IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ward v. Cariboo Regional District,* 2021 BCSC 1495

Date: 20210730
Docket: S172428
Registry: Vancouver

Between:

Bawnie Elizabeth Ward and David John Ward

Plaintiffs

And

Cariboo Regional District

Defendant

Before: The Honourable Mr. Justice M. Taylor

Reasons for Judgment

Counsel for the Plaintiffs:	H.L. Jones S.J. Evans
Counsel for the Defendant:	A.H. Howden-Duke J.S. Lauwers
Place and Dates of Trial:	Vancouver, B.C. September 21–25, 28–30, 2020 October 1–2, 5, 8 & 9, 2020 December 7–11, 2020 January 15, 2021
Place and Date of Judgment:	Vancouver, B.C. July 30, 2021

Table of Contents

I. INTRODUCTION

A. Background
1. The 2015 Flood
2. The 2020 Flood
3. The Earlier Floods
II. THE ISSUES
III. WITNESSES
IV. ANALYSIS
A. TRESPASS AND CONTINUING TRESPASS
1. The Law of Trespass
a) Application of the Law of Trespass to the Facts
i. The 2015 Flood
ii. The 2020 Flood
2. The Law of Continuing Trespass
a) Application of the Law of Continuing Trespass to the Facts
i. The 2015 Flood
(1) The Burden of Proof
(2) Inferential vs. Speculative Reasoning
b) The CRD did not Comply with its own Internal Policy on Sewage Removal
i. The CRD's Justification for Taking No Action
ii. The Sunlight Decontamination Theory
iii. MOE and MOA Protocols
iv. Soil Testing
v. Conclusion on CRD Inaction
c) The Expert Evidence on Sewage Contaminants
d) The Exceedances in the Brown Report
e) The Evidence concerning the Detrimental Changes to the Property and Animals
i. Debris on the Property
ii. Persisting Smell of Sewage
iii. Change in Vegetation
iv. Effect on the Animals
v. Sinkholes and Bubbling over the Sewer Line
f) Conclusion on Detrimental Changes to Property and Animals
g) The 2020 Flood

B. NUISANCE AND CONTINUING NUISANCE
1. Law of Nuisance
a) Application of Law of Nuisance and Continuing Nuisance to Facts
i. The 2015 Flood
ii. The 2020 Flood
C. NEGLIGENCE
1. Duty of Care
2. Standard of Care
a) Application to the Facts
3. The 2015 Flood
4. The 2020 Flood
a) Failure to Maintain and Repair the Known Manhole
b) Failure to Repair or Replace the Backflow Preventer
c) Failure to Inspect and Maintain the Unknown Manhole
d) Failure to Investigate the Bubbling and the Sinkholes
e) The Lift Station Ditch
5. Policy Justifications
D. CONTRIBUTORY NEGLIGENCE
1. The Law of Contributory Negligence
a) Application of the Law to the Facts
i. The Backflow Preventer
ii. Failure to Take Steps to Mitigate
(1) The Tractor
(2) The Sandbags
(3) Moving Soil or Diverting the Water
2. Conclusion on Contributory Negligence
E. LIABILITY UNDER *ENVIRONMENTAL MANAGEMENT ACT*
1. Analysis
F. REMEDIES
1. Injunctive Relief
a) Legal Principles
b) Application of Legal Principles
2. Non-Pecuniary Damages
3. Diminution in Value of the Property
4. Aggravated Damages

5. Punitive Damages
6. Special Damages
G. *LOCAL GOVERNMENT ACT*
V. ORDER

I. INTRODUCTION

[1] On two separate occasions in 2015 and 2020, a sewer line operated by the defendant, the Cariboo Regional District ("CRD"), backed up and overflowed resulting in a flooding of raw sewage onto land and a family home owned by the plaintiffs, Bawnie and David Ward (the "Wards"). The volume of the sewage that flooded the Wards' property in 2015 was estimated by the CRD to be 49,000 gallons; the volume of sewage in 2020 was less than in 2015, but was nonetheless substantial.

[2] This case raises the question of whether and to what extent the CRD is liable for either or both of these floods and, if so, what remedies are appropriate under the circumstances.

A. Background

[3] The Wards, who are married, own a farm property in the Wildwood area of Williams Lake, which they purchased in fee simple in 2002 (the "Property"). The Property is legally described as follows:

> Parcel Identifier: 015-455-025
> Legal Description: BLOCK A OF DISTRICT LOT 9834 CARIBOO DISTRICT EXCEPT PLANS H407 AND 20762

[4] Ms. Ward is 48 years old. Until 2012, she worked for about ten years in emergency management with the CRD, including as a volunteer firefighter and the first female Fire Chief for the Wildwood Volunteer Fire Department (the "Fire Department").

[5] Ms. Ward testified that, in her capacity as Fire Chief, she attended a traumatic emergency highway collision call in 2012, where five people had died, including three children. Ms. Ward assisted the coroner in cutting open the

vehicles and removing bodies. Ms. Ward testified that, immediately after that event, she left employment with the Fire Department as a result of developing very serious post-traumatic stress disorder ("PTSD"), from which she still suffers. Ms. Ward has not worked since 2012 and is currently on a disability pension. Shortly after the accident, Mr. Ward sent Ms. Ward away from Williams Lake for a period in an attempt to help her recover emotionally.

[6] Mr. Ward is 50 years old and is a truck driver in the logging industry. Mr. Ward testified that he has operated his own company, Justified Contracting Ltd., since 2014 and engages in both long and short haul trucking. Mr. Ward operates his business from home and parks his vehicles on the Property. Mr. Ward has also volunteered with the Fire Department in a variety of capacities, including as a Fire Captain.

[7] The Wards have three children, two of whom are adopted, and have raised their children in a house located on the Property (the "Home"). Ms. Ward also testified that the Wards have cared for foster kids, nieces, nephews and others in the Home over the years. In total, she estimated in her testimony that fifteen kids have lived in the Home over the years.

[8] The Property also includes a pasture about 4.5 acres in size (the "Pasture"), two ponds (the "Ponds") and a well from which Wards obtain their drinking water (the "Well"). The Home and the Well are located at the south end of the Property and the Pasture and Ponds are located on the middle and northern portions of the Property.

[9] Over the years leading up to 2015, the Wards raised animals on the Property, including horses, goats, chickens and miniature cows, that have used the Pasture for grazing. Prior to 2015 the Ponds, which were both constructed by the Wards, were used as a water source by the animals.

[10] The CRD is a regional district duly incorporated pursuant to the *Local Government Act*, RSBC 2015, c. 1. The CRD comprises four incorporated municipalities, including the City of Williams Lake.

[11] Services provided by the CRD include the operation and maintenance of the Wildwood Sewer System, which services 192 homes in the Williams Lake

area, including the Property (the “Sewer System”). The Sewer System is approximately 6 kilometres in length with 39 manholes and two lift stations. The Property is at the Sewer System’s lowest point.

[12] The Sewer System is a sanitary sewer system which collects principally raw sewage; it is not a combined system which would typically combine storm or drain water with sewage. The Sewer System is a gravity system, whereby all sewage flows to a lift station, which then pumps the sewage into sewage lagoons. The sewage is not treated until it reaches the lagoons.

[13] The CRD has an easement over the southern portion of the Property where the Sewer System extends underground, which is down the west side of the Wards’ driveway and then turns just north of the Home at a 90-degree angle toward the Home (where the Sewer System extends under the Property I will refer to it as the “Sewer Line”). There are two manholes owned by the CRD and connected to the Sewer Line that are located on the Property. The first (the “Known Manhole”) is above ground and located at the point of the 90-degree turn in the Sewer Line toward the Home along the Wards’ driveway. The second, which had been buried underground since at least 1999 and was not discovered by the CRD until midway through this trial (the “Unknown Manhole”), is located further south along the Wards’ driveway near the entrance to the Property, and is also connected to the Sewer Line.

[14] In 2014, the CRD completed construction of a new lift station (the “Lift Station”), adjacent to the Property. The original Lift Station had been built in 1979. The new Lift Station has a backup diesel pump, which was added for the dual purpose of increasing the capacity of the Lift Station generally and also ensuring that there would be a pump running in the event of a power outage.

[15] The CRD did not purchase the land needed for the new Lift Station. Instead the CRD asked the Wards to donate the land and provide a right-of-way over the Property, to which the Wards agreed. The Wards testified that CRD officials told them that, in addition to improving the CRD’s operation and maintenance of the Sewer System, the new Lift Station would ensure that they would no longer have to worry about flooding problems (which, as I will describe below, had occurred in the past). The Wards testified that they agreed to donate the land based upon that assurance.

1. The 2015 Flood

[16] On March 14, 2015, there was a windstorm in the local area that resulted in a power outage, leaving the Lift Station without power and non-operational for several hours. At that time, the backup diesel pump in the Lift Station was offline and out of service as a result of a coupling which had broken a few weeks before and had not been replaced.

[17] At that time, the Sewer System was experiencing high flows due to the spring melt. As a result of the Lift Station ceasing to operate, the Sewer Line backed up and effluent flowed out of the Known Manhole, resulting in the discharge of what the CRD admitted at trial was approximately 49,000 gallons of raw sewage onto the Property (the "2015 Flood"). The Wards testified that they had conversations with local Williams Lake officials at the time who estimated that the amount could have been as high as 80,000 gallons, but these individuals were not called as witnesses at trial and so that higher number was not proved in evidence. Regardless of the specific volume, it is common ground that the sewage discharge was substantial and travelled into the basement of the Home and also over a large portion of the Pasture.

[18] In his testimony, Mr. Ward stated that he first observed sewage coming out of the Known Manhole around 3 p.m. on March 14, 2015. He immediately called Ms. Ward, who was away from the Property, and she called the CRD, and then returned to the Property. Mr. Ward testified that, after the flooding commenced, there was brown sludgy water going everywhere, including into their basement. Mr. Ward drove to town to purchase pumps to pump the sewage out of their basement. By the time he returned, he testified that the sewage was six or seven inches deep in their basement. Mr. Ward testified that he remembered the smell and the sludge in their basement and described it as being like "ooze". He started pumping from the basement through a hose that ran out through the front door of the Home, with the effluent spilling into their front yard.

[19] Upon returning to the Property, Ms. Ward testified that she recalled brown sludgy water, the Known Manhole being tilted to its side, a "whoosh" sound, with "stuff going and spreading everywhere", into the Pasture and the yard. Ms. Ward testified that she recalled looking into a puddle and seeing "bubbles, crud, stuff

floating”. She recalled Mr. Ward calling out from the basement: “it’s full of [feces]”. Ms. Ward testified that the smell was “nasty”.

[20] The CRD sent vacuum trucks to the Lift Station between 5:00 and 5:30 p.m. on the same day to commence pumping from the Sewer Line and hauling. The Wards testified that, at approximately 6:30 p.m., the sewage had stopped flowing into the basement in the Home as long as the vacuum trucks were pumping. However, when a truck was full and had to stop pumping in order to swap with an empty truck, the flow of sewage resumed. The vacuum trucks continued to pump sewage from the Sewer Line until approximately 1:40 a.m. when the Lift Station went back online and the sewage flow stopped.

[21] Ms. Ward testified that the next day the basement was wet, slimy, stinky, and there were brown sludge lines where the water line had risen and then receded. Mr. Ward testified that the sludge in the basement would make you slip when you walked in it. Ms. Ward testified that there was water and muck in the whole Pasture area, which was “soaked”, including where the animals were. Mr. Ward testified that the Property was “drowned”. Ms. Ward observed feces, toilet paper everywhere, chunks and lids and recalled that there was a “stench”. She testified that she was “devastated” and she cried.

[22] Rowena Bastien, a close friend and former supervisor of Ms. Ward at the Fire Department, also testified. While working at the Fire Department, Ms. Ward reported to Ms. Bastien, who was the Protective Services Manager and had worked at the CRD for 17 years. Ms. Bastien managed 14 fire departments, airport and search and rescue and, as of 2003, was also responsible for emergency planning and fuel management at the CRD. Ms. Bastien in turn reported to Janice Bell, who was also the superior of Mr. Minchau (the former Environmental Services Manager for the CRD whose testimony will be discussed in detail later in these reasons).

[23] Ms. Bastien testified that she visited the Wards’ Property about a week after the 2015 Flood and that it was “gross, muddy, dirty, stinky like a herd of runny cows”. She observed that the horses were no longer in the Pasture and described the smell like a lagoon – a “sick, heavy sewage smell”.

[24] The uncontested evidence at trial was that the CRD had never before or after seen or dealt with a sewage spill as large as the 2015 Flood.

[25] As a result of the 2015 Flood, the Wards had to fully restore their basement, which was not completed until December, 2015. The Wards' furniture and other possessions located in the basement prior to the 2015 Flood were destroyed.

[26] The Well, where the Wards obtain their drinking water, was contaminated until April 23, 2015. Prior to the 2015 Flood, the Wards had never had any problems with their Well, which had a new pump installed by professionals in 2009.

[27] Following the contamination of the Well, the CRD provided the Wards with bottled water to drink until the Well was safe. The Wards could not shower in the Home for about a month after the 2015 Flood and instead attended a local campground to bathe. The CRD paid for the Wards to use the campground facilities. The Well had to be "shocked" twice with chlorine by the CRD before the British Columbia Interior Health Authority approved the Wards' resumption of its use.

[28] In an Amended Response to Amended Notice of Civil Claim dated September 16, 2020 ("ARANCC"), the CRD admitted liability in negligence, trespass and nuisance for the 2015 Flood. Specifically, the CRD admitted that the 2015 Flood occurred due to the failure of the CRD to restore the backup diesel pump in the Lift Station. The CRD also admitted liability for a continuing nuisance and trespass but, with respect to all the heads of damage, only admitted such liability up to August 21, 2015.

[29] The Wards allege that the CRD took no steps to clean up the sewage either before or after August 21, 2015, and that the Property has been contaminated since that time. The Wards further allege that the 2015 Flood had a long-term catastrophic effect on the water and vegetation on the Property, requiring them to restrict their farm animals from grazing in the Pasture and drinking from the Ponds, and ultimately requiring the Wards to dispose of many of the animals due to concerns about their health. The Wards also allege that, as a result of the 2015 Flood, their enjoyment of the Property has been substantially diminished and that both of them, including Ms. Ward in particular, have suffered emotionally.

[30] The CRD took the position at trial that the Wards had failed to prove that any sewage contamination from the 2015 Flood remained on the Property after August 21, 2015, and therefore that the Wards had failed to prove any loss or damage arising after that date.

2. The 2020 Flood

[31] On April 14, 2020, there was another sewage discharge from the Known Manhole, this time resulting from fast-rising levels of the nearby Minton Creek, which overflowed its banks during the spring freshet (the "2020 Flood").

[32] Ms. Ward testified that on that day she saw water from the creek pooling on the driveway and running toward the Known Manhole. At approximately 5:30 p.m. she contacted the CRD and left a message. An hour later she had not received a callback and called again. She also contacted Mr. Ward, who was away from the Property at the time. In the meantime, she testified that the water began rushing underneath the cement surrounding the Known Manhole. The CRD did not attend the Property until approximately 7:15 p.m.

[33] In the interim, the water overwhelmed the Sewer Line and sewage travelled into the basement of the Home and onto a portion of the Property. The Wards testified that there was 6-8 inches of sewage all through the basement. Mr. Ward testified that, when he returned to the Property, he looked for the pumps he had used for the 2015 Flood, but could not initially find them, and spoke to his neighbours about bringing over pumps. Ultimately, he testified that he found the pumps, and that he began pumping sewage out of the basement. While the proportion of water to sewage was greater in 2020 than in 2015, due to the volume of water coming out of Minton Creek, Mr. Ward testified that the effluent in the basement smelled overwhelmingly of sewage.

[34] CRD employees attended on site the same day and began placing sandbags around the Known Manhole around 9 p.m. By that time, vacuum trucks were also on site, although the 2020 Flood was not under control until approximately 11 p.m.

[35] Although the volume of the sewage discharge was not as great as the 2015 Flood, the Wards once again had to completely restore their basement. This restoration was ongoing at the time of commencement of the trial.

[36] Ms. Bastien testified at trial that she visited the Property shortly after the 2020 Flood. She testified that the driveway was flooded, the Known Manhole was underwater and covered in dirt, and the basement was ripped apart again. She stated: “Oh Lord did it stink”. She stated that the smell was still there six months later, including prior to her attendance in Court in September, 2020.

[37] The Wards allege that the 2020 Flood occurred as a result of the failure of the CRD to maintain and operate the Sewer System generally, including the Known Manhole, the Unknown Manhole and a ditch attached to the Lift Station (which I will address later in these reasons) in particular. The CRD denies all liability for the 2020 Flood. In its pleadings, the CRD also alleges that the Known Manhole had been damaged “after being hit with force”, alleging at trial that it was the Wards who had damaged it. The CRD claims that the Wards were also contributorily negligent for failing to take adequate steps to stem the flooding from Minton Creek.

3. The Earlier Floods

[38] The 2015 Flood and the 2020 Flood were the third and fourth sewage floods from the Sewer System onto the Property since the Wards purchased it in 2002. There were also earlier sewage floods in 2006 (the “2006 Flood”) and 2010 (the “2010 Flood”), which similarly flooded the basement of the Home and required the Wards on each occasion to restore their basement.

[39] Ms. Ward testified that the 2006 Flood came out of the Known Manhole. She testified that it was not a big flood and that, in fact, the Wards did not realize at the time that there was sewage in the effluent. Nonetheless, the 2006 Flood did require the Wards to restore their basement.

[40] The 2010 Flood occurred as a result of a power outage during the spring melt when the Lift Station ceased to operate. The Sewer Line filled up and overflowed through the Known Manhole onto the Property, in the non-Pasture area.

[41] With respect to the 2010 Flood, Ms. Ward testified that it came out of the Known Manhole and into the basement. She testified that her son came up from the basement and said there was water in basement. She called the CRD. She recalled a sludge line along the wall, rising and rising. She testified it was like ooze

and the smell was “gross”. Mr. Ward in his testimony described the smell as “indescribable”. Ms. Ward testified that the Wards had to redo basement again that year, and that the CRD took responsibility.

[42] Ms. Ward testified that a CRD employee, Mr. Colin Cons, hydro-vacuumed near the manhole, put lime down, and erected signs up saying keep off. Mr. Minchau admitted in cross-examination that this liming was one of only two liming events ever conducted by the CRD. He also admitted that the CRD had no special training or information about liming and that he did not know at the time that liming on the land when wet would render the liming ineffective (although he accepted this to be true in his testimony). Mr. Cons testified that he did the liming in 2010, and admitted that he did not know that the Property should be dry prior to liming.

[43] Mr. Minchau also admitted at trial that the CRD did not follow the proper protocol in 2010 with respect to reporting the spill to the provincial Ministry of the Environment (“MOE”). As the 2010 spill was over 200 litres, the CRD was required under its permit and the provincial *Spill Reporting Regulation* to report it to the MOE. The CRD did not follow these requirements and failed to report the spill to the MOE, as admitted by Mr. Minchau. The CRD received a Notice of Non-Compliance from the MOE with respect to the 2010 Flood.

[44] The CRD took responsibility with respect to both the 2006 Flood and the 2010 Flood, and paid for the restoration in both cases.

[45] At trial, the Wards did not pursue separate claims for the 2006 Flood and 2010 Flood, and accordingly liability for these earlier events was not an issue before the Court. However, the Wards did argue that these earlier floods are evidence as background of a longstanding and ongoing problem with the CRD’s maintenance and management of the Sewer System, including the Lift Station, the Known Manhole and the Unknown Manhole.

II. THE ISSUES

[46] The issues at trial were as follows:

1. Trespass:
    - Did the 2015 Flood and 2020 Flood each constitute trespasses?;

- Did the 2015 Flood and 2020 Flood each constitute continuing trespasses?;

2. Nuisance:
   - Did the 2015 Flood constitute a nuisance and a continuing nuisance?;
   - Did the 2020 Flood constitute a nuisance and a continuing nuisance?;
3. Negligence:
   - Was the CRD negligent in respect of the 2015 Flood and, if the CRD was negligent, what damage did the negligence cause?;
   - Was the CRD negligent in respect of the 2020 Flood and, if so, what damage did the negligence cause?;
4. Were the Wards contributorily negligent with respect to the 2020 Flood?;
5. Is the CRD liable to the Wards under the *Environmental Management Act*, S.B.C. 2003, c. 53 ("*EMA*"), in respect of either the 2015 Flood or the 2020 Flood?;
6. If the CRD is liable under any of the above heads, what remedies are appropriate? Specifically:
   a. Are the Wards entitled to injunctive relief?;
   b. Are the Wards entitled to general non-pecuniary damages?;
   c. Are the Wards entitled to damages for diminishment of the value of the Property?;
   d. Are the Wards entitled to aggravated damages?;
   e. Are the Wards entitled to punitive damages?;
   f. Are the Wards entitled to special damages?; and
7. Does s. 744 of the *Local Government Act*, R.S.B.C. 2015, c. 1 provide the CRD with legal immunity with respect to the nuisance claim?

III. WITNESSES

[47] The following witnesses testified at trial:

a) Plaintiffs' Witnesses:

- Ms. Bawnie Ward, the co-plaintiff;

- Mr. David Ward, the co-plaintiff;
- Ms. Maria Henri, a next-door neighbour of the Wards;
- Ms. Rowena Bastien, a friend of the Wards and a former co-worker of Ms. Ward;
- Mr. Jason Christensen, a contaminated site assessment and remediation expert; and
- Mr. Reid Umlah, a real estate appraisal expert.

b) Defendant's Witnesses:

- Mr. Mitch Minchau, the former and now retired Environmental Services Manager for the CRD, who managed three departments, including solid waste management, invasive plants, and water and sewer utilities. Mr. Minchau held that position from 2000 to October, 2016;
- Mr. Colin Cons, a CRD Utilities Operator since 1996;
- Mr. Tyler Olsen, a CRD Utilities Operator since November, 2019;
- Mr. Ross Peddie, the CRD's Supervisor of Utilities, who has held that position since 2012, and has been with the CRD since 1992;
- Mr. Kevin Erickson, Chief Financial Officer for the CRD since March, 2019;
- Mr. Rob Brown, a contaminated site assessment and remediation expert; and
- Mr. Adrian Rizzo, a real estate appraisal expert.

[48] I have reviewed and carefully considered all the testimony in this case, including weighing the credibility and reliability of the testimony. I will not summarize all of the testimony in these reasons. Instead, where appropriate in my analysis, I will refer to relevant portions of the testimony and provide my related conclusions on the credibility and reliability of that testimony.

IV. ANALYSIS

A. TRESPASS AND CONTINUING TRESPASS

1. The Law of Trespass

[49] The tort of trespass to land is committed by entry upon, remaining upon, or projecting any object upon land in the possession of the plaintiff without lawful justification.

