Drive.

[94] The opinion of the plaintiff's expert, Mr. Stirling, does not address the "but for" question. The only standard of care referenced by Mr. Stirling is the standard set by s. 44 of the *Regulation*. However, Mr. Stirling does not provide an opinion that the plaintiff's losses would not have occurred had the PGT met the requisite standard of care.

[95] In addition, Mr. Stirling does not consider or account for the numerous other crossing failures along Cherry Creek that occurred during the May 2017 flood event.

[96] The authorities establish that the question of causation does not require scientific certainty and the court may draw inferences of causation on the basis of common sense. However, in this case, I cannot infer causation from the proven facts because:

- a) Many, if not all, of the properties along Cherry Creek were subject to a significant and unusually high flow event on Cherry Creek during the flood in May 2017;
- b) There was significant and widespread culvert and crossing damage to properties along Cherry Creek in May 2017; and
- c) Culverts along Cherry Creek that were much more significant in size than the Culvert on the PGT Property were overtopped and washed out during the flood event of May 2017.

[97] Based on these circumstances, I am not able to infer that "but for" the conduct of the PGT, the plaintiff would not have sustained the losses she claims.

[98] Therefore, I must dismiss the plaintiff's negligence claim against the PGT.

Nuisance

[99] Justice Watchuk described the tort of nuisance in *Suncourt Homes Ltd. v. Cloutier*, 2019 BSCS 2258 at para. 85:

[85] A nuisance consists of “an interference with the claimant’s use or enjoyment of land that is both substantial and unreasonable”: *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para. 18.

[100] Unlike negligence, nuisance focusses on the harm done to the plaintiff, rather than the conduct of the defendant. The Supreme Court of Canada in *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64 at para. 77 held:

[77] At common law, nuisance is a field of liability that focuses on the harm suffered rather than on prohibited conduct (A. M. Linden and B. Feldthusen, *Canadian Tort Law* (8th ed. 2006), at p. 559; L. N. Klar, *Tort Law* (2nd ed. 1996), at p. 535). Nuisance is defined as unreasonable interference with the use of land (Linden and Feldthusen, at p. 559; Klar, at p. 535). Whether the interference results from intentional, negligent or non-faulty conduct is of no consequence provided that the harm can be characterized as a nuisance (Linden and Feldthusen, at p. 559). The interference must be intolerable to an ordinary person (p. 568). This is assessed by considering factors such as the nature, severity and duration of the interference, the character of the neighbourhood, the sensitivity of the plaintiff’s use and the utility of the activity (p. 569). The interference must be substantial, which means that compensation will not be awarded for trivial annoyances (Linden and Feldthusen, at p. 569; Klar, at p. 536).

[101] However, in the context of a natural water course, a property owner is generally not liable in nuisance for water naturally flowing from their property. In *Jorgensen*, at para. 85, Justice Norell held:

[85] ...To be liable in nuisance, generally an uphill property owner must take positive steps that cause a change in the direction, volume, or velocity of the natural flow of water that interferes with another party’s property: *Trans Mountain Pipeline Co. v. Nicola Valley Sawmills Ltd.* (1975), 52 D.L.R. (3d) 279 at 299-300 (B.C.S.C.) [*Trans Mountain*]; *Suncourt* at para. 90; *Middelkamp v. McMath*, [1990] B.C.W.L.D. 833 (S.C.) [*Middelkamp*]; and *Kraps v. Paradise Canyon Holdings Ltd.*, 1998 CarswellBC 703, [1998] B.C.J. No. 709 at para. 15 (B.C.S.C.). ...

[102] Although the focus in a claim for nuisance is not on the defendant’s fault, the plaintiff must still prove that the defendant’s conduct caused unreasonable interference with the Plaintiff’s Property. As in claims of negligence, causation is an

essential element that the plaintiff must prove in order to succeed in a nuisance claim. In *Jorgensen*, Norell J., citing *Blatz v. Impact Energy Inc.*, 2009 ABQB 506, at paras. 5-9, aff'd 2011 ABCA 92, held that causation is an element that must be proven for claims in nuisance and negligence. Justice Norell also held that the test for establishing causation in a nuisance claim is the same as the test in negligence.