[50] In *Peter Ballantyne Cree Nation v. Canada (Attorney General)*, 2016 SKCA 124 [*Peter Ballantyne*] at paras. 128–130, the Saskatchewan Court of Appeal explained the rationale for the tort of trespass as follows:

> [128] The mischief that trespass is directed at remedying is "unjustifiable interference with possession": *Didow v Alberta Power Limited*, 1988 ABCA 257, [1988] 5 WWR 606. It is "the act of entering upon land, in the possession of another, or placing or throwing or erecting some material object thereon without the legal right to do so": *Mann v Saulnier* (1959), 1959 CanLII 360 (NB CA), 19 DLR (2d) 130 (NBSC) at 132 [*Mann*]. As can be gleaned from the above, the discharge of some substance such as water or oil onto another's property may similarly interfere with possession: Fleming's *The Law of Torts* at 50; *Esso*.
>
> […]
>
> [130] The modern function of trespass to land was described by Philip H. Osborne in *The Law of Torts*, 4th ed (Toronto: Irwin Law, 2011) at 295-296: […] In modern tort law, trespass to land plays a much more sophisticated role. First, it protects the possessor's interest in freedom of land use. The power to control entry onto land facilitates the use and development in accordance with the possessor's desires and interests. A possessor of land is not required to accommodate others who may have a reasonable need or desire to enter his land. Second, trespass to land plays a conventional compensatory and deterrent role when an intruder damages land or destroys premises. Third, trespass to land plays an important role in the protection of privacy interests. The slightest intrusion into a person's home or apartment gives rise to trespassory remedies. … Finally, trespass to land is an adjunct of the law of real property. It plays a role in the determination of competing land claims and the settlement of boundary disputes. It also provides protection to the possessor against the acquisition of prescriptive easements over his property as a result of twenty years of continuous trespassing in derogation of the possessor's rights. The trespassory conduct may be trivial and harmless, such as a technical but permanent invasion of airspace and the use of land as a pedestrian right of way. Nevertheless, the tort of trespass to land allows the possessor to assert his proprietary rights and prevent the establishment of a prescriptive easement. The capacity of the tort to trespass to complement property law is enhanced by the fact that trespass is actionable without proof of damage and also by the fact that mistake is no defence.
>
> [Footnotes omitted]

[51] In *Peter Ballantyne*, the Court further described the nature of the analysis to be applied in individual cases, at paras. 131–132:

> [131] Osborne in *The Law of Torts* describes the elements of trespass as follows (at 296-298):
>
> (a) the intrusion onto the land must be direct;
>
> (b) the interference with land must be intentional or negligent; and
>
> (c) the defendant's interference with the land must be physical.

> [132] In practice, the requirement that the interference must be intentional or negligent, is limited to intentional interference as negligent interference is normally pleaded in the tort of negligence. It is generally viewed that "intentional" does not mean that the defendant intended to do a wrongful act against the plaintiff, but that the defendant completed a voluntary and affirmative act. Trespass will occur, regardless of consciousness of wrongdoing, if the defendant intends to conduct itself in a certain manner and exercises its volition to do so (*Calgary (City) v Costello*, 1997 ABCA 281 at para 33, 152 DLR (4th) 453 [*Costello*]). In R v East Crest Oil Co. Ltd., 1945 CanLII 24 (SCC), [1945] SCR 191 at 195, Rand J. stated that "[t]respass does not depend upon intention. If I walk upon my neighbour's land, I am a trespasser even though I believe it to be my own". Furthermore, if person A is carried against his will by person B onto the plaintiff's land, A is not liable for trespass as his act was not voluntary (see *Smith v Stone* (1647), 82 ER 533). The requirement that the interference must be physical simply means that the defendant themselves must have physically interfered with the property or caused some physical object to be placed on the property. Objects such as fumes, smoke, noise, or odour do not fall within trespass.

[52] It is an important feature of the law of trespass that it is actionable *per se*, in the sense that it does not require proof of actual damage. As explained in *Peter Ballantyne* at para. 135:

> [135] Next, trespass is actionable *per se* in that it does not require proof of actual damage to render a wrong actionable: *Wordsworth v Harley* (1830), 109 ER 833; *Collins v Pelletier*, 2014 SKCA 130 at para 13, 446 Sask R 303. Trespass is concerned primarily with interference of possessory rights. As a tort of strict liability, it acts as a remedy against dispossession, vindicating a propriety interest rather than a tort obligation: see Fleming at 50; Costello. A classic example of this aspect of trespass is illustrated by the old case of *Basely v Clarkson* (1681), 83 ER 565 [Basely]. In Basely, the defendant was liable in trespass to land for innocently mowing the plaintiff's grass in belief it was his own. However, he intentionally (perhaps should be read as "voluntarily") acted which interfered with the property right of another: see Osborne at 296-97.

[53] Similarly, in *Shaman v. Meek*, 2019 BCSC 9, Mr. Justice Funt observed at para. 32:

> [32]… The tort of trespass is actionable as of right: a defendant's presence (or interference) "is in and of itself damage that gives rise to liability". However, a trespass only continues while the defendant remains present on the plaintiff's land.…

[54] A trespass to land includes trespass beneath or above the surface of the land as ownership or possession of land carries with it an interest below and above the land: Klar, *Remedies in Tort*, ch. 23, para. 14.i.

a) Application of the Law of Trespass to the Facts

i. The 2015 Flood

[55] As described above, the 2015 Flood was caused by a power outage resulting in the Lift Station being without power for several hours. It is common ground between the parties that, at that time, the backup diesel pump at the Lift Station was offline due to a broken coupling.

[56] In its ARANCC, filed September 15, 2020, the CRD admitted that it failed to fix the broken coupling on the diesel pump in a timely manner prior to March 14, 2015, and further admitted that the offline diesel pump caused or contributed to the 2015 Flood. The CRD also pleaded as follows:

> "17. The CRD states that the prolonged power outage, combined with the high level flows resulting from spring melt, combined with the offline diesel pump, created unmanageable conditions that resulted in a sewer backup on the Plaintiff's Property on March 14, 2015."

[57] The CRD also specifically admitted that the 2015 Flood was a continuing trespass (which I will discuss more fully below), at least for the period between March 14, 2015 and August 21, 2015. In Part 3 of the ARANCC, the CRD pleaded as follows:

> "6. The CRD admits that it trespassed on the Property for the period between March 14, 2015 and August 21, 2015, in that it entered upon the lands through the discharge of effluent onto the Property, wrongfully and without legal justification. The CRD specifically denies any claim of ongoing trespass after August 21, 2015."

[58] Accordingly, trespass is admitted in this case with respect to the 2015 Flood, and there is no need to proceed any further with the analysis in that respect. However, the live issue I will address more fully below is whether the 2015 Flood created a continuing trespass beyond August 21, 2015.

ii. The 2020 Flood

[59] The CRD does not admit that the 2020 Flood was a trespass. The Wards allege that it was a trespass.

[60] Accordingly, I must apply each of the three prongs of the legal test for trespass to the facts of the case, namely:

(a) the intrusion onto the land must be direct;
(b) the interference with land must be intentional or negligent; and
(c) the defendant's interference with the land must be physical.

[61] Applying this legal test, I find that there is no question that the test for trespass is met with respect to the first and third prongs, namely that the intrusion/interference on the Property was direct and physical. In support of this conclusion, I note that the 2020 Flood, which resulted from fast-rising levels of the nearby Minton Creek during the spring freshet, travelled out of the Known Manhole after the Sewer Line backed up and into the basement of the Home and a portion of the Property. Although the volume of the sewage discharge was not as great as the 2015 Flood, it nonetheless involved a significant amount of effluent, left a strong smell of sewage in the Home and on the Property, and resulted in the Wards once again having to completely restore their basement.

[62] Thus, the remaining issue on the question of trespass was whether, in accordance with the second prong of the test, the interference with land arising from the 2020 Flood was intentional and/or negligent.

[63] As noted in *Peter Ballantyne*, intentionality under the law of trespass does not require proof of a wrongful act against the plaintiff, but merely that the defendant completed a voluntary and affirmative act. While the overflowing of Minton Creek due to the spring freshet was certainly not an intentional act by the CRD, the construction of the Sewer Line under the Property, the installation of the Known Manhole and Unknown Manhole and the Lift Station, the securing of the relevant easements and rights- of-way, and the continued operation of the Sewer Line under the Property, were most certainly intentional, requiring the CRD to ensure that these installations were properly maintained and not negligently installed or operated, and also that the CRD had taken reasonable precautions to protect the Property from reasonably preventable damage. Accordingly, the ultimate question on trespass was whether the 2020 Flood was attributable to negligence on the part of the CRD.

[64] For the reasons set out in more detail in the negligence analysis below at paras. 220–267, which I will not repeat here, but adopt for the purposes of this trespass analysis, I find that the CRD was negligent with respect to the 2020 Flood for at least five reasons, which are summarized at para. 220 below.

[65] Accordingly, I find that the test for trespass is made out in this case with respect to the 2020 Flood.

2. The Law of Continuing Trespass

[66] In *Roberts v. City of Portage La Prairie*, [1971] S.C.R. 481 at p. 490, the Supreme Court of Canada described the law with respect to continuing trespass as follows:

> I adopt the proposition of law stated in *Salmond on Torts*, 15th ed., at p. 791, as follows:
>
> > When the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus the wrong of false imprisonment continues so long as the plaintiff is kept in confinement; a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land; and a trespass continues so long as the defendant remains present upon the plaintiff's land. In the case of such continuing injury an action may be brought during its continuance, but damages are recoverable only down to the time of their assessment in the action.

[67] In *Peter Ballantyne*, at paras. 136–138, the Court explained that liability for continuing trespass arises where the defendant has placed an object on the plaintiff's land and failed to remove it and where the object accordingly remains on the land:

> [136] An aspect of trespass that is of particular importance in this case is that the tort may "continue" if the interference is not dealt with by the defendant. This characteristic is explained in Fleming's, *The Law of Torts*, 10th ed at 53 (portions of this passage is quoted by the Chambers judge, and in *Johnson* and *Williams*):
>
> > If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains; and on account of it both a subsequent transferee of the land may sue and a purchaser of the offending chattel or structure be liable, because the wrong gives rise to actions de die in diem until the condition is abated … In all these cases, the plaintiff may maintain successive actions, but, in each, damages are assessed only as accrued up to the date of the action. This solution has the advantage to the injured party that the statute of limitations does not run from the initial trespass, but entails the inconvenience of forcing him to institute repeated actions for continuing loss.

[footnotes omitted]

> [137] A similar passage is found in *Salmond on the Law of Torts* (R.F.V. Heuston, 17th ed (London: Sweet & Maxwell, 1977)) at 42:
>
>> That trespass by way of personal entry is a continuing injury, lasting as long as the personal presence of the wrongdoer, and giving rise to actions *de die in diem* so long as it lasts, is sufficiently obvious. It is well settled, however, that the same characteristic belongs in law even to those trespasses which consist in placing things upon the plaintiff's land. Such a trespass continues until it has been abated by the removal of the thing which is thus trespassing; successive actions will lie from day to day until it is so removed; and in each action damages (unless awarded in lieu of an injunction) are assessed only up to the date of the action. …
>
> [footnotes omitted]
>
> [138] When one examines the origins and characteristics of trespass, one ascertains the immediate logic behind the concept of continuing trespass. Trespass is different from most other torts, notably from nuisance, in that the offending action is in and of itself the damage that gives rise to liability. As identified by Fleming at 50, "[i]ntentional invasions are actionable whether resulting in harm or not." A trespass is occurring as long as the possessory rights of the plaintiff are being interfered with. As affirmed in *Portage la Prairie*, "a trespass continues so long as the defendant remains present upon the plaintiff's land".

[68] The failure to remove a trespass is an actionable wrong in and of itself, if the object remains on the land: *K & L Land Partnership v. Canada (Attorney General)*, 2014 BCSC 1701 [*K & L*] at para. 45:

> If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a 'continuing trespass' as long as the object remains.

[69] Similarly, in *Peter Ballantyne*, at para. 122, the Court cited the decision in *Johnson v. British Columbia Hydro and Power Authority* (1981), 123 D.L.R. (3d) 340, with respect to the duty to remove arising from a trespass:

> [122] The decision in *Johnson* provides a similar analysis. This case involved the construction of power lines across the plaintiff's reserve land used for fishing and hunting. Justice Murray held that the erection of the power lines was a continuing trespass which gave rise to a new cause of action each day. In coming to this conclusion he relied on the following passage from *Fleming*:
>
>> If a structure or other object is placed on another's land, not only the initial intrusion but also failure to remove it constitute an actionable wrong. There is a "continuing trespass" as long as the object remains; and on account of it both a subsequent transferee of the land may sue and a purchaser of the offending chattel or structure be liable, because the wrong gives rise to actions *de die in*

> *diem* until the condition is abated. Likewise, if the chattel was initially placed on the land with the possessor's consent, termination of the licence creates a duty to remove it; and it seems that, according to modern authority, a continuing trespass is committed by failure to do so within a reasonable time. In all these cases, the plaintiff may maintain successive actions, but in each damages are assessed only as accrued up to the date of the action. This solution has the advantage to the injured party that the statute of limitations does not run from the initial trespass, but entails the inconvenience of forcing him to institute repeated actions for continuing loss.
>
> The doctrine of "continuing trespass" applies only to omissions to remove something brought on the land and wrongfully left there; not where a defendant fails to restore land to the same condition in which he found it, as where he digs a pit in his neighbour's garden and fails to fill it up. Here the plaintiff can only treat the initial entry as trespass and must content himself with one action in which damages are recoverable for both past and future loss.

[70] The Court in *Peter Ballantyne*, at paras. 140–141, went on to conclude that a flood onto land could constitute a continuing trespass if it resulted in water or any other substance or chattel being left on the land without being removed:

> [140] The Chambers judge reasoned that, because there was no structure erected or chattel left on the reserve, the facts of the immediate case were rather analogous to the pit in the neighbour's garden scenario. With respect, I do not agree with this conclusion. The case of the pit is distinguishable from the case at bar because nothing foreign is left on the land after the initial entry. Here, something (in the form of water) was brought to the Cree Nation's land and left there. If, for example, the dam had caused a single instance of flooding which resulted in the water damaging the land and displacing rocks and trees before rushing away, then the trial judge would be correct in saying that no new harm had since arisen. In that situation the flood would be the reference point for the purpose of limitations. Yet, the question at hand is whether there is continued interference because "the defendant remains present on the plaintiff's land" or, "something…has been brought on land and wrongfully left there."
>
> [141] I believe the Chambers judge placed too much emphasis on the word "chattel" as used by Fleming in *The Law of Torts*. There are many cases in which water was the subject matter that was tortiously interfering with the plaintiff's land in the form of a trespass (see above discussion under "Review of the Case Law" heading). Furthermore, the parties, for the purpose of the summary judgment application, agreed that a trespass had occurred when the land was flooded. If this initial intrusion constitutes a trespass, should not the failure to remove the water constitute a continued trespass? I conclude that it would. The fact that water is not a "chattel" makes no difference. The flooding was a direct, physical, and intended consequence of the construction of the dam. The water was wrongfully left there, and the respondents continue to omit to remove it. The mere existence of the water is the continuing harm that forms the basis of the continuing trespass, and no "fresh" or "new" damage need arise. In this

sense, the injury is still in the course of being committed and is not wholly past.

a) Application of the Law of Continuing Trespass to the Facts

i. The 2015 Flood

[71] As noted in *Peter Ballantyne*, once an object is placed on another's land, not only the initial intrusion, but also the failure to remove it constitutes an actionable wrong, and there is a "continuing trespass" as long as the object remains.

[72] Thus the question in this case is whether the sewage, and any contamination caused by the sewage, remained on the Property after August 21, 2015, when the CRD alleges that the sewage and resulting contamination ceased to remain on the Property. If it did remain on the Property after August 21, 2015, the further question arises whether it remained up to and including the date of trial, or whether it ceased to remain at some earlier date prior to trial.

(1) The Burden of Proof

[73] The burden of proof is on the Wards to establish on the balance of probabilities that the 2015 Flood constituted a continuing trespass. The Supreme Court of Canada has made it clear that the balance of probabilities is the only standard of proof in a civil case: *F.H. v. McDougall*, 2008 SCC 53 [*McDougall*] at para. 49:

> [49] In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[74] At the same time, the Supreme Court of Canada has also recognized that the "but for" test must be applied in a "robust and pragmatic" fashion and that "causation need not be determined with scientific precision": *Athey v. Leonati*, [1996] 3 S.C.R. 458 at para. 16 [*Athey*]; *Ediger v. Johnston*, 2013 SCC 18 [*Ediger*].

[75] In *Athey*, at paras. 16–17, Mr. Justice Major described the correct approach as follows, and cautioned that the causation test is "not to be applied too rigidly":

> In *Snell v. Farrell*, supra, this Court recently confirmed that the plaintiff must prove that the defendant's tortious conduct caused or contributed to the plaintiff's injury. The causation test is not to be applied too rigidly. Causation need not be determined by scientific precision; as Lord Salmon stated in *Alphacell Ltd. v. Woodward*, [1972] 2 All E.R. 475, at p. 490, and as was quoted by Sopinka J. at p. 328, it is "essentially a practical question of fact which can best be answered by ordinary common sense". Although the burden of proof remains with the plaintiff, in some circumstances an inference of causation may be drawn from the evidence without positive scientific proof.
>
> It is not now necessary, nor has it ever been, for the plaintiff to establish that the defendant's negligence was the sole cause of the injury. There will frequently be a myriad of other background events which were necessary preconditions to the injury occurring. To borrow an example from Professor Fleming (*The Law of Torts* (8th ed. 1992) at p. 193), a "fire ignited in a wastepaper basket is . . . caused not only by the dropping of a lighted match, but also by the presence of combustible material and oxygen, a failure of the cleaner to empty the basket and so forth". As long as a defendant is part of the cause of an injury, the defendant is liable, even though his act alone was not enough to create the injury. There is no basis for a reduction of liability because of the existence of other preconditions: defendants remain liable for all injuries caused or contributed to by their negligence.

[76] As will be seen from the analysis that follows, I conclude on the balance of probabilities, and taking into account all the evidence, that the 2015 Flood did constitute a continuing trespass which persisted up until the date of trial, in the sense that it left sewage and contamination on the Property would not have existed and remained, but for the 2015 Flood. The 2020 Flood, in my view, merely compounded the problem by introducing additional sewage and contaminants onto the Property, in addition to those already present after the 2015 Flood.

(2) Inferential vs. Speculative Reasoning

[77] Before I proceed to elaborate upon my conclusions with respect to continuing trespass, I must address a preliminary argument raised by the CRD with respect to the type of inferential reasoning that is permitted by a fact-finder in these circumstances.

[78] In its argument, the CRD cautions that "it may be tempting" for the Court to draw an inference that, since sewage was deposited onto the Property in 2015 and was not removed, the Property remains contaminated by the presence of sewage. The CRD cautions that there is no reason for the Court to draw such an inference based solely upon the fact of non-removal, as such a conclusion would

constitute impermissible speculation as opposed to permissible inferential reasoning.

[79] The CRD further argues that while it is within the Court's fact-finding role to draw inferences from the evidence presented, if inferences are to be drawn they must be drawn on the basis of facts established in the evidence. Otherwise, the CRD argues, such inferences are purely speculative. In this respect, the CRD relies upon the decision of the British Columbia Court of Appeal in *Fuller v. Harper*, 2010 BCCA 421 at para. 38, for the principle that a distinction must be drawn between inference and speculation:

> [38] If there are no positive proven facts from which an inference can be drawn, then a conclusion based on an inference that lacks an evidentiary basis is speculative. Speaking for the Court in *Hall v. Cooper Industries Inc*., 2005 BCCA 290, 40 B.C.L.R. (4th) 257, leave to appeal to SCC refused, [2005] S.C.C.A. No. 351, Mr. Justice Thackray observed:
>
>> [47] ... inferences must be drawn from "accepted facts" and "must be reasonably supported by the findings of fact of the trial judge." If a trial judge errs in the finding of facts upon which the inference is drawn, then the "inference-drawing process" is in error. (See *Housen v. Nikolaisen*).

[80] Similarly, the CRD relies upon the decision of the Court of Appeal in *District of West Vancouver (Corporation of) v. Liu*, 2016 BCCA 96, where the Court described the difference between inference and speculation as follows:

> [57] The difference between inference and speculation was explained by Lord Wright in *Caswell v. Powell Duffryn Associated Collieries Ltd*., [1940] A.C. 152 at 169-170 (H.L.):
>
>> …Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.
>
> [58] A similar point was made in *R. v. Morrissey* (1995), 1995 CanLII 3498 (ON CA), 97 C.C.C. (3d) 193 at 209 (Ont. C.A.): "An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation" (see also *R. v. Dadshani*, [2006] O.J. No. 1857 (Ont. S.C.J.)).

[81] I fully agree with the CRD's statement of the law that a fact-finder's conclusions must be based upon inferences from positive, proved facts and not mere speculation or conjecture. However, in this case, I emphasize that my conclusions on continuing trespass are not based upon speculation or conjecture, but rather upon an array of evidence adduced at trial, which includes (but is certainly not limited to) the fact that the CRD never cleaned up the sewage in 2015. Specifically, in addition to the fact that the CRD took no steps to remove the sewage in 2015, I have considered and weighed the following additional evidence in reaching my conclusions on continuing trespass:

1. There was clear evidence that the CRD's decision not to clean up the Property was not compliant with either its own policies or provincial policies or recommendations, which are intended to protect against the risk of ongoing contamination of land;

2. The expert evidence at trial was that sewage contains not only liquids, but many solids, plastics, metals and other contaminants which are recalcitrant and do not naturally disappear without human intervention;

3. The expert called by the CRD, Mr. Brown, found that there were metals on the Property in 2018 in volumes that exceeded the standard for contamination under the *EMA*; and

4. There was testimonial evidence from the Wards and other witnesses concerning ongoing negative effects to the Property and the animals on the Property after 2015, which provided additional circumstantial support for the conclusion that a continuing trespass was occurring.

[82] A recurring theme in the CRD's argument at trial was that if a particular fact or piece of evidence was not proven individually on a balance of probabilities, then it was not a fact that could be taken into account by the trier of fact at all. In essence the CRD took a "divide and conquer" approach to the evidence in its argument, subjecting each piece to the civil standard and then arguing that a failure to meet that standard rendered that piece of evidence essentially inadmissible. In my view, the CRD's argument is not based upon a correct statement of the law for at least two reasons: first, it ignores the fact that the trial judge must apply the balance of probabilities standard to the evidence as a whole

and not each individual piece of evidence and, second, it ignores the crucial role played by circumstantial evidence in the fact-finding process.

[83] With respect to the first reason why the CRD's position is incorrect, I note that the courts have been clear that the evidence in a particular case must be considered as a whole, and that is not appropriate for a trial judge to "parse" individual items of evidence on their own: *Insurance Corporation of British Columbia v. Mansur*, 2019 BCSC 2261 at para. 17, citing the decision of the Supreme Court of Canada in *McDougall*:

> [17] Lastly, I would be careful to assess the whole of the evidence and not parse individual items of evidence on their own. As stated in *F.H. v. McDougall,* 2008 SCC 53 [*McDougall*] at para. 58, a trial judge should not consider the plaintiff's evidence in isolation but must look at the totality of the evidence to assess the impact of the inconsistencies in that evidence on questions of credibility and reliability pertaining to the core issue in the case. Thus, individual items of evidence that seemingly have little probative value when considered separately may make for a more compelling case when considered cumulatively.

[84] As the fact-finder, I must of course consider each piece of evidence individually to consider whether I accept it as a proven fact, but the relevance and weight to be attributed to that piece of evidence cannot be determined in isolation from the totality of the other evidence. Rather, I must consider each piece of evidence in light of the evidence as a whole, by considering any inherent probabilities or improbabilities, addressing any consistencies or inconsistencies, and ultimately determining whether the evidence adduced as a whole is clear, convincing and cogent: *McDougall* at paras. 40–49. This analysis does not imply or require that each individual piece of evidence must be proved on a balance of probabilities, considered solely in isolation.

[85] With respect to the second of these reasons, the CRD's argument is flawed to the extent that it ignores completely the important role to be played by circumstantial evidence in the fact-finding process. In *Fontaine v. British Columbia (Official Administrator)* (1997), 1998 CanLII 814 at para. 27, 46 B.C.L.R. (3d) 1 at p. 13 (SCC) [*Fontaine*], where the Supreme Court of Canada abolished the maxim of *res ipsa loquitur* which applied to negligence actions, the Court said the following:

> It would appear that the law would be better served if the maxim was treated as expired and no longer used as a separate component in negligence actions. After all, it was nothing more than an attempt to deal

> with circumstantial evidence. That [circumstantial] evidence is more sensibly dealt with by the trier of fact, who should weigh the circumstantial evidence with the direct evidence, if any, to determine whether the Plaintiff established on a balance of probabilities a *prima facie* case of negligence against the Defendant. Once the Plaintiff has done so, the Defendant must present evidence negating that of the Plaintiff or necessarily the Plaintiff will succeed.

[86] In *Fontaine,* the Court made it clear that the onus on the plaintiff to prove negligence may be satisfied by circumstantial evidence that allows an inference of negligence to be made, unless the defendant negates the inference with an explanation that is at least as consistent with no negligence as with negligence: *Siever v. Interior Health Authority*, 2021 BCSC 880 at para. 107. The use of circumstantial evidence to meet the onus of proof has also been recognized in the trespass and nuisance context: *Bedell v. Enbridge Pipelines Inc.*, 2018 ABPC 73.

[87] Similarly, in *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 [*Fraser Health*], the Supreme Court of Canada found that causation may be proved by circumstantial evidence, even in the absence of expert evidence and proven facts. In this case, the workers were technicians at a hospital laboratory and were diagnosed with breast cancer. Each of them applied for compensation under the *Workers Compensation Act* on the basis that the cancer was an occupational disease. That legislation provides that where a worker is disabled from an occupational disease that is due to the nature of his or her employment, compensation is payable as if the disease were a personal injury arising out of and in the course of that employment. The medical experts who provided evidence concluded that there was a lack of a sufficient scientific basis to causally link the incidence of breast cancer to the workers' employment in the laboratory. The Supreme Court of Canada, at para. 38, concluded that causation need not be proven by expert evidence, nor even proven facts, but may be proven by circumstantial evidence alone:

> [38] The presence or absence of opinion evidence from an expert positing (or refuting) a causal link is not, therefore, determinative of causation (e.g. *Snell*, at pp. 330 and 335). It is open to a trier of fact to consider, as this Tribunal considered, other evidence in determining whether it supported an inference that the workers' breast cancers were caused by their employment. This goes to the chambers judge's reliance upon the Court of Appeal's decisions in *Sam* and *Moore* and to Goepel J.A.'s statement that there must be "positive evidence" linking their breast cancers to workplace conditions. Howsoever "positive evidence" was intended to be understood in those decisions, it should not obscure the fact

> that causation can be inferred — even in the face of inconclusive or contrary expert evidence — from other evidence, including merely circumstantial evidence. This does not mean that evidence of relevant historical exposures followed by a statistically significant cluster of cases will, on its own, always suffice to support a finding that a worker's breast cancer was caused by an occupational disease. It does mean, however, that it may suffice. Whether or not it does so depends on how the trier of fact, in the exercise of his or her own judgment, chooses to weigh the evidence. And, I reiterate: Subject to the applicable standard of review, that task of weighing evidence rests with the trier of fact — in this case, with the Tribunal.

[88] The *Fraser Health* decision has largely been followed in British Columbia in other workers' compensation decisions, but has been referred to in other settings. For example, in *Yahey v. British Columbia*, 2021 BCSC 1287 at pars. 678–682, Madam Justice Burke expanded its application to the question of causation in treaty litigation, finding that the presence or absence of evidence from an expert positing or refuting a causal link is not determinative of causation:

> [678] Scientists, however, work to a different standard of proof than the court. The court does not require proof to a standard of scientific precision or certainty (*Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311 [*Snell*]; *Clements v. Clements*, 2012 SCC 32; *Ediger v. Johnston*, 2013 SCC 18 at para. 36 [*Ediger*]). As this is a civil case, neither does the court require proof to the criminal law standard of beyond a reasonable doubt. The civil standard of proof requires the plaintiff to prove causation only on a balance of probabilities.
>
> [679] Causation in the context of a cumulative effects claim is something of a novel or currently developing issue at law, and one which was not fully litigated at trial. It is not necessary for me to fully explore it here. For now, it is enough to note that I am not tasked with determining whether industrial development is the *only* cause of wildlife decline, nor with resolving debates amongst the scientific community. I am tasked only with determining whether, based on the evidence before me and on a balance of probabilities, the Province's actions have caused, contributed to or resulted in an infringement of the Plaintiffs' rights which include the Province's actions in permitting the industrial development.
>
> [680] In the context of treaty litigation and s. 35, it is open to the court to take a robust common sense approach to cause and contribution. In Sopinka J.'s unanimous decision in *Snell v. Farrell*, 1990 CanLII 70 (SCC), [1990] 2 S.C.R. 311, he noted at 327:
>
>> If I were convinced that defendants who have a substantial connection to the injury were escaping liability because plaintiffs cannot prove causation under currently applied principles, I would not hesitate to adopt one of these alternatives.
>
> [681] Given the specialized nature of the subject matter, I am entitled to rely on expert testimony for inferences and opinions on causation: *White Burgess* at para. 15. That said, the presence or absence of evidence from

> an expert positing or refuting a causal link is not determinative of causation: *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Health Authority*, 2016 SCC 25 at para. 38 [*Fraser Health*]. Causation can be inferred – even in the face of inconclusive or contrary expert evidence – from other evidence, including merely circumstantial evidence: *Fraser Health* at para. 38.
>
> [682] Finally, I note from *Ediger* that the trier of fact may, upon weighing the evidence, draw an inference against a defendant who does not introduce sufficient evidence contrary to that which supports the plaintiff's theory of causation (at para. 36). In this case, the Province has significant informational power differential as it holds much of the data distinctly applicable to the issues in this case.

[89] Inferring causation from "merely circumstantial evidence" as set out in *Fraser Health* was similarly cited by Mr. Justice G.P. Weatherill in *Waterway Houseboats Ltd. v. British Columbia*, 2019 BCSC 581 [*Waterway Houseboats*], rev'd in part 2020 BCCA 378 regarding the contributory negligence findings. This was a case of nuisance and negligence claimed against the Province and the District of Sicamous, among others, for damages to the property and a houseboat business of the plaintiffs arising out a flood in 2012. The facts are also somewhat analogous to this case. Justice Weatherill sets out the principles relevant to causation, at paras. 384–386, as follows:

> [384] The "but for" causation analysis is to be applied using a robust, pragmatic and common sense approach. Scientific certainty is not required. Inferences of causation may be drawn on the basis of common sense. Causation can be inferred – even in the face of inconclusive or contrary expert evidence – from other evidence, including merely circumstantial evidence: *Benhaim v. St-Germain*, 2016 SCC 48 at para. 54; *British Columbia (Workers' Compensation Appeal Tribunal) v. Fraser Valley Health Authority,* 2016 SCC 25 at para. 38.
>
> [385] Justice Garson (in dissent in the result) summarized the basic principles in *British Columbia v. Canadian Forest Products Ltd.,* 2018 BCCA 124 at para. 135 as follows:
>
>> [135] To summarize, the following principles emerge from the Supreme Court of Canada's jurisprudence on causation in negligence:
>>
>>> a) The appropriate test for causation is the "but for" test, except in rare circumstances unrelated to this appeal: *Clements*.
>>>
>>> b) Courts must take a common-sense approach to "but for" causation rather than requiring certain or scientific proof of causation: *Snell* at 328; *Clements* at para. 9.
>>>
>>> c) The burden of proof remains with the plaintiff: *Snell* at 330. However, as in other fact-finding contexts, a court may infer "but for" causation based on an

> assessment of all the evidence if the defendant fails to introduce sufficient evidence contrary to the plaintiff's theory of causation: *Clements* at paras. 10-11.
>
> d) In determining whether the defendant has introduced sufficient evidence to contradict the plaintiff's theory of causation, the trier of fact may consider the relative positions of the parties to adduce evidence on causation: *Benhaim* at para. 54. In other words, evidence should be "weighed according to the proof which it was in the power of one side to have produced and in the power of the other to have contradicted": *Blatch v. Archer* (1774), 98 E.R. 969 at 970, cited in *Clements* at para. 11, *Benhaim* at para. 48.
>
> e) Even if the defendant's negligence created causal uncertainty and the plaintiff has adduced some evidence in support of its theory of causation, the trial judge is not obliged to draw an inference of causation against the defendant: *Benhaim* at para. 42.
>
> f) The trial judge's decision to infer or not infer causation is a finding of fact and attracts deference on appeal: *Benhaim* at paras. 36, 42.
>
> [386] With these principles in mind, I will provide my conclusions on causation from inferences I have drawn from the evidence as a whole, including the photographs, videos, and various expert opinions that I have accepted.

[90] Taking the above principles into account, I will now address in the analysis that follows each of the key pieces of evidence relating to continuing trespass.

b) The CRD did not Comply with its own Internal Policy on Sewage Removal

[91] Mr. Minchau admitted under cross-examination that, despite approximately 49,000 gallons of raw sewage being released onto the Property, the CRD took no steps at any time after the 2015 Flood to clean up the sewage despite repeated requests from the Wards that the CRD do so.

[92] If inaction were the optimal method for addressing a sewage spill, one might expect that approach to have been reflected in the CRD's policies. However, to the contrary, I find on all the evidence that the failure of the CRD to take any steps to clean up the sewage was a clear violation of its own internal policy on sewage spills, which was the Wildwood Sewer Treatment Plant Emergency Response Plan ("ERP").

[93] Mr. Minchau, who testified that he was the author of the ERP, admitted in his testimony that the ERP, which was developed in 2014, was the only CRD policy in place at the time of the 2015 Flood that related to sewage floods or overflows. He testified that the ERP was developed for emergencies precisely to ensure that there would be "no second guessing what you should do". Further, it is obvious that the purpose of creating a policy of this nature was to put in place protocols to protect the local environment, humans and animals in the event of a sewage spill. A failure on the part of the CRD to comply with its own policy would inevitably indicate that the CRD had not taken the steps that it itself had previously considered necessary and previously adopted as a baseline standard to ensure such adequate protection.

[94] The ERP had a number of protocols for dealing with sewage spills, which Mr. Minchau admitted in cross-examination were not complied with in the 2015 Flood, including messaging to the public, taping off affected areas and posting of warning signs, even though the evidence was that the CRD did comply with these protocols during the 2010 Flood (indicating that the CRD was aware that the protocols were applicable after a sewage flood). Mr. Minchau also admitted, as confirmed by Mr. Cons and Mr. Peddie, that at no time did the CRD provide training to its employees concerning the ERP or emergency spill response, and the evidence was clear that the CRD employees were woefully underprepared to apply the ERP during the 2015 Flood. However, the most important protocol that Mr. Minchau admitted was not followed was the protocol that "if possible, contain sewage and remove utilizing septic tank hauler equipment".

[95] Despite the clear directive in the ERP, Mr. Minchau admitted that the CRD took no steps to contain the sewage or to remove it utilizing septic tank hauler equipment after the 2015 Flood, nor did it take any steps to remove any debris. This inaction by the CRD was made even more puzzling by the fact that Mr. Minchau admitted on cross-examination that the CRD was specifically aware that vacuum trucks could be used to remove sewage after a spill, and had in fact used such vacuum trucks for previous sewage spills. Further, Mr. Minchau admitted under cross examination that he had advised the Provincial Ministry of Agriculture ("MOA") on March 16, 2015 in writing that the CRD's "normal practice in these cases is to collect the sewage, as much as possible".

[96] Mr. Minchau did testify that he had doubts at the time as to whether septic tank hauler equipment would be effective in removing sewage over the large contaminated area on the Property. However, Mr. Minchau also admitted that he took no steps at all to determine if it was in fact "possible" (which is the word used in the ERP protocol) to contain or remove the sewage utilizing septic tank hauler equipment. For example, he admitted that he did not speak with a septic tank hauler company, including the septic hauler that had been on site on the day of the flood, about the feasibility of removal of sewage or obtain any quotes to ascertain the cost. Indeed, in his own words, he "did not seriously consider" septic tank hauler removal as an option.

[97] There was also evidence at trial of discussions between the Wards and the CRD about liming the Property. The evidence was that the Wards consulted a veterinarian concerning the possible impact of lime on the farm animals and were advised that lime could be detrimental to the health of the animals. For that reason, the Wards declined to have the CRD lime the Property. Further, there was evidence adduced at trial that liming is not effective when soil is wet and, as I will discuss more fully below, there was ample evidence that the Property had not dried at the time that liming was being considered. However, the fact that it may not have been feasible for the CRD to lime the Property was not a sufficient justification on all the evidence for the CRD not to use vacuum trucks to remove the sewage. The evidence was, and Mr. Minchau admitted, that such trucks could have been used even where the soil had not first been limed.

[98] The inaction of the CRD was also certainly not due to a lack of effort on the part of the Wards to get the CRD to act. Mr. Ward testified that, after a meeting with Mr. Minchau on March 17, 2015, he left the meeting believing the CRD was going to take steps to remove the sewage. Both Mr. Ward and Ms. Ward testified that they made repeated requests to the CRD thereafter that the CRD should remove the sewage. Ms. Ward testified that she recalled speaking with Mr. Minchau about "sucking up the sewage" and she also raised the issue in an email on April 9, 2015 in which she asked the CRD to vacuum the sewage off her Property.

[99] Counsel for the Wards by letter dated April 14, 2015 raised the issue again stating that nothing had been done to clean up the Wards' Property including

removing the raw sewage. Neither this request, nor the previous requests by the Wards, led to action by the CRD. Generally, Ms. Ward testified that Mr. Minchau was difficult to reach and would not answer questions. The Wards asked for an action plan and never got one. In sum, Mr. Minchau never told the Wards what he was going to do (or more specifically not do); he simply proceeded without real consultation up until and after August 21, 2015.

[100] Further I find it significant that there was evidence from the expert Mr. Christensen at trial that using septic hauler equipment to remove sewage from the Property after the 2015 Flood would have been possible:

> "It is my opinion that immediately or shortly after the 2015 Flood it would have been possible, and likely recommended as a typical spill response tactic to use a vacuum truck to recover ponding liquid, grit and debris. It is also my opinion that it is fairly common to use a vacuum truck as a spill response method such as this to contain the spill and remove what is recoverable, to reduce the risk to human health and the environmental, including livestock."

[101] The foregoing evidence from Mr. Christensen was not contradicted by the CRD's expert, Mr. Brown.

i. The CRD's Justification for Taking No Action

[102] It was uncontested at trial that the CRD never removed the sewage and any debris from the Property. Thus, the logic of the CRD's position at trial appeared to be that the Court should conclude that the sewage and any associated contaminants disappeared naturally without human intervention, and that CRD action was therefore unnecessary. The CRD took the position at trial that their decision to take no action was justifiable for three reasons:

> (i) the CRD believed that the Property could be decontaminated solely by sunlight exposure;
>
> (ii) the CRD believed that their inaction was consistent with the policies of the British Columbia MOA and MOE, with which the CRD consulted; and
>
> (iii) the CRD did soil testing in 2015 which they alleged confirmed that there was no contamination.

[103] In my view, the evidence at trial did not support the CRD's purported justifications for inaction, or their theory that the sewage and contamination naturally disappeared from the Property. I will address each of the CRD's arguments in turn.

[104] However, before I do so, I wish to address briefly the credibility and reliability of Mr. Minchau's testimony, as he was the central witness for the CRD. I note first that I found Mr. Minchau's evidence to be credible, in the sense that he did appear to be attempting to answer questions honestly and to the best of his ability. Indeed, in this respect, I emphasize that many of his responses to questions on cross-examination were not helpful to the CRD or indeed outright damaging to the CRD's position.

[105] However, I also note that there were serious issues with the reliability of Mr. Minchau's testimony, as his independent recollection of events was very shaky without reference to specific documents. This is perhaps not surprising, given that he has been retired for a number of years. Nonetheless, the net effect of his poor recollection was that, where his testimony came into conflict with the testimony of the Wards on matters where a specific document could not be consulted, I preferred their testimony as more reliable (my full assessment of the reliability and credibility of their testimony is set out further below).

[106] With this in mind, I now proceed to consider each of the CRD's arguments with respect to the alleged disappearance of the sewage from the Property.

ii. The Sunlight Decontamination Theory

[107] At trial, the logic underlying the CRD's argument that the continuing trespass ended on August 21, 2015 was somewhat difficult to discern, particularly given Mr. Minchau's admission in his testimony that the CRD did no soil testing for contaminants on the Property after March 23, 2015 and conducted no inspections (or even visited the Property) after June 17, 2015. Indeed, it was an uncontested fact at trial that, as of August 21, 2015, CRD representatives had not set foot on the Property for over two months. Thus, there was no clear data available to the CRD as of August 21, 2015 that could reasonably have supported the conclusion at that time that the Property was sewage-free.

[108] Nonetheless, it seems that the rationale underlying the CRD's position is derived from a theory considered and apparently applied by Mr. Minchau in March, 2015 that the Wards' Property could be decontaminated solely by exposure to sunlight. It was Mr. Minchau's theory that by keeping animals off the Property for a period of 60 days after the Property had dried, the Property would be rendered free of contamination after the conclusion of that 60-day period without further action being required. Based upon this theory, the CRD put forth the position at trial that the Property had become contaminant-free because 60 days had passed since the last visit to the Property by CRD officials on June 17, 2015.

[109] This theory, which Mr. Minchau adopted on the basis of two academic abstracts that he had located through his own research, and also following email exchanges with the MOA, was not reflected in or supported by CRD policy, nor was it even referenced in the ERP. Further, it was apparent on all the evidence that the email exchanges with the MOA with respect to the potential effectiveness of this option were far from definitive.

[110] There are numerous problems with the CRD's attempt to rely upon Mr. Minchau's sunlight decontamination theory. First, Mr. Minchau admitted under cross-examination that at no time did the MOA advise him that sunlight decontamination would actually remove all the sewage, or that the Property would be free of all contaminants after 60 days. At best, in one email in 2015, a MOA representative advised Mr. Minchau that the theory did have the potential to allow for pathogens to "drop off", without going so far as to say that they would be removed.

[111] Second, Mr. Minchau admitted that the MOA advised that the best opportunity for the theory to work would be to wait until the Property had dried out (at which point the counting of the 60 days could be commenced) and yet Mr. Minchau never confirmed over the spring and summer of 2015 that the Property did in fact dry out. To the contrary, the evidence at trial was clear that the Property had not dried out by June 17, 2015, nor indeed did it ever dry over the summer. Some of the key evidence in that respect was as follows:

- Mr. Cons, who has been servicing the Lift Station since 1997 and is well acquainted with the Property, testified that the Property was wet a fair bit of the year and "seldom dried out";

- By email dated April 17, 2015, Mr. Minchau himself advised the MOA that the CRD had viewed the Property a few days earlier and that he was “concerned that the property may never adequately dry out” because “it is not a well drained site” and “continues to receive water from freshet conditions and a high ground water table”;

- The evidence of the Wards and Ms. Henri was that the Property was not dry in August, 2015 and in fact that it did not fully dry at any point in 2015;

- Mr. Minchau attended the Property on June 17, 2015 and walked the Property with Mr. Ward. Mr. Ward testified that during the walk on the Property he told Mr. Minchau that the Property was not dry. Mr. Ward testified that there were wet spots all over and that the soil was spongy and moist. Ms. Ward took pictures of the Pasture area two days later and, under cross-examination, Mr. Minchau admitted that those pictures showed wet ground and standing water;

- Mr. Minchau emailed the MOA on June 17, 2015 about his visit to the Property. In that email, Mr. Minchau stated that the soil was “moist with a few spots being spongy” and that there was “standing water” in a few spots. He also observed that “this is low land and prone to moisture”. Mr. Minchau’s observations about moisture were consistent with the testimony of the Wards and also the photographs adduced at trial showing water and wet soil in the Pasture;

- Mr. Minchau testified that he did not return to the Property after June 17, 2015 and took the position that it was “wait and see”. However, despite not returning to the Property, and despite having described the Property as wet, spongy and with standing water, Mr. Minchau wrote to the MOA on August 17, 2015, claiming incorrectly and without any evidentiary basis that his report of June 17, 2015 stated that the Property was mostly dry. Mr. Minchau certainly “waited”, to use his words, but he never did return to the Property to “see” if the soil had actually dried; and

- Further, Mr. Minchau admitted that he did not have any direct communication with the Wards on or around August 17, 2015 to confirm whether the Property had actually dried or otherwise; he simply assumed that it was dry without further investigation.

[112] Third, Mr. Minchau admitted under cross-examination that the MOA advised him that sunlight decontamination was not a complete solution because metals should be addressed separately from the sunlight decontamination and that coliform levels should be checked before the animals were returned to the Property. Despite MOA recommendations, Mr. Minchau admitted that coliform levels were never checked by the CRD thereafter and testing for metals was not undertaken by the CRD until 2018. Mr. Minchau admitted that his approach was to address pathogens only and no other contaminants.

[113] Further, Mr. Minchau testified that he understood the MOA to be advising that 60 days after the site dried it could be considered usable for livestock. However, this was incorrect. In fact, the written correspondence indicates that the MOA had advised only that it “should” be usable for livestock 60 days after it dried, but that “the Property should be checked after 60 days before animals are turned back in” to address concerns about pathogens associated with moisture in the soil. Mr. Minchau admitted that no checking or testing of the Property after 60 days was ever done by the CRD.

[114] Fourth, it appears obvious on its face that sunlight decontamination could only address some of the continuing trespass and not all of it. For example, in addition to the metals and coliform levels identified by the MOA as not being impacted by sunlight decontamination, it is clear as a matter of common sense that sunlight exposure could not have resulted in the removal of many of the solid debris items contained in sewage, including for example, plastics and other items.

[115] Thus, Mr. Minchau’s sunlight decontamination theory was seriously flawed on its face. To make matters worse, the CRD at trial adduced no expert evidence in support of the sunlight decontamination theory, nor did they call any MOA or MOE representatives as witnesses to provide clarifying or supporting testimony. Accordingly, I conclude that there was no compelling evidence adduced at trial that the Property was decontaminated by sunlight by August 21, 2015 or at any other relevant time.

iii. MOE and MOA Protocols

[116] The CRD argues that, in taking no action, it followed the directions and protocols of the MOE and the MOA. In my view, the evidence does not support the CRD's position. To the contrary, the evidence was that the MOE and MOA provided a number of directions that were either imperfectly followed or not followed at all by the CRD. For example:

- The Sewer System is obliged to have permits issued by the MOE and there are inspections. However, under cross examination, Mr. Minchau admitted that MOE permits are only required for the lagoons and that no MOE permits, inspections or oversight occurs for the remainder of the Sewer System, which falls solely under the responsibility of the CRD. In other words, the MOE had no direct oversight of the Sewer Line on and under the Property, either before or after the 2015 Flood;

- The MOE protocol for reporting a spill, as set out in a Notice dated November 30, 2010, was that if a spill was over 200 litres it would have to be reported by the CRD to the MOE. In his testimony, Mr. Minchau explained that the purpose of reporting to the MOE was because the MOE needed to know what the effects were on the environment, the magnitude of the event and what actions would need to be taken, which would depend upon the severity of the spill.

- Mr. Minchau testified that he did in fact report the sewage spill to the MOE and the MOA by telephone a day or so after the 2015 Flood. However, he could not recall if he ever advised the MOE or MOA of the volume of the sewage, the fact that the sewage had travelled onto Pasture land and, most importantly, that the sewage had not been removed. Certainly, there was no evidence adduced at trial that Mr. Minchau did report the volume of the spill to the MOE.

- Further, the evidence at trial was that the CRD used the wrong standard to conduct its testing, despite express advice from the MOE to the contrary. Specifically, Mr. Minchau sent an email to the MOE on March 19, 2015 inquiring about applicable standards and suggesting the British Columbia *Organic Matter Recycling Regulation* ("*OMRR*"). On March

23, 2015, an MOE representative responded by stating that the *OMRR* applied to effluent, but not to raw sewage, and that Mr. Minchau should reach out to "other organizations" for advice on determining applicable standards. However, Mr. Minchau admitted on cross-examination that he contacted no other organizations and obtained no further information. Thus, despite the MOE advising that the *OMRR* did not apply, Mr. Minchau proceeded to use these inapplicable standards in undertaking his testing.