Dislodged Culvert

[103] The plaintiff claims that the PGT is liable in nuisance because the Culvert became dislodged during the flood event in May 2017. The plaintiff's claim in nuisance cannot succeed on this basis. The Culvert did not become dislodged as a result of any "positive steps" taken by the PGT to cause a change in the direction, volume or velocity of the flow of water on Cherry Creek.

[104] Further, as I have found earlier in these reasons on the question of causation, the plaintiff has failed to prove that the PGT's conduct caused the Culvert on the PGT Property to become dislodged.

Diversion of the Cherry Creek Channel

[105] The plaintiff claims that the PGT is liable in nuisance because after determining that its Culvert had become dislodged and embedded in the creek bed, the PGT failed to take steps to remove the dislodged Culvert. The plaintiff claims that once the Culvert became embedded in the original channel of Cherry Creek, it diverted the flow of water to the west causing an avulsion and the creation of a secondary channel which has unreasonably interfered with the Plaintiff's Property.

[106] There is a difference in the evidence with respect to the effect of the dislodged Culvert in the original Cherry Creek channel. Mr. Stirling says that the dislodged Culvert sits perpendicular to the original flow of Cherry Creek and thereby diverts the flow of Cherry Creek to the west.

[107] On the other hand, Dr. Millar says that no such diversion occurred as a result of the dislodged Culvert. Dr. Millar's view is that the Culvert is parallel to the original flow of water in Cherry Creek and that the water either flows through or around the

Culvert in the original direction. Accordingly, it is Dr. Millar’s opinion that the dislodged Culvert did not play a material role in the development of the secondary channel. Dr. Millar’s opinion is that the secondary channel was the natural result of the Cherry Creek overflowing its banks due to the large flow of water in the creek during the May 2017 flood event.

[108] Dr. Millar saw no evidence of the Culvert diverting any significant flow of water to the west. He also points out that Mr. Costerton does not mention the dislodged Culvert as a cause of any redirection of Cherry Creek.

[109] In resolving the conflict in the evidence on this point, I prefer the evidence of Dr. Millar. Dr. Millar referred to photographs of the dislodged Culvert and explained that the photographs show the Culvert oriented parallel to the flow of water and that the water was flowing through and around the Culvert.

[110] In contrast, the annotated aerial photographs produced by Mr. Stirling contradict his opinion that the dislodged Culvert caused the diversion of Cherry Creek to the west. Figure 3 of Mr. Stirling’s report is an aerial photograph of the subject properties after the May 4, 2017 flood event. Mr. Stirling has annotated Figure 3 to show the path of the secondary channel of Cherry Creek created after the May 2017 flood event (labelled in Figure 3 as the “May 2017 avulsed channel”) and the location of the dislodged Culvert in the pre-flood creek channel. Figure 3 shows that the diversion of Cherry Creek to the secondary channel occurred at a point significantly to the south of the final resting location of the Culvert. The point of diversion is not at the location of the dislodged Culvert.

[111] The separation between the final resting location of the dislodged Culvert and the diversion point in Cherry Creek is not consistent with Mr. Stirling’s opinion. Therefore, I find that the plaintiff has failed to prove that the dislodged Culvert caused the diversion of Cherry Creek.

[112] Accordingly, I find that the plaintiff has failed to establish that any interference with the Plaintiff's Property was caused by a nuisance created by the PGT. Therefore, the plaintiff's nuisance claim is dismissed.

Costs

[113] If the parties cannot agree on the issue of costs, they have leave to make written submissions on costs.

[114] The PGT will file its costs submissions within 21 days of the date of these reasons. The plaintiff will file her response submissions within 21 days from receiving the PGT's submissions. The PGT will have seven days from receiving the plaintiff's cost submissions to file a reply.

"D.K. Hori J."

HORI J.