- The MOE further advised Mr. Minchau in writing that, "All I can say is the gross contamination needed to be addressed". The MOE then provided two treatment options for the contaminants: physically remove them or treat them onsite, but either way it had to be safe for direct exposure and potential impacts to drinking water. Mr. Minchau admitted that neither of these options were pursued by the CRD.

- The MOE also suggested treating the areas with lime and then adding a layer of ground cover. Mr. Minchau admitted that this suggestion was never put to the Wards and was never investigated as he had determined, without actually costing the option, that it was too costly.

- In an email dated March 16, 2015, Geneve Jasper of the MOA responded to Mr. Minchau and inquired about the amount of lime that the CRD was thinking of applying and if it was looking to incorporate lime into the soil or vacuum it off. Mr. Minchau responded that the CRD was not looking to incorporate lime into the soil, but that it could vacuum the residue. As discussed above, the CRD never took steps to do any vacuuming. Mr. Minchau admitted that at no time did he subsequently advise the MOA that the CRD had not removed any of the sewage.

- By email dated March 18, 2015, the MOA provided a number of suggestions. The first recommendation was to sample the soil using a contaminated site professional, in accordance with standard recommended by the MOE, prior to applying treatments recommended by the MOE. However, Mr. Minchau admitted that the CRD never used a contaminated site professional to do the testing.

- In his August 17, 2015 email, Mr. Minchau asked the MOA if livestock could return to the Pasture. The CRD did not test or even visit the site at that time, nor did the MOA or MOE. The MOA contacted a local vet who responded by email. The vet did not visit the property, nor was the vet advised about the extent of the sewage spill or the actual onsite soil conditions. Nonetheless, the vet stated that the Property was "as safe as can be at this point". Mr. Minchau admitted on cross-examination that the vet did not state that the Property was safe. The vet did not testify at trial;

- It is apparent from the evidence that the MOA never provided definitive directions to the CRD, not did it ever suggest a complete solution to the problem of sewage contamination. At best, the MOA provided some recommendations or suggestions and, even with respect to these recommendations or suggestions, it was clear on the evidence that they were not completely followed by the CRD.

[117] I conclude that the CRD's inaction was not materially consistent or compliant with policies or recommendations of the MOA and MOE.

iv. Soil Testing

[118] The one and only soil test undertaken by the CRD on the Property was on March 23, 2015, and this was conducted by Mr. Minchau personally. No further soil testing was done by the CRD on the Property until 2018. Nonetheless, the CRD took the position at trial that the test results revealed a sufficiently low level of contamination to justify taking no further action.

[119] In my view, this argument is weak. Under cross-examination, Mr. Minchau admitted that he had limited experience in testing and that all he had ever done was water testing, not soil testing. He admitted that he was not sure what could be tested for in soil.

[120] Mr. Minchau testified that he took samples from three locations and a background sample as well. Mr. Minchau admitted that the soil samples he took were scooped off the surface. The expert called by the CRD, Mr. Brown, testified that it is not proper to scoop a soil sample off the surface of land. Mr. Brown also

testified that a soil sample should be taken from within the soil and the depth of the sample should be recorded, which was also not done by Mr. Minchau.

[121] Mr. Minchau further admitted that he was aware that the background sample should probably be the same type of soil as the Pasture, but that it probably was not the same soil. Mr. Christensen also opined that background samples should be from similar soil (I will address the substance of his report in more detail later in these reasons). Mr. Minchau admitted that the CRD test results were not reviewed by a professional at the time, and that the MOE and MOA never provided any comment on the test results.

[122] Thus, according to Mr. Brown's and Mr. Christensen's evidence, and Mr. Minchau's own admission, the soil samples were done incorrectly. Accordingly, I give these soil samples no weight.

[123] Mr. Minchau also attended at the Property on March 31, 2015 and April 8, 2015 to do puddle testing, although he admitted that he did not accurately chart where the puddle testing was actually done on the Property. Again, as Mr. Minchau had no experience and did not retain an expert to do the puddle testing, the validity of these tests is also highly questionable.

[124] However, despite their clear inadequacy, it was these samples which formed the basis for the CRD's subsequent actions (and, more importantly, inaction). Mr. Minchau testified that he relied upon the background sample results and compared them to the *OMRR* (which as previously discussed, was the wrong standard in any event). Mr. Minchau also provided these test results to the MOA, with the result that the MOA did not have the proper data to provide adequate recommendations.

[125] Mr. Minchau testified on a number of occasions that he was not concerned about following up on the question of whether the MOA should have further soil testing because of the (unfortunately misplaced) confidence he had as a result of his initial flawed test results. The CRD argued at trial that Mr. Minchau's decision to undertake testing was sufficient on its own to meet the standard of care in negligence (which I will discuss more fully below). However I disagree, as that standard of care in my view required Mr. Minchau to ensure at a minimum that the

testing was undertaken by an individual with the requisite testing training and skill, and preferably by a trained professional.

[126] Further, even if the testing in March and April, 2015 had been done correctly, which it was not, it is significant in my view that Mr. Minchau admitted that there was no testing or monitoring of the Property in August, 2015, despite the MOA expressly recommending that testing and checking for moisture and pathogens should be done before animals were allowed onto the Property. Mr. Minchau agreed that the latest test results were from April 8, 2015. Mr. Minchau was unable to provide a compelling rationale as to why no further testing was conducted before the CRD deemed the Property safe as of August, 21, 2015. I conclude that he had no such compelling rationale.

v. Conclusion on CRD Inaction

[127] In my view, it is apparent from all the foregoing that the CRD did not have an adequate justification for taking no action to clean up the sewage and contamination from the 2015 Flood.

[128] To be clear, and to avoid confusion, I am not intending here to shift the burden of proof to the CRD, but merely to address the logic underlying the CRD's argument at trial that the continuing trespass ended on August 21, 2015. Of course, the burden of proof at all times remained on the Wards at trial to adduce positive evidence with respect to the presence of sewage and resulting contamination on the Property after August 21, 2015. Again, to be clear, it is my view that a mere demonstration by the Wards of the CRD's failure to clean the sewage was not sufficient in itself for them to meet their ultimate burden of proof, nor is my determination that the CRD's purported justifications for failing to clean up the sewage were inadequate. It is my view that more and better evidence was required to be adduced by the Wards to meet the burden.

[129] Accordingly, I now proceed to consider the direct and circumstantial positive evidence adduced at trial which the Wards alleged supported their argument that sewage and resulting contamination remained on the Property, namely, the expert evidence and evidence concerning observed impacts on the Property and animals (as more particularly summarized in items 2, 3 and 4 at para. 81 above).

c) The Expert Evidence on Sewage Contaminants

[130] A further problem with the CRD argument that the sewage on the Property disappeared naturally is that there was ample evidence at trial concerning the wide array of elements in sewage, many of which are recalcitrant or non-biodegradable.

[131] Mr. Christensen, an expert qualified in relation to sewage, opined that likely contaminants associated with raw sewage include:

- Pathogens (e-coli, fecal coliform, enterococci);
- Nutrients (ammonia, nitrate, nitrite, total phosphorus);
- Ions (chloride, fluoride and sulphate);
- Metals;
- PAHs (benzo(a)pyrene);
- Phenols;
- Nonylphenols;
- Phthalates; and
- Debris, including plastics and typically measurable concentrations of pharmaceuticals.

[132] Mr. Christensen also made the important point that some of the above items can remain in soil for a long period of time:

> "It is my opinion that parameters such as metals and PAHs tend to be recalcitrant and remain in the soil for a long period of time. Should these parameters be at a concentration greater than BC Contaminated Sites Regulation numerical standards, it is possible that they may pose long term effects to livestock and human health on the Property after August, 2015."

[133] Mr. Christensen also opined that where numerical soil standards are exceeded, "this potentially indicates an unacceptable risk for long-term effect". Mr. Christensen further testified that sampling of E.coli should have occurred until it was confirmed to no longer be present. However, the evidence was that such E.coli sampling was never done by the CRD.

[134] Mr. Minchau, Mr. Cons and Mr. Peddie (all CRD employees) also all admitted under cross examination that sewage may contain a wide variety of items in addition to excrement, including: plastics, toys, hair, gasoline, condoms, feminine hygiene products, detergents, syringes and heavy metals. In addition to Mr. Christensen's expert opinion about the recalcitrance of metals and PAHs, it is

obvious based on common human experience that items such as plastics, toys and syringes do not disappear naturally once left on land – they need to be actively removed.

[135] Of course, as the CRD argues, the fact that such items may theoretically be found in sewage does not prove on its own that such items actually were left on the Property, or remained on the Property, in this case. Thus, the evidence concerning the composition of sewage is certainly insufficient on its own to conclude that sewage remained on the Property, but it is an important piece of circumstantial evidence that must be considered in conjunction with the other evidence adduced at trial, which I will review below.

d) The Exceedances in the Brown Report

[136] Mr. Robert Brown was called as a witness by the CRD and was qualified as an expert in these proceedings. Mr. Brown prepared three reports dated May 15, 2019 (the "First Report"), October 17, 2019 (the "Second Report") and August 7, 2020 (the "Third Report").

[137] With respect to the scope of Mr. Brown's opinion, the Executive Summary of the First Report states that the objective of his investigation was to determine current soil and surface water quality at the Property as of 2018 and to compare the analytical results against the appropriate provincial land use standards. The scope of work included advancing 17 test pits, collecting soil samples from each test pit and collecting surface water samples from two on-site livestock watering ponds. I note that whereas test pits 1-16 involved samples from the Pasture, test pit 17 was a background sample location in a topographically elevated area, upgradient of the sewage release. Test pit 17 was intended to be a background sample.

[138] Mr. Brown found in the First Report that soil and surface water results indicated exceedances in the soil samples of applicable BC Contaminated Sites regulation standards for molybdenum, uranium and chloride (the "Exceedances").

[139] In my view, the finding of the Exceedances in the First Report, three years after the 2015 Flood, is powerful evidentiary support for the conclusion that the continuing trespass was ongoing, and is consistent with Mr. Christensen's opinion about the recalcitrance of metals in soil. Further, it is by no means speculative to

conclude that metals found in the soil of the Property in 2018 continue to persist in 2021. To the contrary, the evidence of Mr. Christensen was that once such exceedances are found, active remediation of the soil is necessary, as the metals do not generally disappear on their own.

[140] However, I hasten to add, there is an additional wrinkle in this case because, in the Second Report and the Third Report, Mr. Brown went on to opine that the Exceedances were not caused by the 2015 Flood, instead attributing them to background local conditions.

[141] For the reasons that follow, I do not accept Mr. Brown's conclusion that the Exceedances were not caused by the 2015 Flood. I start by emphasizing that, during the course of the trial I delivered a ruling where I found certain significant portions of the Second Report and the Third Report to be inadmissible under the analysis set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. I will not repeat that ruling in detail here, except to note two important points about Mr. Brown's conclusions in the Second Report and the Third Report.

[142] First, Mr. Brown's opinion that the Exceedances were not caused by the sewage was, to a significant extent, reliant upon the background sample on test pit 17. In my ruling at trial I found that the analysis Mr. Brown applied with respect to the background sample from test pit 17 was seriously flawed and unreliable for a number of reasons, including in particular a failure to comply with Protocol 4 under the British Columbia *EMA*. The principal concerns I identified with Mr. Brown's background sample analysis in my ruling were as follows:

- Mr. Brown admitted on cross-examination that the background sample taken from test pit 17 was "not ideal" because the soil composition was silty sand and gravel, which was different from the organic soil composition of the other 16 test pits. He also admitted that it was "not a great background sample" and that he made no efforts to do other background sampling despite that fact.

- Under cross examination, Mr. Brown admitted that under s. 64(1)(c) of the *EMA*, the director can set protocols with respect to "specifying requirements for any investigation, analysis and interpretation,

assessment, preparation of a remediation plan or any other activity included in the definition of “remediation” in section 1(1), and that one of these protocols is Protocol 4 dealing with background samples.

- Mr. Brown further admitted that Protocol 4, which is the director’s protocol for background soil concentrations under s. 64 of the *EMA*, was not part of the work plan and that he did not follow it with respect to test pit 17.

- Although the definition of “remediation” in s. 1(1) of the *EMA* (and also in s. 64) expressly includes “preliminary site investigations, detailed site investigations, analysis and interpretation, including tests, sampling, surveys, data evaluation, risk assessment and environmental impact assessment”, and Mr. Brown admitted that the First Report was indeed a preliminary site investigation, Mr. Brown also strangely took the position that his report did not need to comply with Protocol 4 because it did not fall within the definition of “remediation” under the *EMA*, even though that definition specifically references preliminary site investigations and also tests, sampling, data evaluation and environmental impact assessment. Mr. Brown in his testimony did not reference any statutory or regulatory support for his opinion that Protocol 4 was not applicable, despite the clear wording of the statute, nor did he provide a compelling rationale for his position on the applicability of the *EMA*.

- Mr. Brown admitted on cross-examination that his background sample was non-compliant with Protocol 4 in many ways. I am not going to summarize all of them here, but they include for example the following, among others:

  - Failing to select a reference site with similar soil stratigraphy
  - Failing to identify 4 testing locations
  - Failing to take 12 samples instead of 1
  - Failing to sample to sufficient depth

  There is no question based on the evidence that there is a wide gap in rigour of analysis between the methodology applied by Mr. Brown and

that required under Protocol 4. This is not merely a matter of marginal difference in technique; it goes to the heart of the reliability of the results.

- In his Third Report, Mr. Brown opined that it was not necessary to complete a Protocol 4 study, and stated instead that one sample of soil was sufficient in an area of the property known to be unaffected by the sewage release. He stated that this is a “common industry standard approach which is employed during preliminary site investigations for both soil and groundwater”. However, Mr. Brown provided no evidentiary support in his report or his testimony for his claim that this is a “common industry standard approach” even though this approach appears on its face to contradict the wording in the *EMA*. Mr. Brown provided no articles, industry documents or legislative or regulatory materials to support his assertion of a common industry approach; it was simply a bald assertion.

- I note that Mr. Christensen, the expert for the plaintiffs who was also qualified as an expert in these proceedings, specifically identified Mr. Brown’s failure to comply with Protocol 4 as an issue in his report. Mr. Christensen made no reference to the “common industry standard approach” identified by Mr. Brown as an alternative to Protocol 4.

- If the issues I have just identified were the only issues, I would already have had significant concerns with respect to the reliability of Mr. Brown’s opinion concerning background sample methodology. However, this is not the end of the analysis. In fact, the concerns with respect to reliability are made much worse by certain statements made by Mr. Brown in his own reports, which are at best misleading and at worse outright falsehoods.

- I will start with the outright falsehoods:

    - Mr. Brown stated in s. 6.1 of his report that “the soil stratigraphy observed in all seventeen test pits was similar and consisted of organic soil (peat like) with silt to the maximum investigation depth of 0.3 mg”. This was false.

Mr. Brown admitted on cross-examination that this statement was false (he claimed that it was a mistake), as test pit 17 in fact had very different soil stratigraphy from the other 16 samples. Counsel for the defendant argued that there was no prejudice created by this false statement because Table 1 to the First Report described TP17 as having "silty sand and gravel" soil as distinct from the organic soil descriptions for the other test pits.

However, the defendants' argument is not supported by the legal authorities. In this respect, I refer to the statement by Mr. Justice Abrioux (as he then was) in *Maras v. Seemore Entertainment Ltd.*, 2014 BCSC 1109 at para. 29 as follows:

> "To the extent there is information in an appendix that is a fact or assumption upon which an expert relies, then that should be contained in the "facts and assumptions" section of the report itself. Likewise to the extent that an appendix contains an opinion, then that should be set out in the opinion section of the report."

A similar analysis is found in the *Lozinski v. Maple Ridge (District)*, 2015 BCSC 2565 case at para. 7, which makes it clear that any opinions should be found in the body of the report and not the appendices.

The reference in Table 1 of the First Report describing TP17 as having "silty sand and gravel" was not contained in the opinion section of Mr. Brown's report. To the contrary, the opposite statement was contained in the opinion.

As a general matter, I observe that the onus should not be on the finder of fact to dig through the appendices or tables of a report to help clarify or make sense of false or contradictory statements in the body of an expert report, or to correct mistakes made in the body of the report. As mandated by Rule 11-6(1)(f) of the *Supreme Court Civil Rules,* BC Reg 168/2009, it is the role of the expert to provide such clarity.

- A second falsehood is found that s. 3 of the report under the title "regulatory standards". In that section, Mr. Brown states as follows:

> "BC ENV Protocol 4, Regional Background Concentrations for inorganic substances, Cariboo, Version 9 (draft) also applies at the site. The protocol states that any substance that exceeds an applicable numerical soil standard in the CSR but does not exceed corresponding appropriate background soil quality for the substance under Protocol 4, can be provided a release and the soil would not be considered contaminated."

  Similarly, I note that in Appendix B to his report at p. 1, Mr. Brown references s. 64 of the *EMA* and comments that "protocols under section 64 of *EMA* are also legally binding". On page 2 of Appendix B he states as follows:

> "Provision exists in the CSR (section 11(3)) for considering background concentrations for soils. Requirements have been specified in Protocol 4 for using local and background soils concentrations as an alternative to the numerical standards prescribed in the CSR."

  The foregoing statements directly contradict Mr. Brown's stated opinion in his Third Report that Protocol 4 was not applicable in this case and also his testimony to the same effect. Nowhere in these passages is there is a reference to the view that protocol 4 is not applicable in this analysis, nor is there a reference to why not.

  In my view, the net effect of these contradictory statements is to render Mr. Brown's opinion on this applicability of Protocol 4 largely incoherent, as Mr. Brown failed completely to address or explain the internal contradiction at all in the Third Report. Further, these statements are seriously misleading as they imply incorrectly that Protocol 4 was followed with respect to background sample testing, when they were not, lending a false veneer of scientific rigour to the testing methodology.

[143] On the basis of the foregoing, I excluded any conclusions Mr. Brown derived from test pit 17, which in my view undermines the principal rationale for his conclusion that the Exceedances were not caused by the 2015 Flood.

[144] I should note, however, that in addition to his opinion arising from test pit 17, Mr. Brown did provide some separate opinions that were not dependent upon the background sample. For example, he opined that the chloride in the soil could be attributable to road salt. He also opined that uranium is not a contaminant generally associated with sewage, and that it can be naturally occurring in soil. Further, he opined that only 3 test pits exceeded the standard for molybdenum, and that these were closest to the point of discharge, from which he appeared to infer that the worst of the contamination had not travelled far into the Pasture.

[145] I was not persuaded by Mr. Brown's separate opinions. With respect to his opinion on molybdenum, I note that he did not dispute the fact that there was an exceedance, but merely the extent to which it had travelled across the Property. This, of course, does not assist the CRD under the law of trespass, which is actionable *per se* once an object is found to remain on the Property, regardless of the quantity or extent of the trespass. With respect to the first two of the above conclusions I note that they were not based upon test-based data, and amounted to little more than theoretical suppositions or speculation. While under different circumstances these theoretical suppositions might have been entitled to some weight in light of Mr. Brown's expertise, in this case I find that they are entitled to no weight, given the fact that Mr. Brown had, in my view, put himself in the role of an advocate in this case. This is the second concern with Mr. Brown's report that I identified above, which I will now address.

[146] The underlying basis for my concern with Mr. Brown's advocacy arises from the fact that, in his file, there were emails between him and counsel for the CRD, made during the process of preparing his Second and Third Reports, where he stated that he needed to "explain away" certain of the Exceedances and also indicates his concern that results with respect to depth testing were "maybe not what you were looking for". For example, although Mr. Brown communicated with CRD legal counsel that he had concerns about inconsistencies between results from deep and shallow samples that he observed did not support the defendant's position (the lack of molybdenum and uranium in deeper samples could indicate

that these were not naturally occurring), he included none of those concerns in his reports.

[147] In my view, it was clear from these emails and also from the thrust of Mr. Brown's testimony at trial, which indicated confusion about his role (he admitted that he had never testified in Supreme Court before and was unclear as to the nature of his client relationship), that he did not clearly understand his duty to assist the Court and not be an advocate for either party in accordance with Rule 11-2(1) of the *Supreme Court Civil Rules*. Certainly, for example, it was not Mr. Brown's role to provide the defendant's counsel with "what they were looking for" nor was it appropriate for him to "explain away" any evidence unless this was undertaken in accordance with an impartial analysis.

[148] On the basis of all the foregoing, I am not persuaded by Mr. Brown's attempts to "explain away" the Exceedances in the Second and Third Reports. The finding of Exceedances in the First Report therefore stands essentially uncontradicted as compelling evidence of a continuing trespass.

[149] In my view, the evidence of the Exceedances, coupled with the expert evidence from Mr. Christensen about the recalcitrant quality of some components of sewage, is arguably sufficient on its own to conclude (taking into account the large volume of sewage left on the Property and never removed) that there was a continuing trespass that persisted up to the date of the trial.

[150] However, it is unnecessary for me to reach this conclusion based solely on the foregoing evidence, as there was also substantial additional circumstantial evidence adduced at trial concerning sudden, detrimental changes to the Property and the animals after the 2015 Flood, which also supports the same conclusion. I emphasize at the outset that I do not view this circumstantial evidence as separately or independently proving a continuing trespass (since the connection between the detrimental changes and the 2015 Flood was not definitively established by expert evidence at trial), but merely as buttressing my conclusion based upon all the available evidence.

e) The Evidence concerning the Detrimental Changes to the Property and Animals

[151] The Wards testified at length at trial with respect to the many detrimental changes in the Property that took place after the 2015 Flood that, in their direct experience and view, were attributable to the sewage contamination.

[152] Before I proceed to review their evidence, I pause to note that I found their evidence to be honest and credible: *Bradshaw v. Stenner*, 2010 BCSC 1398. I found Ms. Ward's testimony to be consistent with Mr. Ward's testimony, and also consistent with the testimony of their neighbours and friends who testified at trial and the relevant documents. Although both Wards were subjected to rigorous cross-examination, this cross-examination did not reveal any major contradictions or credibility concerns. I also found their narrative concerning the stress, family upheaval and emotional pain caused by the repeated flooding of their Property and Home to be sincere and heartfelt.

[153] That said, I note that there were certain reliability concerns with the testimony of the Wards, which I have taken into account in weighing their evidence. With respect to Ms. Ward, I note that she openly admitted that her PTSD has impaired her memory. This was evident at times during her testimony. However, I also emphasize that Ms. Ward was at all material times conscious of this limitation and, as a result, explained that she had adopted a mitigation strategy since 2012 of taking copious notes of key events, dates and times which she keeps in a notebook. The notebook was adduced as evidence at trial. To the extent that Ms. Ward's testimony was supported by these notes, I found that this buttressed the reliability of her testimony. To the extent that her testimony was not supported by the notes or documents, I gave it correspondingly less weight.

[154] With respect to the reliability of Mr. Ward's testimony, the CRD raises the concern that it was Ms. Ward who was principally responsible for dealing with the CRD relating to the 2015 Flood, and also for managing the farm animals and day-to-day matters on the Property. Thus, to the extent that aspects of Mr. Ward's testimony involved his recollections about what Ms. Ward told him concerning these matters, his testimony was essentially second-hand and derivative of Ms. Ward's testimony. I agree with the CRD's concern in that regard and have taken into account that concern in according less or no weight to Mr. Ward's testimony where it strayed into second-hand information. That said, I also note that Mr. Ward gave ample testimony concerning his personal recollections and

experiences, and this testimony is not in my view subject to the same reliability concerns.

[155] With these credibility and reliability issues in mind, I now proceed to consider their evidence, in addition to the supporting evidence of their neighbours and friends, with respect to the detrimental impacts on the Property and the animals. These facts were as follows:

i. in the immediate aftermath of the 2015 Flood and in the years following, the Wards testified that they saw and found debris on the Property, including plastics;

ii. the Wards testified that in the years following the 2015 Flood, they could smell sewage from time to time on the Property, depending upon the temperature and humidity;

iii. the Wards testified that they witnessed a noticeable negative change in the vegetation on the Property in the immediate aftermath of the 2015 Flood and thereafter;

iv. the Wards testified that they saw an immediate decline in the health of the effect on their animals after the 2015 Flood; and

v. the Wards testified that they witnessed the development of sinkholes and mysterious bubbling in their driveway along the line of the Sewer System, which they had not witnessed before 2015.

[156] While one or two of these changes after 2015 taken alone could be characterized as a coincidence, the totality of these changes in my view paints a powerful circumstantial evidentiary picture about the continuing trespass that persisted between 2015 and 2021. I will now review the evidence about each of these detrimental changes in turn.

i. Debris on the Property

[157] The Wards testified as follows with respect to debris on the Property, including plastics:

- Ms. Ward testified that, on the day of the 2015 Flood, she looked into a puddle and saw bubbles, crud, stuff floating. She testified that, on the Property, she observed toilet paper everywhere, chunks and lids;
- Mr. Ward testified that on the day of the 2015 Flood he observed sludge, towels, tampons and condoms;
- Maria Henri, a neighbour of the Wards who testified at trial, stated that she visited the Property on the day of the 2015 Flood and she could see that the field was full of disgusting sewage everywhere, including toilet paper, raw sewage and "unusual things"; and
- Mr. Ward testified that, just prior to trial, he turned over some dirt in the Pasture and found a half a pill bottle. He testified that there "is still stuff out there".

[158] In light of the uncontested evidence that the CRD never removed any debris, this evidence of plastic debris on the Property takes on significance, since plastics are not biodegradable, and thus would not likely have disappeared naturally.

[159] In the face of this testimony, the CRD argues that the Wards adduced no photographs at trial of debris as evidence. While this is true, I note that this is an argument about quantity and quality of evidence rather than lack of evidence altogether (which would entail the type of speculative reasoning referenced by the CRD, rather than the permissible form of inferential reasoning). While I acknowledge that photographs of debris would have given the evidence of the Wards and Ms. Henri more weight, I found their testimonial evidence to be credible nonetheless and am unwilling to dismiss it entirely due to lack of photographs alone.

[160] The CRD further argues that there is no evidence that the pill bottle found by Mr. Ward in the soil was causally connected to the 2015 Flood, positing that it could have been thrown from the window of a passing vehicle on the road. While this is of course true, it also if accepted puts the Wards in an impossible evidentiary position if followed to its logical conclusion. This is because the evidence was clear that sewage contains ordinary household items whose

presence on the Property could always theoretically be attributable to other sources than sewage. Given this fact, in my view some amount of inferential reasoning is inevitable and reasonable in weighing this evidence.

ii. Persisting Smell of Sewage

[161] There was evidence adduced at trial that the smell of sewage persisted on the Property well after the 2015 Flood:

- Ms. Henri testified that on the day of the 2015 Flood, and for a month afterward, she could smell the smell of sewage on the Wards' Property from her own property. She testified that it smelled like an outhouse on a hot day;

- With respect to the smell, Ms. Ward testified that it has never fully abated. She testified that the smell is weather dependent. If the weather is overcast the smell is worse;

- Ms. Bastien, a close friend and former co-worker with Ms. Ward, also testified that she has visited the Property in the following years and that she could still smell that odour from time to time depending upon the temperature and humidity; and

- Ms. Bastien testified that she visited the Wards' Property around the commencement of the trial in 2020 and testified that "the stink is still there".

[162] I pause to note here that the case law is clear that smell alone cannot on its own ground a trespass claim. In that light, and to be clear, I find this evidence relevant not as a basis for concluding that the smell itself constituted a freestanding or separate trespass, but rather as compelling circumstantial evidence that physical sewage did indeed remain on the Property after 2015 (since the smell of sewage is clearly a telltale sign of the presence of sewage itself). This in my view is not a form of speculative reasoning, as alleged by the CRD, but rather a sound inferential application of the laws of cause and effect, analogous to the conclusion that the sound of a gun shot is circumstantial evidence that a gun has been fired nearby.

iii. Change in Vegetation

[163] The Wards and Ms. Henri testified that they noticed a substantial and immediate change in the vegetation on the Property after the 2015 Flood:

- Ms. Ward testified that, since the 2015 Flood, the Property has never fully dried out and has wet spots;

- Ms. Ward testified that she has also observed a change in vegetation, from dry to wet vegetation. She testified that the cattails on the left side are now gone, and there are now only cattails on the right side. She also testified that the Pasture used to be covered with normal grass, but that swamp grass has grown and extends into the Pasture. She noted that swamp grass is harder for animals to eat because it is prickly and difficult to digest. She testified that thistles have grown, that there are weeds like Indian paintbrush all through the top of the Pasture where they were not there before. She further testified that the willows in the northwest corner have changed – they used to be all over and now there are only two or three, and there are daisies in the top right of the Pasture instead of grass and an abundance of timothy on the left side;

- Ms. Henri, who I found to be a credible witness, also testified that, following the 2015 Flood there was a change of vegetation on the Wards' Property compared to her own property and that there is now "nothing growing there besides willows". For example, in contrast to her adjoining property, she stated after 2015 there was very sparse grass, no wildflowers, no clover, no pasture, like she has on her property. She testified that 2015 was a very good year for grass on her property, but not on the Wards' Property, where the grass was two feet shorter along the fence line; and

- Mr. Henri also testified that the Pasture was "wet all year" after the 2015 Flood. She testified that, compared to prior years, the "whole thing was wet" and not just certain areas.

[164] The Wards adduced no expert evidence concerning the causal link between the 2015 Flood and the change of vegetation on the Property and I cannot therefore definitively conclude that such a causal link existed. However, I note that

the Wards and Ms. Henri are long-time residents of their respective properties and know the land intimately, given in particular its regular use by their animals. While they were not qualified as experts at trial, their lay testimony with respect to observed changes in vegetation certainly carries considerable weight. Thus, seen in the context of the other evidence admitted at trial, the sudden change to the vegetation on the Property (after the Wards had lived on the Property for 13 years without witnessing such changes previously) is strong circumstantial evidence that does reasonably contribute to the inference that the sewage remained on the Property after 2015.

iv. Effect on the Animals

[165] The Wards testified that, after the 2015 Flood, the health of the animals on the Property declined immediately and substantially:

- Mr. Ward testified that, prior to 2015, the animals would primarily eat off the Pasture, with some supplemental hay in the winter;

- Ms. Ward testified that, after the 2015 Flood, the animals were restricted to a small portion of the Property on the high side. The CRD erected fencing to restrict their access to the Pasture. As a result, the animals were no longer able to graze in the Pasture, and she had to supplement their diet by purchasing hay;

- By 2016, Ms. Ward testified that the health of the animals was not good. She testified that they had lost weight, had brown hair when it should be black, and that there were pieces of fur hanging off;

- Although the CRD told the Wards that the animals could go back in the Pasture as of August, 2015, the cows did not do well and aborted all their calves that year;

- Shortly thereafter, despite Ms. Ward’s close relationship with the animals and their therapeutic effect on her PTSD and depression, she testified that she decided to sell the cows because she decided it was “not fair” to them to keep them on the Property, given their failing health. That summer she also got rid of the goats, as their health was failing as well; and

- Ms. Ward testified that, after the 2015 Flood, the horses would no longer drink from the Ponds. Her evidence (confirmed also by Ms. Henri) was that horses will generally refuse to drink from a contaminated water source.

[166] The CRD correctly argues that the Wards adduced no expert evidence that proved definitively the link between the 2015 Flood and the subsequent decline of the animals, and I therefore cannot conclude that such a link was proved in this case. However, I note that Ms. Ward had extensive experience dealing with animals on a day-to-day basis and was in a good position to give lay evidence concerning the changes in their health. I found her testimony credible in this regard and, given her close emotional and therapeutic connection to the animals, find it highly unlikely that she would have gotten rid of the animals without a serious concern about the impacts on their health.

[167] Again, in light of all the other evidence, this circumstantial evidence does in my view reasonably contribute to the inference that the sewage remained on the Property after 2015.

v. Sinkholes and Bubbling over the Sewer Line

[168] The Wards, Ms. Henri and Ms. Bastien all testified as to “bubbling” over the Sewer Line during the 2015 Flood and 2020 Flood and also as to the development of sinkholes in the Wards’ driveway in the proximity of the Sewer Line:

- With respect to the 2015 Flood, Mr. Ward testified that he was outside the carport hooking up a trailer to a pickup and saw puddles with bubbles, looked left and could see the Known Manhole overflowing. Mr. Ward testified that the bubbles were north on the driveway on the left side. He noted that there was still bubbling 2 days later;

- Mr. Ward testified that there was bubbling along the Sewer Line and sinkholes also along the Sewer Line after the 2015 Flood;

- Ms. Henri testified that, at the time of the 2015 Flood she saw bubbling coming up from the ground on the Wards’ Property about ten feet from her property line along the Sewer Line. She saw the same bubbling during the 2020 Flood;

- Ms. Henri further testified that she saw two low spots in the Wards' driveway which were around the Known Manhole and also where she saw the bubbling in 2015 and 2020;

- Mr. Ward testified that there is currently no more bubbling, but there are four to five sinkholes along the Sewer Line, 6 to 8 inches deep, which appeared after the 2015 Flood. He testified that he has made efforts to repair them by putting gravel in the holes, but that they keep sinking; and

- Ms. Bastien, who I found to be a credible witness, testified that the Wards' driveway has "undulations", and that you have to drive no more than 5 km per hour on the driveway as a result.

[169] After the CRD conducted Sewer Line scoping during the course of the trial and found the Unknown Manhole, it was apparent the location of the bubbling was in close proximity to the Unknown Manhole on the Wards' driveway.

[170] The CRD argues that the Wards have adduced no expert evidence to prove that there is a connection between the sinkholes and bubbling and the Sewer System. Again, this is true, but does not eliminate the value of this evidence as circumstantial evidence. Indeed, I find it significant that Mr. Minchau, who certainly has expertise concerning the Sewer System, admitted under cross-examination that water bubbling on top of the line could be a problem, and that sinkholes could also be indicators of a problem with the Sewer System. These admissions support the conclusion that the Wards' concerns have not been mere speculation. Further, Mr. Minchau admitted that the Wards advised him of their concerns about bubbling over the Sewer Line and that he never investigated, despite his admission that it could have been an indication of a problem.

f) Conclusion on Detrimental Changes to Property and Animals

[171] As noted above, the foregoing pieces of evidence as to the detrimental changes to the Property and the animals after 2015 are circumstantial and do not separately prove a continuing trespass. However, considered in conjunction with the fact of the Exceedances and the evidence from Mr. Christensen about the recalcitrant quality of components of sewage, this additional evidence powerfully

reinforces the conclusion that there has indeed been a continuing trespass between 2015 and the date of the trial. In my view, the sheer number of material changes, and the fact that each of these changes were all initiated in 2015, and not before, is difficult to attribute to coincidence and creates a strong inference that they are causally related to the 2015 Flood.

[172] The CRD takes the position that the Wards have failed to prove each of these changes individually with expert evidence, which is true. However, as the Supreme Court of Canada made clear in *Fraser Health*, causation may be proved by circumstantial evidence, even in the absence of expert evidence and proven facts. In this case, in contrast to *Fraser Health*, there actually was expert evidence and facts proven at trial which support the conclusion that there has been a continuing trespass. Moreover, and in any event, I note that the onus is not on the Wards to prove every single piece of evidence on a balance of probabilities, but rather to prove, based on all the evidence taken as a whole, that there has on the balance of probabilities been a continuing trespass following the 2015 Flood. In considering all the above evidence, I find the Wards have met this burden.

g) The 2020 Flood

[173] I found above that the 2020 Flood was a trespass. For the reasons that follow, I also find that it constituted a continuing trespass.

[174] The 2020 Flood occurred only months before the commencement of the trial. As of the date of closing argument, the renovations to the Wards' basement had not been completed, the CRD had taken no material steps to clean up the sewage, and the CRD had not repaired the Unknown Manhole.

[175] After the 2020 Flood, the CRD was also slow to repair the Known Manhole. It took two months to get a repair estimate and remained unrepaired for seven months. During that time, the CRD put up barriers and pylons around the Known Manhole, which interfered with Mr. Ward's ability to drive his trucks along the driveway. Mr. Ward testified this has meant that he has to drive over the grass to access his Home. During that time, the Known Manhole was partially open and emitting sewage odours. Clearly all of the above constituted a continuing trespass.

[176] Mr. Olsen also testified that the repairs to the Known Manhole were not done properly and will have to be redone, which continues the trespass. Further

Mr. Olsen testified that the Unknown Manhole will have to be repaired, but this process has not even commenced as of the conclusion of the trial, which will also continue the trespass.

[177] As with the 2015 Flood, the CRD appears to have again adopted a strategy of inaction with respect to impacts to the Property caused by the 2020 Flood. As a result, I have little difficulty in concluding that the 2020 Flood is a continuing trespass as of the date of trial.

B. NUISANCE AND CONTINUING NUISANCE

[178] The Wards claim in the alternative to their trespass claim that the 2015 Flood and 2020 Flood also constituted a nuisance and continuing nuisance.

1. Law of Nuisance

[179] The tort of 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 [*Antrim*] at para. 18. In *Antrim*, at para. 19, the Supreme Court of Canada explained the two-part test as follows:

> [19] The elements of a claim in private nuisance have often been expressed in terms of a two-part test of this nature: to support a claim in private nuisance the interference with the owner's use or enjoyment of land must be both substantial and unreasonable. A substantial interference with property is one that is non-trivial. Where this threshold is met, the inquiry proceeds to the reasonableness analysis, which is concerned with whether the non-trivial interference was also unreasonable in all of the circumstances. This two-part approach found favour with this Court in its most recent discussion of private nuisance and was adopted by the Court of Appeal in this case, at para. 80: *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, at para. 77; see also *St. Pierre v. Ontario (Minister of Transportation and Communications)*, 1987 CanLII 60 (SCC), [1987] 1 S.C.R. 906, at pp. 914-15, quoting with approval H. Street, *The Law of Torts* (6th ed. 1976), at p. 219; *Susan Heyes Inc. v. Vancouver (City),* 2011 BCCA 77, 329 D.L.R. (4th) 92, at para. 75, leave to appeal refused [2011] 3 S.C.R. xi; *City of Campbellton v. Gray's Velvet Ice Cream Ltd*. (1981), 1981 CanLII 2866 (NB CA), 127 D.L.R. (3d) 436 (N.B.C.A.), at p. 441; *Royal Anne Hotel Co. v. Village of Ashcroft* (1979), 1979 CanLII 2776 (BC CA), 95 D.L.R. (3d) 756 (B.C.C.A.), at p. 760; *Fleming's The Law of Torts* (10th ed. 2011), at s. 21.80; J. Murphy and C. Witting, *Street on Torts* (13th ed. 2012), at p. 443; L. N. Klar, *Tort Law* (5th ed. 2012), at p. 759.

[180] The Supreme Court of Canada described the "substantial interference" test, at para. 22, as follows:

> [22] What does this threshold require? In *St. Lawrence Cement*, the Court noted that the requirement of substantial harm "means that compensation will not be awarded for trivial annoyances": para. 77. In *St. Pierre*, while the Court was careful to say that the categories of nuisance are not closed, it also noted that only interferences that "substantially alte[r] the nature of the claimant's property itself" or interfere "to a significant extent with the actual use being made of the property" are sufficient to ground a claim in nuisance: p. 915 (emphasis added). One can ascertain from these authorities that a substantial injury to the complainant's property interest is one that amounts to more than a slight annoyance or trifling interference. As La Forest J. put it in *Tock v. St. John's Metropolitan Area Board*, 1989 CanLII 15 (SCC), [1989] 2 S.C.R. 1181, actionable nuisances include "only those inconveniences that materially interfere with ordinary comfort as defined according to the standards held by those of plain and sober tastes", and not claims based "on the prompting of excessive 'delicacy and fastidiousness'": p. 1191. Claims that are clearly of this latter nature do not engage the reasonableness analysis.

[181] The Supreme Court of Canada made it clear at para. 23 in *Antrim* that "[n]uisance may take a variety of forms and may include not only actual physical damage to land but also interference with the health, comfort or convenience of the owner or occupier": *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 [*Tock*] at pp. 1190-91.

[182] In *St. Lawrence Cement Inc. v. Barette,* 2008 SCC 64 at para. 77, the Supreme Court of Canada elaborated upon the concept of "unreasonable interference":

> [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).

[183] With respect to the test for unreasonableness in the context of public authorities, the Supreme Court of Canada in *Antrim* similarly stated as follows, at paras. 25–26:

> [25] The main question here is how reasonableness should be assessed when the activity causing the interference is carried out by a public authority for the greater public good. As in other private nuisance cases, the reasonableness of the interference must be assessed in light of all of the relevant circumstances. The focus of that balancing exercise, however, is on whether the interference is such that it would be unreasonable in all of the circumstances to require the claimant to suffer it without compensation.
>
> [26] In the traditional law of private nuisance, the courts assess, in broad terms, whether the interference is unreasonable by balancing the gravity of the harm against the utility of the defendant's conduct in all of the circumstances: see, e.g., A. M. Linden and B. Feldthusen, *Canadian Tort Law* (9th ed. 2011), at p. 580. The Divisional Court and the Court of Appeal identified several factors that have often been referred to in assessing whether a substantial interference is also unreasonable. In relation to the gravity of the harm, the courts have considered factors such as the severity of the interference, the character of the neighbourhood and the sensitivity of the plaintiff: see, e.g., *Tock*, at p. 1191. The frequency and duration of an interference may also be relevant in some cases: *Royal Anne Hotel*, at pp. 760-61. A number of other factors, which I will turn to shortly, are relevant to consideration of the utility of the defendant's conduct. The point for now is that these factors are not a checklist; they are simply "[a]mong the criteria employed by the courts in delimiting the ambit of the tort of nuisance": Tock, at p. 1191; J. P. S. McLaren, "Nuisance in Canada", in A. M. Linden, ed., *Studies In Canadian Tort Law* (1968), 320, at pp. 346-47. Courts and tribunals are not bound to, or limited by, any specific list of factors. Rather, they should consider the substance of the balancing exercise in light of the factors relevant in the particular case.

[184] In *10565 Nfld. Inc. v. Canada (Attorney General)*, 2017 NLTD(G) 84 [*10565 Nfld.*] at para. 354, the Court cited *Klar*, Tort Law, 5th ed. at 769, for the proposition that the overflow of a municipal sewer may constitute a nuisance even though the sewer itself provides a public benefit:

> Contemporary nuisance law increasingly has been used, alongside negligence, as a means of shifting the accident costs of activities from individual victims to those actors who are best equipped to distribute them among the activities' beneficiaries. Due to the common law's narrow interpretation of the principle of *Rylands v. Fletcher* and, in particular, its non-natural use requirement, the common law has found itself devoid of a principle of strict liability applicable to cases of property damage caused by hazardous but, at the same time, ordinary and beneficial uses of land. Not satisfied with resort to the law of negligence, with its requirement of fault for the resolution of these disputes, and interested in promoting the goal of

> loss distribution for the damaging effects of socially beneficial activities, the common law is adopting nuisance law to deal with these cases.

[185] To constitute a continuing nuisance, the harm must be suffered on a continuing basis: *K & L* at para. 49. A nuisance continues as long as it is not "wholly past" and as long as the "state of things causing the nuisance is suffered by the defendant" to remain upon the land:

> "[49] Because of the focus on the harm, a cause of action in nuisance does not arise until damage occurs. To constitute a continuing nuisance, the harm must be suffered on a continuing basis. In *Roberts* at 491, Martland J., for the court, adopted the proposition of law stated in *Salmond on Torts*, 15th ed. at 791:
>
> Where the act of the defendant is a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. An injury is said to be a continuing one so long as it is still in the course of being committed and is not wholly past. Thus … a nuisance continues so long as the state of things causing the nuisance is suffered by the defendant to remain upon his land …"

a) Application of Law of Nuisance and Continuing Nuisance to Facts

i. The 2015 Flood

[186] The CRD admitted liability in nuisance with respect to the 2015 Flood in Part 3 of its ARANCC:

> 8. The CRD admits that it is liable to the Plaintiffs in nuisance in that, between March 14, 2015 and August 21, 2015, the CRD allowed sewage effluent to enter and remain upon the lands, diminishing the Wards' enjoyment, value and beneficial use of the lands between March 14, 2015 and August 21, 2015.
>
> 9. The CRD specifically denies nuisance after August 21, 2015 and denies that there is continuing nuisance after August 20, 2015.

[187] Given the admission of nuisance, the live question to be determined in this case with respect to the 2015 Flood is whether it constituted a continuing nuisance. Based upon the same evidentiary foundation I have reviewed with respect to my continuing trespass analysis, and without repeating that factual analysis here, I find that the 2015 Flood did in fact create a continuing nuisance.

[188] Applying the analysis set out in *Antrim*, I find that the release of 49,000 gallons of raw sewage onto the Property was clearly substantial. I note that the

legal standard is relatively low, namely, whether the interference is not "trivial" or more than a slight annoyance or trifling interference. In this case, the interference persisted beyond 2015 and up to the date of trial and included the following:

- As a direct result of the 2015 Flood, the Wards have not been able to use 4.5 of the 6 acres of their land since 2015. The Wards have not used the Pasture for their horses, cows and goats, although the Pasture was previously the primary source of food for the animals prior to that time. The Wards were forced to put the animals in a small pen beside and behind the house and the CRD put up a fence delineating the affected area from the non-affected area. Ultimately, as described above, Mr. Ward felt compelled to give the cows and goats away due to concerns about their health.
- The Wards were forced to endure a 10-month basement renovation in 2015, which reduced the useable size of their home to about half.
- The 2015 Flood resulted in a terrible smell, which their neighbour Ms. Henri could smell from her property for a month, despite being about 2 acres away. The Wards and Ms. Henri all testified that the sewage smell has persisted from time to time since 2015, depending upon the weather and humidity.
- The Wards and Ms. Henri also testified to the presence of sinkholes along the driveway over the Sewer Line, which have proved to be an inconvenience for Mr. Ward in particular, who operates commercial trucks along that driveway.

[189] Turning to the reasonableness analysis, I note in the first place that this is not a case involving overly sensitive plaintiffs or a mere trifling harm. To the contrary, most reasonable people would consider the frequency, duration and severity of the flooding events that the Wards have had to endure as being pretty close to a worst nightmare for any homeowner: *Tock*, at p. 1191.

[190] At trial the Wards testified as to the cumulative psychological effect of the 2015 Flood, which has been very large. After the 2015 Flood, the Wards' children had to share bedrooms, and Mr. Ward's business, which he operates out of the home, was also impacted. Ms. Ward testified that, due to the family stress, their daughter moved away from the Property.

[191] The 2015 Flood was also particularly hard on Ms. Ward, who suffers from PTSD. The Wards and Ms. Bastien testified as to the importance of the animals to enable Ms. Ward to manage her PTSD. They testified that the overall effect of the disruption of her family life, the smell, the renovation and the loss of her animals put Ms. Ward into a suicidal state. Ms. Ward testified that she was admitted to a 6-week recovery centre in Calgary in the spring of 2016 to treat her suicidal depression.

[192] Further, continuing with the unreasonableness analysis, there was nothing about the character of the neighbourhood in this case that could justify four sewage floods on one property over a period of 15 years, particularly considering that there have only been two other sewage floods in the entire CRD area over the rest of its history (and none involving another home). Instead, by virtue of their position at the end of the Sewer System and in close proximity to the Lift Station and Known Manhole, it appears that the Wards have been forced to bear a disproportionate amount of the risk and accident costs associated with the operation of the entire Sewer System, that otherwise benefits all homeowners in the CRD area.

[193] As noted in *10565 Nfld.*, the purpose of contemporary nuisance law is increasingly seen by courts as a means of shifting the accident costs of activities from individual victims to those actors who are best equipped to distribute them among the activities' beneficiaries, such as the CRD. That rationale clearly applies in this case.

[194] Taking into account all the evidence, it is my view that the Wards have proved that the 2015 Flood constituted a continuing nuisance.

ii. The 2020 Flood

[195] The CRD has not admitted nuisance or continuing nuisance with respect to the 2020 Flood. Accordingly, I must consider whether the 2020 Flood constituted an interference with the Wards' use or enjoyment of land that is both substantial and unreasonable: *Antrim* at para. 18.

[196] In my view it is clear that the *Antrim* test is met with respect to the 2020 Flood. Although the volume of sewage in the 2020 Flood was not as great as in the 2015 Flood, it was nonetheless substantial. The volume of sewage was

sufficient that vacuum trucks were on site for over two hours vacuuming the effluent.

[197] As described earlier in these reasons, the Wards testified that the 2020 Flood left 6-8 inches of sewage all through their basement and the basement smelled overwhelmingly of sewage afterward. Ms. Bastien testified at trial that she visited the Property shortly after the 2020 Sewage Flood, and observed that the driveway was flooded, the Known Manhole was underwater, and the basement was ripped apart again. She stated: “Oh Lord did it stink”. Ms. Henri testified that, after the 2020 Flood, the Property smelled like an “outhouse” again.

[198] In addition to being substantial, the interference from the 2020 Flood was also unreasonable. I have addressed this aspect of the analysis in relation to the 2015 Flood and the same considerations apply with respect to the 2020 Flood. Further, both Wards testified as to the devastating psychological impact of having to endure yet another flood, only a few years after recovering from the 2015 Flood. With respect to the impact of the 2020 Flood on Ms. Ward’s PTSD, Ms. Bastien described that it was as if Ms. Ward was “kicked in the teeth all over again”.

[199] Although only a few months had passed from the 2020 Flood up to the date of trial, it was clear on the evidence that the nuisance has been ongoing. As a result of the 2020 Flood, the Wards once again had to completely restore their basement. This restoration had not still not been completed at the time of commencement of the trial, which goes to the continuing nature of the nuisance.

[200] The evidence was that, after the 2020 Flood, it took the CRD two months to get an estimate for repair of the Known Manhole. The CRD attended on site, without notifying the Wards they were going to attend. An estimate was obtained on June 29, 2020 with a cost of only $2,418. The estimate was that it would take one day to complete, but the work was not completed until the fall of 2020. Mr. Olsen testified that it was his responsibility to retain the contractor to do the repairs. He testified that the only instruction he gave to the contractor was to raise the Known Manhole a further six inches, despite the clear evidence that the Known Manhole was deficiently constructed and inadequately sealed. Mr. Olsen did not give instructions to address these deficiencies.

[201] As admitted in the testimony of Mr. Cons and Mr. Olsen, the Known Manhole remains inadequately repaired. The problems include a lack of grouting to seal the Known Manhole to prevent water from entering and there is a concern with the concrete padding. But none of this additional repair work has even been directed to be performed, let alone actually completed, by the CRD as of the conclusion of the trial.

[202] During the months following the 2020 Flood that the Known Manhole remained unrepaired, the Known Manhole was partially opened and produced a sewage smell. In addition to the sewage smell, the CRD put up barriers and pylons around the Known Manhole, which interfered with Mr. Ward's ability to drive his trucks along the driveway.

[203] Ms. Bastien testified that the sewage smell was still there six months later, including prior to her attendance at trial in September, 2020, which is a strong indication that sewage remains on the Property.

[204] It is clear based on the foregoing that the 2020 Flood constituted a nuisance and an ongoing nuisance.

C. NEGLIGENCE

[205] The Wards allege negligence with respect to both the 2015 Flood and the 2020 Flood.

[206] The CRD admitted liability in negligence with respect to the 2015 Flood in Part 3 of its ARANCC:

> "11. The CRD admits liability in negligence for the March 14, 2015, the particulars of which include:
>
> > (a) The CRD owed the Wards a duty of care;
> >
> > (b) The CRD breached the duty of care owed to the Wards by failing to replace the broken coupling in the diesel pump within a reasonable period of time;
> >
> > (c) As a result [of] the CRD's breach of the duty of care as described in (b), the Wards have suffered loss and damage, as de[s]cribed in paragraphs 6 and 8 above."

[207] Accordingly, the live issue with respect to the 2015 Flood is whether the CRD's negligence caused the continuing presence of sewage on the Property and any resulting damage after August 21, 2015 and up to the date of trial.

[208] The CRD has not admitted negligence with respect to the 2020 Flood. Thus, both the issues of breach of duty of care and of causation must be fully addressed with regard to the 2020 Flood.

1. Duty of Care

[209] In *Carhoun & Sons Enterprises Ltd. v. Canada (Attorney General),* 2015 BCCA 163, the Court of Appeal summarized the *Anns/Cooper* test for determining the existence of a private duty of care in negligence by a public authority:

> [50] The test for determining the existence of a private duty of care owed by a public authority is known as the "Anns/Cooper" test: *Cooper v. Hobart*, 2001 SCC 79. The test requires a court to address the analysis by considering the following series of questions:
>
> > 1) Does a sufficiently analogous precedent exist that definitively found the existence or non-existence of a duty of care in these circumstances;
> >
> > If not;
> >
> > 2) Was the harm suffered by the plaintiff reasonably foreseeable;
> >
> > If yes;
> >
> > 3) Was there a relationship of sufficient proximity between the plaintiff and the defendant such that it would be just to impose a duty of care in these circumstances;
> >
> > If yes, a prima facie duty arises;
> >
> > 4) Are there any residual policy reasons for negating *the prima facie* duty of care established in question/step 3, aside from any policy considerations that arise naturally out of a consideration of proximity.
> >
> > If not, then a novel duty of care is found to exist.
>
> [51] The onus is on the plaintiff to show a *prima facie* duty of care (through answering questions 1–3, above); but the onus is on the defendant to establish any policy reasons for negating the prima facie duty of care: *Childs v. Desormeaux*, 2006 SCC 18 at para. 13…

[210] With respect to the analogous precedent referenced in stage 1 of the *Anns*/*Cooper* test, the courts have recognized on numerous occasions that municipalities may owe a duty of care to residents in respect of the maintenance and operation of municipal sewer systems: *Tock*; *Alberni v. Moyer* (1999), 65 B.C.L.R. (3d) 352 (S.C.); *Guard v. Trochu (Town of),* 2001 ABQB 816; *Moffat v. White Rock (City)*, 1992 CanLII 1718 (B.C.S.C.) ; *Elson v. Gibsons (Town),* [1997] BCJ No. 3185; and *Craxton v. North Vancouver (District)*, 2006 BCPC 212.

[211] The courts have also recognized that municipalities who operate sewer systems have a relationship of proximity with affected homeowners, and a breach of a duty by municipalities may reasonably cause damage to homeowners entitling such homeowners to take action. In *Tock* at para. 10, the Newfoundland Court of Appeal stated as follows:

> … The municipality, needless to say, has a duty of care to members of the community to properly construct and maintain its works and to take all reasonable care to avoid the causing of injury or discomfort to individual occupiers of land, but a breach of that duty of care, or failure to comply with it, which resulted in the creation of a nuisance, would obviously amount to negligence on the municipality's part and allow an action to be taken under that head.

2. Standard of Care

[212] In *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 at para. 28, the Supreme Court of Canada set out the considerations that are applicable with respect to the standard of care:

> [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, 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 injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.

[213] The burden is on the plaintiffs to establish what the standard of care is and whether the conduct of the CRD fell short of that measure: *Pettigrew v. Halifax Regional Water Commission,* 2019 NSSC 362 at para. 26, rev'd on other grounds at 2020 NSCA 82.

[214] In my view, the applicable standard of care in this case is that of a reasonable public authority in the same circumstances as the CRD and being responsible for the operation, maintenance, repair and inspection of a sewer system.

[215] In *Donaldson v. John Doe*, 2009 BCCA 38, the Court of Appeal made it clear that foreseeability with respect to the specific risk of harm is considered in

determining whether there has been a breach of the standard of care by failing to take steps that could have prevented that harm.

a) Application to the Facts

3. The 2015 Flood

[216] Given the CRD's admission of negligence in 2015, the further issue to be determined is whether the CRD's negligence caused the continuing presence of sewage on the Property and any resulting damage after August 21, 2015 and up to the date of trial

[217] In *Clements v. Clements*, 2012 SCC 32 at para. 8 [*Clement*s], the Supreme Court of Canada stated that causation in negligence is assessed using the "but for" test:

> 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.

[218] I reviewed the causation analysis in detail in my trespass discussion and will not repeat it here, except to note that the onus is on the Wards to demonstrate that the negligence was a necessary cause of the alleged damage, although not necessarily the sole cause, and that the "but for" analysis must be applied in a robust and common sense fashion: *Athey*; *Clements* at paras. 8–10; *Ediger*.

[219] As I determined in my trespass analysis, I am satisfied on the balance of probabilities that sewage was deposited during the 2015 Flood and that this sewage and resulting contamination remained on the Property after August 21, 2015 and up to the date of trial. I have previously reviewed extensively the evidence of damage to the Property, the Wards and the animals that resulted from the presence of the sewage on the Property. I will not repeat this evidentiary analysis again here except to note that the initial deposit and subsequent persistence of the sewage on the Property would clearly not have occurred but for, and were substantially connected to, the CRD's admitted negligence. I conclude that the Wards have proved causation of damage arising from the CRD's negligence relating to the 2015 Flood.

4. The 2020 Flood

[220] With respect to the 2020 Flood, the Wards allege that the CRD was negligent for the following reasons:

1. The CRD failed to properly maintain and seal the Known Manhole, which enabled effluent to infiltrate the Known Manhole through the side during the 2020 Flood;

2. The CRD failed to maintain and repair the backflow preventer installed by the CRD in the Home, which was broken and did not function during the 2020 Flood;

3. The CRD failed to identify the presence of the Unknown Manhole on the Property, to remove the soil that covered it, and to properly maintain it;

4. The CRD failed to investigate the cause of the sinkholes and bubbling over the Sewer System on the Wards' driveway, and also failed to take steps to repair these issues; and

5. Ms. Ward testified that there is a drainage ditch attached to the Lift Station, designed for snow melt, which drains directly onto the Property, thereby contributing to the ongoing difficulties the Wards have had in drying out the soil on the Property.

[221] I will address each of the Wards' allegations concerning a failure of the CRD to meet its standard of care in turn.

[222] As a preliminary matter, I start by noting that it was acknowledged at trial by at least three CRD representatives (Mr. Minchau, Mr. Peddie and Mr. Cons) that the Sewer System and the Known Manhole and Unknown Manhole are the property of the CRD and that it is the CRD's responsibility to maintain them.

[223] I also note the admission of Mr. Cons and Mr. Peddie in their testimony that the CRD has no system of regular maintenance or inspection of the manholes or lines in the Sewer System. Instead, maintenance is primarily directed toward the Lift Station and the lagoons.

[224] This lack of maintenance of the Sewer System, which is relevant to the standard of care, can be contrasted with the system of maintenance described by

Mr. Olsen for the Quesnel sewer systems. Mr. Olsen testified that in Quesnel, every year one third of the sewer system, including lines and manholes, are reviewed and maintained so that the whole system is subject to a full maintenance review every three years. No such system exists for the Sewer System, nor was it adequately explained why.

a) Failure to Maintain and Repair the Known Manhole

[225] The evidence is clear that the CRD had been aware for years prior to the 2020 Flood that the Known Manhole was prone to sinking. In fact, the Known Manhole was repaired by the CRD at least three times dating back to the 1990s, with the most recent repair taking place in 2014. Specifically, the evidence at trial with respect to the CRD's knowledge of prior issues with the Known Manhole was as follows:

- Mr. Cons testified that he put a second lid on the Known Manhole in the 1990s;
- Mr. Peddie testified that the Known Manhole had been repaired around the year 2000. The repair had included removing the steel frame, putting spacer rocks on the existing concrete lid and putting another lid on top raising the Known Manhole a further 3 inches for a total of 6 inches; and
- Mr. Minchau admitted in his testimony that there were ongoing concerns at the CRD with the condition of the Known Manhole prior to and after 2015.

[226] The last repair undertaken by the CRD of the Known Manhole was in 2014. On May 2, 2014, Will Bamsey of True Consulting, an engineer retained by the CRD, advised Mr. Minchau that Ms. Ward had identified and showed him a problem with the Known Manhole. Mr. Bamsey advised Mr. Minchau that the "manhole is at a low spot and it appears all the surface runoff and it appears all the surface runoff in the area runs into the manhole due to the failed concrete." Mr. Bamsey wrote again to Mr. Minchau and Mr. Peddie on May 16, 2014 stating that the void around the spacer rocks was letting water in and had to be repaired.

[227] The CRD subsequently retained Mandrax Enterprises Ltd. ("Mandrax") as a subcontractor to repair the Known Manhole in 2014. Mandrax excavated around the Known Manhole, removed broken concrete and re-compacted the soil,

removed the frame and cover and reset to grade using concrete spacer rings, placed concrete around the cast iron frame on top of the existing lid and graded the existing ground around the Known Manhole.

[228] In testimony which I consider to be critical on this issue, Mr. Olsen testified under cross-examination that, upon review of the 2014 repair sketch used by Mandrax, he would not have endorsed the repair as he did not know how the 3-inch void between the spacer rings on the side of the Known Manhole could be sealed. In my view, this testimony was about as clear an admission of negligence as can be imagined, given the fact that the 2020 Flood involved an incursion of water through the side of the Known Manhole, which Mr. Cons admitted was improperly sealed as a result of an ill-conceived repair job.

[229] Despite the repairs by Mandrax, problems with the Known Manhole persisted. Mr. Ward testified that the Known Manhole was sinking again by 2016. The Wards took a picture in April, 2017 which confirmed this fact. The Wards' neighbour, Ms. Henri, also testified that that the Known Manhole was at a lower grade than the driveway prior to the 2020 Flood.

[230] Mr. Minchau admitted on cross-examination that he did not inspect the Known Manhole after the 2015 Flood and did not ask for it to be inspected by CRD employees. He also admitted that he was aware that the continued issues with the sinking Known Manhole could have meant that the Sewer Line was lowering below the manhole. Nonetheless, and despite this concern, he testified that he never investigated that issue prior to the 2020 Flood. At the request of the Wards, Mr. Cons testified that he came out to look at the Known Manhole in 2018, but took no further action.

[231] In my view, the repair of the Known Manhole in 2014 to a standard that Mr. Cons admitted was inadequate, coupled with the failure of the CRD to investigate and repair the Known Manhole thereafter despite knowledge that it was sinking, were sufficient to establish that the CRD failed to meet its standard of care.

[232] It was clearly foreseeable, and indeed admitted by Mr. Cons, that the inadequately sealed Known Manhole created a gap on the side of the concrete that could lead to an incursion of water into the Sewer Line, resulting in a back up

and damage to the Property. And indeed the evidence was clear at trial that the flooding of the basement in the Home did in fact occur as a direct result of the incursion of the water through the side of the Known Manhole. In this respect, Ms. Ward testified that the water began running underneath the cement surrounding the Known Manhole and washed away some of the cement, leaving the Known Manhole partially exposed. Mr. Ward testified that when he arrived at the Property, he lifted the lid and could see and hear water pouring into the Known Manhole on the side around the riser, which was below the top of the manhole.

[233] Mr. Olsen testified that he arrived at the site around 9 p.m. The vacuum trucks were on site and water was pouring in the side of the Known Manhole. The north side of the Known Manhole had been washed away and in the dark he said it looked like the seal was broken, there were gaps and the manhole was off-kilter.

[234] I note that the location of the water incursion identified by the Wards corresponded exactly with the area of deficient construction of the Known Manhole identified by Mr. Cons. This clearly establishes the causal connection between the breach of the standard of care and the resulting damage.

[235] The CRD argued at trial that the Known Manhole may have been damaged by a collision with one of the Wards' vehicles, which resulted in the water incursion. I reject this argument for four reasons. First, the CRD adduced no evidence in support of this argument at trial, which amounted to pure speculation. Second, this argument was not consistent with the other testimonial and pictorial evidence that the Known Manhole had sunk to a level below grade of the driveway, which would have made a collision with a vehicle practically impossible. Third, the Wards' testimony, which I accept, was that there was no evidence of any damage to their vehicles which would lend support to the CRD's theory. Clearly, a collision between a vehicle and a concrete manhole would have created noticeable damage on that vehicle if it indeed occurred. Fourth, Mr. Minchau admitted under cross-examination that manholes are commonly placed along roadways, are subject to all kinds of vehicle traffic including trucks, and are built to withstand that traffic.

[236] Thus, there was a breach of the CRD's standard of care with respect to the repair and maintenance of the Known Manhole. In my view, this evidence of a breach of standard of care was sufficient on its own to establish negligence on the

part of the CRD with respect to the 2020 Flood (coupled with the causation analysis I have discussed above). However, there were other failures of the CRD to meet the standard of care that further contributed to the damage arising from the 2020 Flood, which I will now address.

b) Failure to Repair or Replace the Backflow Preventer

[237] Mr. Minchau admitted that, after the 2006 Flood, the CRD undertook to retain, instruct and pay for a plumber to install a backflow preventer in the Home (the "Backflow Preventer"). The Backflow Preventer was a device installed in the basement of the Home, and connected to the plumbing, which was intended to prevent or minimize the flow of effluent into the Home in the event of a further Sewer Line backup.

[238] Both Wards testified that the CRD did not provide the Wards with instructions or a review of the operation of the Backflow Preventer when it was installed, nor did the CRD request their assistance with respect to the ongoing maintenance of the Backflow Preventer. To the contrary, the Wards testified that it was always their understanding that the Backflow Preventer was owned by the CRD and that the CRD had a responsibility to maintain it. Mr. Ward testified that it "never crossed [his] mind" to maintain the Backflow Preventer because he was not the owner and did not want to interfere with CRD equipment.

[239] Further, Ms. Bastien testified that, in her role as Protective Services Manager for the CRD, she had experience installing equipment on private property. It was her evidence that any time the CRD installs equipment on private property, it is the CRD's responsibility. She testified that the CRD must ensure that it has right-of-way access to the equipment and if the CRD wants a private party to participate in the maintenance or operation of the equipment then it must enter into an agreement with the private party to do so. None of the steps described by Ms. Bastien were taken with the Wards with respect to the Backflow Preventer.

[240] The evidence was that the CRD was certainly aware by 2015 that the Backflow Preventer was not working correctly. In an email report to his superiors dated April 8, 2015, Mr. Minchau acknowledged that the Backflow Preventer had failed. Mr. Minchau suggested in that report that the CRD should inspect the equipment, and also suggested that the Backflow Preventer had likely not been

maintained. He suggested that the CRD could enter into a legal agreement with the Wards to maintain it, but Mr. Minchau admitted that no such agreement was entered into with, or proposed to, the Wards. Mr. Minchau also recommended in his email report that the CRD install backflow preventers inside and outside the Home, with an estimated cost of $4000. He further discussed recommendations by Mr. Bamsey on April 6, 2015 that a gravity overflow system could be installed on the Property which would provide about two hours of storage capacity at maximum spring freshet flow (with a 100,000 litre tank) in the event that the backup pump was out of service, and also that an alarm could be configured to call the sewer pumper truck removal company on a high alarm scenario. The CRD ultimately failed to implement any of Mr. Minchau's or Mr. Bamsey's recommendations.

[241] In addition, after the initial installation in 2006, Mr. Minchau admitted that the CRD took no further steps thereafter to maintain, inspect or repair the Backflow Preventer. Despite the flooding into the Wards' basement in 2010 and 2015, Mr. Minchau testified that he simply "trusted that it was installed correctly".

[242] Ms. Ward testified that, after the 2010 Flood, she told the CRD that she believed the Backflow Preventer was not working, but got no response. She testified that after 2015 the CRD promised they would replace it, but they never did.

[243] The evidence at trial was clear that the Backflow Preventer was in fact broken at the time of the 2020 Flood due to the CRD's failure to repair or replace it. In my view, the CRD fell below the standard of care by failing to do so, as they were aware in 2015, and most likely as early as 2011, that the Backflow Preventer was broken, and yet did nothing.

[244] The Backflow Preventer was designed to mitigate the effects of a Sewer Line backup and reduce (albeit not necessarily eliminate) the resulting flow of effluent into the basement of the Home. To the extent that the Backflow Preventer was broken it was clearly reasonably foreseeable to the CRD that the effects of the backflow of sewage through the Sewer System and into the Home would be made worse, and I find that this is what actually occurred.

c) Failure to Inspect and Maintain the Unknown Manhole

[245] Mr. Peddie admitted that the CRD was aware of the location of the Unknown Manhole, which was buried on the Property, as early as 1999. He admitted that the location of the Unknown Manhole was marked on the as-built drawings located in the Lift Station, which were fully available to CRD employees at all material times.

[246] Yet, despite this knowledge, the CRD took no steps for 21 years to uncover or maintain the Unknown Manhole. Indeed, it was only during the middle of this trial that the CRD, without notice to the Wards, sought to uncover fresh evidence in support of their defence by scoping the Sewer Line. It was during the scoping exercise that they discovered the Unknown Manhole, which had sunk 16 inches beneath the surface.

[247] To the extent that there were only two manholes on the Property, it is evident that the CRD's failure to take reasonable steps to uncover and maintain the Unknown Manhole, which obviously constituted one half of the access points to the Sewer Line on the Property, fell below the standard of care.

[248] It is also notable that it was in the location of the Unknown Manhole that the Wards witnessed the bubbling during the 2015 Flood and the 2020 Flood. Mr. Minchau agreed on cross-examination that the backup in the sewer lines of the Sewer System would first start through the Wards' Property and then up Wildwood Road (in the direction of the Unknown Manhole). He particularly stated that the backup would go higher and the pressure would build up in the Sewer Line pipes.

[249] Given the acknowledged pressure buildup in the pipes, and the fact that the Unknown Manhole represented only one of two access and outlet points on the Property for sewage during a backup, it is in my view more likely than not that some sewage came out of the Unknown Manhole during both the 2015 Flood and the 2020 Flood, particularly given the bubbling observed over that area. The difference with the Unknown Manhole, as opposed to the Known Manhole, was that the sewage would have had no escape route above the soil, and therefore would no doubt have seeped directly into the soil.

[250] Mr. Cons admitted on cross-examination that it was possible that sewage leaked out of the Unknown Manhole during the 2015 Flood, and that such a leak during a sewer backup could have indicated a break in the sewage line.

[251] Mr. Olsen testified at trial that he arranged for scoping of the Sewer System to be completed during the course of the trial in response to the legal issues raised at trial. Mr. Olsen testified that the scoping indicated that there were no issues with the line between the Known Manhole and the Unknown Manhole, but that they would have to re-scope between the Known Manhole and the Lift Station. However, I note that the individual who did the scoping (it was not Mr. Olsen) did not testify at trial and the actual scoping video was not adduced in evidence. There was also no report produced. Thus, Mr. Olsen's testimony on this point was in the nature of hearsay and I give it no weight.

[252] I caution that there was no expert evidence adduced at trial to confirm the precise extent and impact of any sewage that may have seeped out of the Unknown Manhole underground, nor to confirm definitively that the bubbling above ground was caused by the Unknown Manhole. However, when considered in conjunction with the evidence about the bubbling and sinkholes in the driveway, there is at a minimum powerful circumstantial evidence that the buried Unknown Manhole contributed to the damage to the Property during the 2020 Flood (and no doubt the 2015 Flood as well).

d) Failure to Investigate the Bubbling and the Sinkholes

[253] I have reviewed the evidence on the bubbling and the sinkholes in my trespass analysis and will not repeat that here. However, for the purposes of the standard of care analysis, I note Mr. Minchau's admission on cross examination that he was aware that water bubbling on top of the line could be a problem, and that sinkholes could also be indicators of a problem with the Sewer Line. Further, Mr. Minchau admitted that the Wards advised him of their concerns about bubbling over the Sewer Line and that he never investigated, despite his admission that it could have been an indication of a problem.

[254] In my view, a failure to investigate an issue that Mr. Minchau was expressly aware could indicate a problem with the Sewer Line was a failure on the part of the CRD to meet their standard of care. While there was no evidence at trial to indicate the precise cause of the bubbling and sinkholes, there is no question that these phenomena only started to occur after the 2015 Flood and that they occurred in a location which was directly over the Sewer Line. Considered

together with all the other circumstantial evidence I have previously reviewed, I conclude that these sinkholes were causally attributable to the CRD's negligent failure to inspect and maintain the Sewer Line and the two manholes on the Property.

e) The Lift Station Ditch

[255] When the CRD built the new Lift Station, it also built a ditch to carry snow melt and water generally away from the Lift Station area (the "Lift Station Ditch"). Ms. Ward testified that her observation was that the Lift Station Ditch directs water into the Wards' Pasture rather than into the CRD's ditch which runs parallel to the highway and is separate from the Property. She also testified that she has raised the issue with the CRD for about five years, but that the CRD has never done anything to repair or correct the Lift Station Ditch.

[256] Mr. Minchau testified on cross-examination that if the Lift Station Ditch was not tied into the highway ditch, but instead drained onto the Property, then it was not properly built. Mr. Minchau also testified that he recalled Ms. Ward raised concerns about the Lift Station Ditch and that he understood she had spoken with the engineer who built the Lift Station, Mr. Bamsey, about the issue. However, he admitted that the CRD never followed up or inspected the issue.

[257] Obviously, accepting Ms. Ward's testimony at face value that the Lift Station Ditch does drain directly onto the Property, then Mr. Minchau's admission on cross-examination that it is, as a result, improperly built is sufficient to establish negligence. A failure to investigate despite specific complaints from Ms. Ward, and given the circumstances relating to ongoing moisture problems on the Property, is also sufficient in my view to establish negligence.

[258] To the extent that drainage from the Lift Station Ditch would have further contributed to increasing moisture in the soil on the Property, which the evidence indicated at trial is causally correlated with difficulties in removing ongoing contamination, it stands to reason that the Lift Station Ditch exacerbated the contamination issues created by the 2015 Flood and the 2020 Flood, which establishes the causal connection.

[259] However, the CRD takes the position that the Wards did not expressly include a reference to the Lift Station in the Amended Notice of Civil Claim

("ANCC"), and accordingly that they should be precluded from raising this issue at trial. I am not convinced by this argument for three reasons.

[260] First, the Wards specifically pleaded in the ANCC that the CRD has "failed to properly maintain, inspect, repair, investigate, operate, monitor and remediate the [Sewer System]" and further pleaded that the Lift Station was a part of the Sewer System and was, at least with respect to the 2020 Flood, "at risk of failing and causing water and sewage to flood the [Property]." To the extent that the Lift Station Ditch serves the purpose of regulating water flow going towards and away from the Lift Station, it is in my view reasonable to consider it part of the Sewer System, as pleaded. The pleading concerning water damage to the Property from the Sewer System, therefore, is inclusive of water damage originating from the Lift Station Ditch, as it forms part of the Sewer System (in the same manner that the Known Manhole, the Unknown Manhole and the Lift Station also form part of the Sewer System).

[261] Second, the reference to the Lift Station Ditch was not in my view a separate material fact in this litigation, but rather was more in the nature of a particular. The core material fact in this litigation was that the Sewer System was improperly maintained, inspected, repaired and investigated, resulting in flooding onto the Property. The Known Manhole, the Unknown Manhole and the Lift Station Ditch were exit points for the effluent during the flooding, but being part of the Sewer System themselves, a specific reference to them in the pleadings would not have altered the fundamental nature of the claim against the CRD.

[262] Third, there is no real prejudice to the CRD to have this issue considered at trial. The CRD has been on notice about the Lift Station Ditch issue for years as a result of Ms. Ward's complaints. For example, Mr. Minchau was advised in an email dated May 2, 2014 from Leanne Rivet, a CRD Environmental Services Assistant, that Ms. Ward "wants to know when we will be working on the ditching at the lift station… She said that the new ditch that was done is draining right into her yard." Further, this is not a matter that required complex expert evidence or extensive discovery and preparation prior to trial. To the contrary, it raises a simply binary issue that can be resolved by any CRD employee or even a layperson, namely: does the Lift Station Ditch drain onto the Property or not? The CRD had

plenty of opportunity prior to and during the trial to designate an employee to verify this simple fact and testify on this issue, but chose not to do so.

[263] I conclude that the Lift Station Drainage issue is an issue that can properly be addressed by this Court as an element of the negligence claim. An amendment to the pleadings is not in my view strictly necessary in this case, but if it were, I would exercise my discretion to grant that amendment despite any limitation period concerns on the basis that it is just and convenient under the circumstances: *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd.* (1996), 1996 CanLII 3033 (BC CA), 19 B.C.L.R. (3d) 282 (C.A.).

5. Policy Justifications

[264] It is open to the CRD to argue that there were policy reasons which negated their *prima facie* duty of care to maintain and repair the Sewer System and the fixtures on the Property. The onus of proof at trial was on the CRD at trial to demonstrate that such policy reasons existed.

[265] In my view, the CRD failed to meet this onus. Although the CRD made general claims at trial about fiscal budgetary constraints, these claims were not sufficiently specific or supported by the evidence. First, the evidence was that the CRD operated with a budget surplus in 2019 of over $2 million, with a projected surplus for 2020 of about the same. In 2019, the Sewer System, which has a separate budget from the CRD, had a slight operating deficit of $42,216.99, but a surplus of $617,000. Thus, it was certainly not the case that the CRD was in a dire financial condition.

[266] Second, and more importantly, the CRD did not adduce any specific evidence that fiscal constraints in any material way limited their ability to repair and maintain the Known Manhole, the Unknown Manhole, the Backflow Preventer, the Lift Station, the Lift Station Ditch or the Sewer Line, as the maintenance and repair of these items was an operational as opposed to a policy-based activity. To the contrary, the evidence was that the CRD had in fact repaired the Known Manhole and the Lift Station on several occasions, without any indication that there was a policy-based restriction on so doing, but had simply performed the repairs in a negligent manner. Similarly, there was evidence that Mr. Minchau had

specifically recommended the replacement of the Backflow Preventer, which was also an operational matter, but that the work was simply never done.

[267] I conclude that there were no compelling residual policy reasons which negated the CRD's duty of care with respect to the 2020 Flood.

D. CONTRIBUTORY NEGLIGENCE

[268] The CRD takes the position with respect to the 2020 Flood that the Wards should be held contributorily negligent. The burden of proof for contributory negligence rests on the CRD.

1. The Law of Contributory Negligence

[269] In *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210 at para. 73, Chief Justice McLachlin (dissenting in part, but not on this point) stated:

> "A finding of contributory negligence is not the same as a finding that the injured party voluntarily accepted the risk of injury. The latter is a complete defence (in the limited circumstances in which it applies), whereas the result of the former is that the injured party generally recovers less than full compensation for its injuries. As Viscount Simon said in *Nance v. British Columbia Electric Railway Co.*, 1951 CanLII 374 (UK JCPC), [1951] A.C. 601 (P.C.), at p. 611:
>
> 'But when contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury. For when contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that, where a man is part author of his own injury, he cannot call on the other party to compensate him in full.'"

[270] The test for contributory negligence was summarized by Denning L.J. in *Jones v. Livox Quarries Ltd.*, [1952] 2 Q.B. 608 (C.A.), at p. 615:

> Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

[271] In *Waterways Houseboats*, the defendants argued that the plaintiffs ought to be found contributorily negligent for moving their business to the property despite knowing the substantial risk of flooding that a nearby creek posed. The Court found that the plaintiffs knew that the property was naturally prone to flooding and accepted that flooding would occur from time to time. Despite clear warnings they ignored the issue. Knowing what they knew, the Court found that flood mitigation measures of some kind should have been undertaken by them and their failure to do so was unreasonable under the circumstances, resulting in them being assessed with a degree of fault of 25%. However, this decision was successfully appealed and was sent for retrial on the issue of contributory negligence.

[272] In *Par Holdings Ltd. v. St. John's (City)* (1995), 133 Nfld. & P.E.I.R. 210 [*Par Holdings*], heavy rain and a thaw of snow and ice resulted in a pond overflowing its banks and causing flooding to the properties around it. The effect of the pond's overflow was exacerbated by a surge of water from the pond into the sewer system, resulting from the actions of a diver employed by the defendant in removing debris from the outlet screen of the pond. The water flooded 54 motor vehicles stored in the plaintiff's building. The plaintiff had known of two previous floods when it purchased the building. The plaintiff was found contributorily negligent in failing to erect a flood barrier and in storing vehicles in the basement. The Court also noted that the plaintiff was negligent in not taking active steps to remove the vehicles from the basement once it first saw significant signs of water in the basement. Fault was assessed at 50%.

a) Application of the Law to the Facts

[273] Relying on the foregoing authorities, the CRD submits that the fault of the Wards should be assessed at 50%, taking into account the following alleged facts:

- The Wards took no steps to ensure a working Backflow Preventer was installed in their home; and
- On the day of the 2020 Flood, the Wards took no steps to divert the water or mitigate its effects while waiting for CRD personnel to arrive. For example, the CRD argued that the Wards could have used a tractor, a shovel, hay or sandbags to attempt to stop the water from entering the manhole.

[274] In my view, the CRD's contributory negligence claim is without merit. Before addressing the CRD's specific allegations, I note as a preliminary matter that this case is distinguishable from the *Waterway Houseboats* and *Par Holdings* cases in the sense that, unlike those other two cases, the Wards testified that they had no prior knowledge of flooding problems with the Property before they purchased it. Thus, there was no evidence at trial that they knowingly assumed any risk with respect to future flooding issues at the time of purchase.

[275] As a further preliminary matter, I note Mr. Peddie' admission on cross-examination that it was not the Wards' responsibility to protect the sewers; this was the responsibility of the CRD.

[276] With these preliminary observations in mind, I now proceed to consider the CRD's specific factual allegations:

i. The Backflow Preventer

[277] The CRD takes the position that the Wards should have installed a working Backflow Preventer.

[278] In light of my finding above that the CRD had a duty of care to maintain, inspect and repair the Backflow Preventer, and failed to meet that duty of care, this argument cannot succeed.

[279] Mr. Minchau admitted on cross-examination that the CRD undertook to retain, instruct and pay for a plumber to install a backflow preventer in the Home. The Wards testified that their understanding at all relevant times was that the Backflow Preventer was the property of the CRD. This understanding was confirmed by testimony of Ms. Bastien, the former Protective Services Manager with the CRD, who confirmed that at any time the CRD installs equipment on private property, as they did with the Backflow Preventer, it is the CRD's responsibility.

[280] In my view, it was entirely reasonable for the Wards to conclude that they did not have the right to interfere with the Backflow Preventer, much less replace it, and to rely upon the CRD's assurance that the Backflow Preventer was functioning and properly maintained. I conclude that there was no contributory negligence with regard to the Backflow Preventer.

ii. Failure to Take Steps to Mitigate

[281] The CRD argues that the Wards could have used a tractor, sandbags or a shovel to attempt to stop the water from entering the Known Manhole during the 2020 Flood. I will consider each of these arguments in turn in light of the evidence.

(1) The Tractor

[282] The evidence was that the Wards' tractor had a hay baling installation on the front. It would therefore not have been possible to use the tractor to move snow, soil or otherwise divert the water in a timely fashion during the 2020 Flood.

(2) The Sandbags

[283] I note in the first place that the Wards testified that they had no sandbags on the Property, nor did it occur to them during the events of the flooding to obtain sandbags. They also testified that they did not know where to procure them.

[284] The CRD argues that this was not credible testimony because, due to the Wards' longstanding involvement with the Fire Department, they should have known there were sandbags there.

[285] Setting aside the fact that Ms. Ward ceased completely her involvement with the Fire Department after the catastrophic accident in 2012, and that Mr. Ward's involvement with the Fire Department was also more limited thereafter, I note in any event that the evidence was clear that there were almost no available sandbags at the Wildwood Fire Hall on the day of the 2020 Flood. This was confirmed by the CRD's own employee. Mr. Peddie from the CRD testified that he was dispatched by Mr. Minchau on the evening of the 2020 Flood to procure sandbags. He testified that Mr. Minchau told him that there were sandbags at the Fire Hall. However, he testified that when he got to the Fire Hall he found that there were only 4-6 sandbags there, and so he had to wait for the Emergency Operations Centre to deliver more. Further, Mr. Peddie testified that it took him and an individual from Emergency Operations Centre working together about 45 minutes to fill the bags once enough of them had been delivered.

[286] Thus, even if the Wards had made the 15-minute trip (half hour roundtrip) to the Fire Hall during the 2020 Flood, they would have found that there were insufficient sand bags to make a difference. Moreover, the evidence was clear

that, even if sufficient bags were available, it was a 45-minute job for two CRD employees to fill the bags and I do not see how both Wards could reasonably have been expected to vacate their flooding Property for close to an hour and a half to fill sandbags. At least one of the Wards would reasonably have had to stay on the Property to monitor and address the flooding in their basement, and this would have left a single Ward to fill sandbags. It would not have been feasible under the circumstances, in my view, for one of the Wards, acting alone, to fill a sufficient number of bags with sand, load them into a vehicle and then return them to the Property, all the while with the knowledge that their basement was flooding and needed to be pumped immediately.

[287] Further, and in any event, the CRD's argument about the Wards' failure to sandbag the Property is undermined by the fact that the CRD had prior knowledge of the high levels in Minton Creek, had concerns about the effect on the Known Manhole, and yet failed to warn the Wards in advance of the 2020 Flood, which would have given the Wards the opportunity to prepare (including to procure sandbags if the CRD had so advised).

[288] Specifically, in the days prior to April 14, 2020, the CRD was concerned about rising levels in Minton Creek, and in fact were taking pictures of the Property, the Known Manhole, and Minton Creek adjacent to the Property in the days prior to the flood. Mr. Peddie testified that he had reviewed the level of Minton Creek on April 11, 2020 and had gone to the Wards' and other places to see if there was pooling around manholes. He testified that he had never seen levels from Minton Creek as high as they were seeing in April, 2020 and he was concerned.

[289] Ms. Henri also testified that the CRD had been to the top of the Property and were taking pictures a few days before the 2020 Flood. Mr. Peddie admitted that Ms. Henri's recollection was accurate and that he was there a few days prior taking pictures of the creek and the Known Manhole. The pictures were not produced prior to trial, but were produced at trial following Ms. Henri's testimony.

[290] Ms. Ward testified, and Mr. Olsen and Mr. Peddie admitted, that at no time did the CRD provide any warning to the Wards of the possibility of a creek overflow prior to April, 2020, or an impact on the Known Manhole, although they could easily have done so.

[291] Having failed to warn the Wards about the risk of a flood in advance, it does not lie in the mouth of the CRD to then blame the Wards for failing to take extraordinary precautionary measures in the heat of the moment after the flooding was already in progress. In my view, this argument is without merit.

(3) Moving Soil or Diverting the Water

[292] The evidence at trial was that the soil was frozen at the time of the 2020 Flood; indeed the evidence was that a large snow and ice bank along Minton Creek was the principal barrier restricting water access into the Known Manhole. Further, by virtue of the frozen ground, it would have been difficult if not impossible to move sufficient amounts of soil, with a shovel or otherwise, to make a material difference. I conclude that this would not have been a realistic mitigation measure.

2. Conclusion on Contributory Negligence

[293] Taking into account all the evidence, I find that the CRD has failed to prove that the Wards were contributorily negligent.

E. LIABILITY UNDER *ENVIRONMENTAL MANAGEMENT ACT*

[294] The *EMA* provides a cause of action for a plaintiff to recover reasonably incurred costs of remediation in cleaning up a "contaminated site" from "responsible persons".

[295] The relevant statutory provisions are as follows:

> Persons responsible for remediation of contaminated sites
>
> 39 …
>
> "contaminated site" means an area of the land in which the soil or any groundwater lying beneath it, or the water or the underlying sediment, contains a prescribed substance in quantities or concentrations exceeding prescribed risk based or numerical
>
> (a) criteria,
>
> (b) standards, or
>
> (c) conditions;
>
> …
>
> "contamination" means the presence in soil, sediment, water or groundwater of a substance prescribed for the purposes of the definition of "contaminated site" in quantities or concentrations exceeding the risk based or numerical
>
> (a) criteria,

(b) standards, or

(c) conditions

also prescribed for the purposes of the definition of "contaminated site";…

Determination of contaminated sites

44 (1) A director may determine whether a site is a contaminated site and, if the site is a contaminated site, the director may determine the boundaries of the contaminated site.

[…]

General principles of liability for remediation

47 (1) A person who is responsible for remediation of a contaminated site is absolutely, retroactively and jointly and separately liable to any person or government body for reasonably incurred costs of remediation of the contaminated site, whether incurred on or off the contaminated site.

[…]

(5) Subject to section 50 (3) [minor contributors], any person, including, but not limited to, a responsible person and a director, who incurs costs in carrying out remediation of a contaminated site may commence an action or a proceeding to recover the reasonably incurred costs of remediation from one or more responsible persons in accordance with the principles of liability set out in this Part.

(6) Subject to subsections (7) and (8), a person is not required to obtain, as a condition of an action or proceeding under subsection (5) being heard by a court,

(a) a decision, determination, opinion or apportionment of liability for remediation from a director, or

(b) an opinion respecting liability from an allocation panel.

(7) In all cases, the site that is the subject of an action or proceeding must be determined or considered under section 44 [determination of contaminated sites] to be or to have been a contaminated site before the court can hear the matter.

(8) Despite subsection (7), if independent remediation has been carried out at a site and the site has not been determined or considered under section 44 [determination of contaminated sites] to be or to have been a contaminated site, the court must determine whether the site is or was a contaminated site.

(9) The court may determine in accordance with the regulations, unless otherwise determined or established under this Part, any of the following:

(a) whether a person is responsible for remediation of a contaminated site;

(b) whether the costs of remediation of a contaminated site have been reasonably incurred and the amount of the reasonably incurred costs of remediation;

(c) the apportionment of the reasonably incurred costs of remediation of a contaminated site among one or more responsible persons in accordance with the principles of liability set out in this Part;

(d) such other determinations as are necessary to a fair and just disposition of these matters.

1. Analysis

[296] In my view, it would be premature under the circumstances of this case for the Court to make an order under the *EMA* for two principal reasons: first, the Wards have not commenced the remediation of the Property with respect to the alleged contamination and, second, they have incurred no costs in respect of remediation.

[297] Section 47(5) of the *EMA* states that a person who "incurs costs" in carrying out the remediation of a contaminated site may commence an action. There was no evidence adduced at trial that the Wards have incurred any costs in respect of remediation of the Property.

[298] It is also common ground that there has been no administrative determination or consideration under s. 44 of the *EMA* as to whether the Property is a "contaminated site". Although s. 47(8) empowers a court to determine whether a site is or was a contaminated site even in the absence of such an administrative determination, it is a precondition of the court's exercise of jurisdiction that an "independent remediation" has been carried out at the site. In this case, it is clear on the evidence that no "independent remediation" has in fact occurred or commenced in this case.

[299] No case law was presented to this Court in argument to support the proposition that a cost recovery action can be commenced before remediation has commenced or costs have been incurred. To the contrary, the weight of authority appears to support the conclusion that the remediation process must first have commenced. In *Rolin Resources Inc. v. CB Supplies*, 2018 BCSC 2018 at para. 186, the Court adopted the reasoning of Kent J. in *J.I. Properties Inc. v. PPG Architectural Coatings Canada Inc.*, 2014 BCSC 1619, to the effect that remediation must at least have been commenced before a cost recovery action can be initiated. Similarly, in *Dolinsky v. Wingfield*, 2015 BCSC 238 at paras. 63–

64, the Court emphasized that it was “important to note that significant remediation had occurred”:

> [63] In response to the defendant Bal’s argument regarding prematurity, the plaintiff notes that the *EMA* does not require that the remediation of the site be complete, but rather only that some costs of remediation have been incurred. Indeed, given the high costs often associated with remediation, it is often the case that property owners will await findings of liability in a cost recovery action before embarking on the full remediation of a contaminated site. *Gehring v. Chevron*, 2006 BCSC 1639 at para. 147 is an example of such a case, and the court noted in that case that its judgment with respect to liability and apportionment would ultimately be applicable to any future remediation, including the remediation of any contamination not yet discovered.
>
> [64] Although it is true that the remediation has not been completed, it is important to note that, significant remediation has occurred on the plaintiff’s property. This remediation included the removal of the source of the contamination by SNC Lavalin, together with the removal of a substantial amount of contaminated soil on both the defendants’ property and the plaintiff’s property by Franz Environmental.

[300] A similar approach was also applied in the following cases, where the courts opted to make a determination concerning a contaminated site, but only in circumstances where an independent remediation had progressed: *Connolly v. Jones et al.*, 2014 BCPC 149 at para. 111; *Aldred v. Colbeck*, 2010 BCSC 57 at para. 55; *Atlantic Waste Systems Ltd. v. Canada (Attorney General)*, 2014 BCSC 490 at para. 45.

[301] Accordingly, I conclude that an order under the *EMA* is premature in this case, and that I have no jurisdiction to make such an order at this time.

F. REMEDIES

1. Injunctive Relief

a) Legal Principles

[302] Where there is an interference with property rights, the law is clear that injunctive relief is strongly favoured.

[303] In *1465152 Ontario Limited v. Amexon Development Inc.,* 2015 ONCA 86 at para. 23, the Ontario Court of Appeal cited Robert J. Sharpe, *Injunctions and Specific Performance,* loose-leaf (consulted on 30 January 2015), (Toronto: Canada Law Book, 2014), at 4.10 and 4.20, for the following proposition:

> Where the plaintiff complains of an interference with property rights, injunctive relief is strongly favored. This is especially so in the case of direct infringement in the nature of trespass.
>
> …
>
> The reason for the primacy of injunctive relief is that an injunction more accurately reflects the substantive definition of property than does a damages award. It is the very essence of the concept of property that the owner should not be deprived without consent. An injunction brings to bear coercive powers to vindicate that right. Compensatory damages for a continuous and wrongful interference with a property interest offers only limited protection in that the plaintiff is, in effect, deprived of property without consent at an objectively determined price. Special justification is required for damages rather than an injunction if the principle of autonomous control over property is to be preserved. A damages award rather than an injunction permits the defendant to carry on interfering with the plaintiff's property. [Footnotes omitted.]

[304] A similar principle was applied in *Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 76, and *OSED Howe Street Vancouver Leaseholds Inc. v. FS Property Inc.*, 2020 BCSC 1066, although both these cases involved applications for interim/interlocutory injunctions. The principle has also been applied in the context of mandatory injunctions for continuing trespasses or nuisance: *White v. Leblanc,* 2004 NBQB 360; *Earle v. Martin* (1998), 172 Nfld. & P.E.I.R. 105*; Lim v. Titov* (1997), 56 Alta. L.R. (3d) 174 (*Lim* was recently discussed in *Samco Developments Ltd v. Canadian National Railway Company,* 2018 ABQB 586); and *Ramsahai-Whing v. Weenen*, 2016 ONSC 2427.

[305] In the textbook *Injunctions and Specific Performance,* at 4.590, Robert Sharpe explains that the rule favouring injunctive relief is even stronger in trespass cases than in nuisance cases:

> Where there is a direct interference with the plaintiff's property constituting a trespass, the rule favoring injunctive relief is even stronger than in the nuisance cases. Especially where the trespass is deliberate and continuing, it is ordinarily difficult to justify the denial of a prohibitive injunction. A damages award in such circumstances amounts to an expropriation without legislative sanction. The courts have expressly condoned injunctive relief, even where the balance of convenience is overwhelmingly in favour of the defendant.

b) Application of Legal Principles

[306] At the conclusion of her testimony, Mrs. Ward pleaded that she wants her house back, and just wants a home that is safe; she does not want to worry about

sewage any more. She testified that she has spent 14 years of her life dealing with sewage and emphasized the stress of feeling “not *if* another sewage flood will happen but *when*”. Ms. Ward concluded her testimony by stating: “please fix it, that is all I am asking”.

[307] Similarly, Mr. Ward concluded his testimony by stating that he is frustrated by receiving “one kick in the pants after another”. He testified that he is emotionally and mentally “done” and that it is “killing me” to watch Ms. Ward suffer. His message to the CRD was “come and fix the property – remediate it. No more band-aid solutions”.

[308] In my view, taking into account the findings on trespass, nuisance and negligence, the Wards are entitled to an order that requires the CRD to fix the problem that it created, namely, to remove the sewage and the contamination caused by the sewage.

[309] The CRD relies upon *Taylor v. King* (1993), 82 B.C.L.R. (2d) 108 at para. 50 (C.A.) [*Taylor*], for the proposition that where the cost of remediation exceeds the diminution in value, the Court must consider the “reasonableness of the plaintiff’s desire to reinstate the property”. Relying on this case, they argue that the appropriate remedy would be the lesser of the cost to remediate or the diminution in value as a result of contamination.

[310] I disagree that the Court is limited to awarding only the diminution in value where the cost of reinstatement exceeds (or may exceed) that diminution. In the first place, I note that the *Taylor* decision was a negligence case, and not a case involving trespass and nuisance as in this case, where the primary remedy is injunctive relief. Second, there is ample evidence in my view that the desire of the Wards to reinstate the Property is reasonable under the circumstances, as the evidence is clear that they want to remain on the Property for life and do not intend to sell. In this respect, I quote from the CRD’s own closing argument:

> “340. In the present case, the Wards’ evidence is that they do not intend to sell the property:
>
> > a. Mrs. Ward said on direct that the home was intended to be their “retirement home”. Mr. Ward’s evidence on direct was that they became interested in the property because they wanted their “forever home”.

> b. While both Mr. and Mrs. Ward's evidence on direct was also that shortly after the 2015 discharge they wanted the Defendant to buy them out, they have not sought to market the property in the 5 years since.
>
> c. Also on direct, Mrs. Ward was asked why they had not just left the property, and she explained that the house has raised over 15 children, nieces and nephews; and that it has changed from her from a child who moved around a number of times, to one with a stable home. She also gave evidence of her husband's nephew who they had taken in. He owed money to 2 drug dealers and stayed with them for 11 years. Another nephew stole money from her and her husband, however, they were able to help and get him through a bad stage, and he is now 43.
>
> d. Mrs. Ward's last evidence on direct was also that she wants to be in the home until she retires."

[311] It is my view that damages would clearly not be an adequate remedy in this case. As the Wards wish to continue to live on the Property for life, it would not be just or reasonable to force them to live on a property that is contaminated with sewage and where their animals cannot freely roam and graze in the Pasture. It would also not be reasonable to force them to live on a property where the Known Manhole, the Unknown Manhole and the Backflow Preventer are clearly negligently built and maintained, where there are sinkholes on their driveway which are more than likely attributable to defects in the Sewer Line, where the Lift Station Ditch drains into their Property, and where the risk of further sewage floods is clearly very likely, if not inevitable.

[312] A damages award in these circumstances would be tantamount to imposing on the Wards a license on the part of the CRD to pollute and trespass upon, and continue to pollute and trespass upon, the Property. As such, it is my view that they are entitled to an injunctive remedy which will ensure the removal of the contaminants, the restoration of their land and the implementation of sufficient repairs and protective measures to minimize to the extent possible the likelihood of a future flooding event.

[313] Accordingly, an injunctive order shall issue as follows:

- The CRD shall retain an engineering firm with contaminated site investigation and remediation expertise (but not Mr. Brown or his firm), and the choice of the firm shall be subject to prior consultation with, and approval by, the Wards.

- If the parties are unable to agree upon a suitable consulting firm, they shall have leave to return to Court for the purposes of having the Court select the consultant. I will remain seized of this matter for that purpose.
- The consultant shall prepare a plan (the “Testing Plan”) to test for the following contaminants on Property, and any other contaminants that the consultant deems to be attributable to sewage from the 2015 Flood or the 2020 Flood (the “Contaminants”):
  - Pathogens (e-coli, fecal coliform, enterococci);
  - Nutrients (ammonia, nitrate, nitrite, total phosphorus);
  - Ions (chloride, fluoride and sulphate);
  - Metals;
  - PAHs (benzo(a)pyrene);
  - Phenols;
  - Nonylphenols;
  - Phthalates; and
  - Debris, including plastics and measurable concentrations of pharmaceuticals.
- To the extent that Contaminants are identified on the Property in accordance with the Testing Plan that are not otherwise reasonably attributable to background local conditions (in accordance with *EMA* Protocol 4), the consultant shall prepare a plan for their removal or treatment (the “Remediation Plan”). The Remediation Plan shall be designed to ensure that the Property is safe thereafter, in accordance with all applicable Provincial standards, for reasonable use by humans and animals.
- The Remediation Plan shall also be designed to ensure that the soil and vegetation on the Property are returned, over a reasonable period of time, to a condition which approximates the pre-2015 condition. If the pre-2015 condition cannot be ascertained with sufficient precision, then the Remediation Plan shall ensure that the soil and vegetation is restored to a condition that is comparable to the soil and vegetation on neighboring properties, taking into account normal regional conditions and reasonable variations.

- For clarity, the purpose of the Remediation Plan shall not be to ensure that the Property is restored to perfect or pristine condition. Rather, the purpose of the Remediation Plan shall be to ensure that the Property is restored to the condition it would have been in but for the 2015 Flood and the 2020 Flood.
- The Testing Plan and the Remediation Plan shall both be fully compliant with the British Columbia *Contaminated Sites Regulation* and the *EMA*, and any other British Columbia policies or protocols that the consulting firm reasonably deems should apply to sewage contamination.
- The Testing Plan shall be finalized by no later than October 1, 2021, unless otherwise agreed between the parties, and shall be subject to approval of the Wards before it is adopted and implemented.
- All testing under the Testing Plan shall be completed no later than December 15, 2021, unless otherwise agreed between the parties.
- The Remediation Plan shall be finalized by no later than February 15, 2022, unless otherwise agreed between the parties, and shall be subject to approval of the Wards before it is adopted and implemented.
- If the parties are unable to agree upon either the Testing Plan or the Remediation Plan, they shall have leave to return to Court to have any specific issues in dispute resolved. I will remain seized of this matter for that purpose.
- The Remediation Plan shall be implemented and all remediation and restoration work shall be completed no later than August 15, 2022, unless the parties agree otherwise.
- Upon implementation of the Remediation Plan and completion of all remediation work, the consultant shall prepare and provide a report and certification to the CRD and the Wards certifying that the Contaminants attributable to the 2015 Flood and the 2020 Flood have been removed in a manner, and to a level and standard, that is compliant with the *EMA* and all applicable British Columbia regulatory standards and that the soil and vegetation have been reasonably restored as set out above. This certification must be supported by final testing results which are fully compliant with the BC *Contaminated Sites Regulation*

and the *EMA*, and any other provincial policies or protocols that apply to sewage contamination testing.

- All costs and expenses arising from, and associated with, the foregoing orders shall be borne exclusively by the CRD.

[314] In addition to the above, the following additional injunctive relief is granted:

- The Known Manhole and the Unknown Manhole shall be fully repaired and restored by the CRD to a grade that ensures proper operation and prevents against future sinkage. The Known Manhole and the Unknown Manhole shall be restored to a standard which ensures that water or effluent cannot in future enter or exit the manholes from the side, or between the risers, which shall be properly sealed.
- The CRD shall remove the current Backflow Preventer in the Home and shall install two functional backflow preventers both inside and outside the Home in locations in relation to the Sewer Line that best protect the Home from future flooding events. The CRD shall enter into an agreement with the Wards for the purpose of enabling the CRD to continue to maintain the new backflow preventers.
- The CRD shall install a gravity overflow system with a 100,000 litre storage capacity and a high level alarm system on the Property, as recommended by Mr. Bamsey in his email to Mr. Minchau on April 6, 2015, or similar systems with comparable functionality.
- The CRD shall repair the sinkholes along the Sewer Line on the Property, and ensure that the driveway is level in those locations.
- The CRD shall inspect the Sewer Line on the Property and shall repair any identified deficiencies, including deficiencies associated with the sinkholes and bubbling, and shall ensure that the Sewer Line is fully operational and without defect. The CRD shall provide the Wards with any relevant videos, testing results and reports arising from the Sewer Line inspection and repair work.
- The CRD shall inspect and test the Lift Station Ditch and confirm whether and to what extent it drains onto the Property. If it does drain onto the Property in whole or in part, the CRD shall effect the necessary alterations and repairs to ensure that it no longer drains onto the Property. The CRD shall provide the Wards with any relevant

videos, testing results and reports arising from the Lift Station Ditch inspection and repair work.

- All the foregoing repairs and installations shall be completed no later than November 1, 2021, unless otherwise agreed between the parties.
- To the extent that a dispute arises between the parties with respect to the nature, extent or reasonable cost of the above repairs and/or installations, or if any of the injunctive orders granted are determined by either party to be practically impossible or clearly unreasonable to implement, I will remain seized of this matter for the purpose of resolving any such dispute.
- All costs and expenses arising from, and associated with, the above orders shall be borne exclusively by the CRD.

2. Non-Pecuniary Damages

[315] Non-pecuniary damages are awarded in cases of property damage for loss of use and enjoyment of the property.

[316] In this case, there is no question on the evidence that the Wards have suffered a material loss of use and enjoyment of the Property. This included the following:

- The Wards' basement was flooded and rendered uninhabitable after both the 2015 Flood and the 2020 Flood, requiring lengthy restorations and resulting in the destruction of furniture and personal possessions;
- Since the 2015 Flood, the Wards have been unable to enjoy approximately 2/3 of their Property, consisting of the Pasture, due to the presence of sewage contamination;
- The Wards have been unable to use the Pasture and Ponds for the grazing and drinking needs of their farm animals, resulting in Ms. Ward having to get rid of most of the animals by 2016; and
- The Wards have had to live with the smell of both the 2015 and 2020 Floods. After the 2015 Flood the smell was so extreme that Ms. Henri could smell it for a month from her neighbouring property. Ms. Henri, Ms. Bastien and the Wards also testified that, depending upon the weather and the humidity, the smell continued to exist between 2015 and 2020.

[317] However, the worst impact of the flooding has been on Ms. Ward's mental health. Both Wards testified that Ms. Ward's pre-existing PTSD has been significantly worsened by the flooding events and the failure of the CRD to clean up the Property. She has been forced to give up her animals, which she testified were a form of treatment for her. She has been suicidal and has required treatment and counselling, and she tied this directly to the flooding in her testimony. Both Wards testified that this has caused a strain on the Wards' family and marriage.

[318] Taking into account these facts, I must now consider the applicable law.

[319] In *Mundell v. Wesbild Holdings Ltd.*, 2007 BCSC 1326 [*Mundell*], the Court stated that awards in such cases are typically modest. In *Mundell*, the plaintiff's backyard had drainage and water problems caused by the developers resulting in a soggy, smelly and unsightly backyard lasting for seven years. The Court awarded $15,000 in non-pecuniary damages, reasoning as follows at paras. 59–63:

> [59] It is challenging to quantify the loss of enjoyment of residential property that has been used continuously but in a compromised state. This is particularly so when considerable mental distress is suffered as a result. It is clear, however, that awards in such cases are typically modest and tend to range between $2,500 and $5,000: *Kraus v. Fech*, [2002] B.C.J. No. 1002; *Carley v. Willow Park Golf Courses Ltd*., [2002] A.J. No. 1174; *Fanstone v. Fensom*, [1979] B.C.J. No. 124; *Caplin v. Gill* (1977), 1977 CanLII 253 (BC SC), 5 B.C.L.R. 115; *Bavelas v. Copley* (1999), 1 M.P.L.R. (3d) 290.
>
> [60] In this case, Mr. Mundell was very distressed and frustrated by the state of his soggy backyard. He had been repeatedly assured by Mr. Moscone that the backyard would be dry and useable and, to a significant extent, it was not. In addition, when he tried to enlist Wesbild's assistance to resolve the problem he was essentially brushed off.
>
> [61] Although Mr. Mundell and his family members were able to use the backyard from time to time that use was compromised by its unsafe and unsightly condition and, when used, the yard was unpleasant due to the smelly, dead grass and unattractive French drains. Caroline Mundell was very upset by her children's inability to play in their own backyard and her consequent need to take them to the park. Mr. Mundell observed this distress and was predictably affected by it.
>
> [62] Mr. Mundell submits that he should be awarded $20,000 a year for the seven years he has endured the inconvenience and distress associated with his soggy backyard. Accordingly, he submits that the total award for this head of damage should be $140,000.

> [63] I do not agree. In my opinion such an award would vastly over-compensate Mr. Mundell for the loss of enjoyment, frustration and distress that he suffered in connection with his soggy backyard and represent an unjustifiable departure from the appropriate range established by existing jurisprudence. Taking into account all of the circumstances, including Mr. Mundell's failure to mitigate as of 2004, I award the sum of $15,000 for non-pecuniary damages.

[320] In *Allison v. Radtke*, 2014 BCSC 1832, the plaintiffs suffered water and sewage flooding. They were forced to sell their horses, and were unable to properly use their land in a way they had before the flooding. The plaintiffs were awarded $10,000 in non-pecuniary damages, which would have been $15,000 if certain earlier flooding had not been statute barred.

[321] In *Medomist Farms Ltd. v. Surrey (District)*, 1990 CanLII 1061 (B.C.S.C.) [*Medomist*], the plaintiff farmer suffered damage from numerous flooding events over a seven-year period. The plaintiff was awarded $15,000 in non-pecuniary damages.

[322] In *Bavelas v. Copley*, 1999 CanLII 5420 (B.C.S.C.), the plaintiff's property suffered damage arising from a neighbour's artificial drainage ditch. The Court awarded $5,000 in non-pecuniary damages.

[323] The plaintiffs rely upon *Weenan v. Biadi*, 2015 ONSC 6832, aff'd 2017 ONCA 533 [*Weenan*], where the Court awarded the plaintiff damages in the amount of $250,000 for loss of use and enjoyment of the land arising from a nuisance claim brought by a homeowner whose property suffered multiple instances of water flooding over several years after a neighbour added thousands of truckloads of fill to the neighbouring property, changing the existing drainage.

[324] I note at the outset that the *Weenan* award is well outside the historical range of awards in British Columbia in comparable cases and, in my view, should be approached with caution for that reason. On its face, for example, it seems difficult to reconcile an award ten times the size of the award in *Medomist*, a case also involving numerous flooding events.

[325] In seeking to understand the *Weenan* award, it is useful to consider some of the specific facts which, in the view of that Court, at paras. 173–175, set it part from the *Medomist* case:

> [173] The plaintiff submitted that I should take some guidance from *Medomist Farms Ltd. v. The Corporation of the District of Surrey* [15]. While it is of some assistance, that case dealt only with three incidents of flooding that occurred in a single year and were quickly rectified. The damages in this case are far greater. In this case, flooding for significant periods of time has occurred for many years and continues to occur.
>
> [174] At all relevant times, Mr. Weenen has lived in his home on the subject lands. I have found that for significant periods of time, every year since 2002, there has often been at least six to nine inches of water covering a very significant amount of the Weenen lands. The photos filed as exhibits show this large amount of water covering huge portions of the property that was unusable for any purpose when such flooding occurred. The flooding was extremely extensive. In addition to rendering unusable the vacant portions of the Weenen lands, Mr. Weenen's chicken coop and workshop were also flooded and unusable for significant periods of time. As I said, this flooding has occurred for significant periods of time every year since 2002.
>
> [175] The consequential effects on Mr. Weenen of having to live in these conditions were undisputed and I accept them. As a result of the flooding caused by Mr. Biadi, Mr. Weenen has suffered: stress; depression; sleep troubles; relationship difficulties; worry for his spouse, Ms. Daniel; fear that leads him to frequently monitor security cameras; increased alcohol consumption; and lost earning opportunities. The testimony of Ms. Daniel supports many of these effects on Mr. Weenen. Looking at the photos and considering all of the evidence, these effects are understandable. It is very hard to imagine how difficult it has been for Mr. Weenen to live in these conditions for such a long time. For days on end, every year, he has seen this flooding on his lands, he has been unable to do anything about it, and he has known that his lands and sometimes some buildings were unusable as a result.

[326] Although the *Weenan* case did not involve sewage flooding as in this case (which in my view is clearly more serious than water flooding), the fact is that it also involved severe flooding of the plaintiff's land for extensive periods every year for a continuous period of thirteen years, as opposed to a series of discrete flooding events. Further, the Court in *Weenan* found that the behaviour of the defendant was "high handed, malicious, arbitrary, and highly reprehensible that departs to a significant degree from ordinary standards of decent behaviour", sufficient to justify an award of punitive damages. For example, there was evidence that he laughed off the plaintiff's complaints and continued to add fill for a number of years after the complaints, and that he refused to allow the plaintiff access to his lands to keep the culver clear, which was the source of the flooding, even though there was no evidence that he would suffer any damage by allowing the plaintiff access.

[327] In this case, the flooding was more serious than in *Medomist*, as the flooding in *Medomist* involved just water and took place over a period of only approximately one year and was relatively quickly resolved, whereas the flooding in this case involved sewage and has involved successive events over a period of years. Further, as in *Weenan*, I find that there was evidence of extreme stress and depression suffered by the plaintiffs in this case. That said, unlike *Weenan*, there was insufficient evidence of high-handed or malicious behaviour sufficient in my view to justify a punitive damages award in this case.

[328] Further, I note that the Court in *Medomist* did take into account the "inconvenience, frustration, anxiety and disappointment" suffered by the plaintiff in battling the floods and struggling to deal with the defendant in considering the general damages award. The evidence in that case of emotional pain was not nearly as substantial as in this case, but was a relevant factor.

[329] Thus, the seriousness of the impacts in this case place it on a spectrum which is more serious than in *Medomist,* but considerably less serious than in *Weenan*. In my view, taking into account all the relevant facts, the comparable authorities and the weight of British Columbia jurisprudence in particular, and the effect of inflation relating to comparable prior awards, I assess general damages in the amount $35,000 in this case.

3. Diminution in Value of the Property

[330] When fixing the measure of damages for loss of property, the principle is that the injured party should be placed in the same position as before the tortious conduct that caused the loss: *Taylor* at para. 46. The courts have recognized that stigma may reduce the value of a property and be taken into account in the assessment of damages, but that such stigma must be supported by evidence.

[331] In *Tridan Developments Ltd. v. Shell Canada Products Ltd.* (2002), 57 O.R. (3d) 503 (C.A.), the Ontario Court of Appeal overturned a stigma damage award at trial in a case involving a gasoline spill from a service station onto an adjacent property in Ottawa. There the trial judge had found that there would be a $350,000 reduction in the value of the property due to the stigma associated with the contamination even after the property was restored "to a pristine condition". The Appeal Court concluded, in disallowing the stigma damage, that ". . . there is no

support for the trial judge’s conclusion that there is a residual reduction of value in a pristine site caused by the knowledge that it was once polluted.”

[332] Although relief was denied in *Tridan*, the Court of Appeal in that case nonetheless recognized that stigma to property could form a valid basis for a damages award where adequately supported by the evidence. In *Steadman v. Corporation of the County of Lambton*, 2015 ONSC 101 at paras. 63–64, the Court considered the significance of the *Tridan* decision:

> [63] The *Tridan* case is important for the fact that a Canadian appellate court recognized that there may be a calculation of a reduction in a property’s value based on the concept of stigma attaching to it, notwithstanding that the court disallowed stigma damages in that case.
>
> [64] The ramifications of the *Tridan* decision were discussed in a paper written for *The Advocates’ Society Journal* by Katherine M. van Rensberg (prior to her appointment to the Superior Court of Justice and subsequently to the Ontario Court of Appeal) entitled: “Deconstructing Tridan: A litigator’s perspective”, (Spring 2006) 24 Advocates’ Soc. J. No. 4, 16-27. The author reviews the common law principles concerning measuring damages for contaminated property and challenges for assessing damages for environmental harm. This case comment reviews aspects of the trial and appellate decisions in Tridan including the debate about the availability and measure of stigma damages, and “. . . the ability of the courts (and their reluctance in Tridan) to fashion creative remedies that do justice to the parties and to the public interest.”
>
> [65] The author concludes that the Court of Appeal ruling:
>
>> [S]uggests that claims for stigma damages will have to be based on compelling and persuasive expert evidence and that the courts may greet such claims with skepticism, especially in the absence of evidence of residual contamination at the property. Finally, the recognition of stigma as a head of damages must recognize that contaminated lands carry risk and liability, as well as post-remediation value. (p. 15)

[333] In *Ban v. Keleher*, 2017 BCSC 1132 [*Ban*] at paras. 69 and 110, Dorgan J. found that damages could be awarded based upon a diminution in value arising from stigma, but recognized that such a loss is difficult to calculate where there is no impending or associated sale in order to crystallize the alleged loss.

[334] Mr. Reid Umlah, a real estate appraiser called as a witness by the Wards, opined that the market value of a property can be impaired as a result of stigma. In his report, he drew principally upon his prior experience analyzing stigma in the context of homes that had previously been used as marihuana “grow ops”.

However, he also opined that such stigma can reasonably arise from prior sewage contamination.

[335] Mr. Umlah valued the Property at $400,000 assuming no flooding had occurred and further opined that a 25% reduction in value ($100,000) should be attributed to stigma arising from the risk of future flooding, on the assumption that the Property has been remediated. Mr. Umlah also opined that, in the event that the Property is not remediated, it would be subject to an additional discount equivalent to the “cost to cure”, which is the cost to restore the Property and “cure” the contamination.

[336] Mr. Adrian Rizzo, a real estate appraiser called by the CRD as a witness, also opined that the market value of a property can be impaired by stigma, including by stigma arising from sewage contamination.

[337] However, Mr. Rizzo’s valuation of the loss of market value attributable to stigma was lower than Mr. Umlah’s valuation. Mr. Rizzo valued the Property at $350,000 assuming no flooding had occurred and further opined that “if the property has been properly remediated and adequate measures have been taken to prevent or mitigate any future flooding damage, no discount, or a minimal discount in the range of +/- 0% to 10% of total value could be expected”.

[338] Mr. Umlah’s conclusions were based in part on a prior quantitative analysis that he had developed in giving evidence as an expert witness relating to grow op properties in *Ban*. In a mid-trial ruling, I found this evidence to be inadmissible at the trial, in addition to any specific quantitative conclusions Mr. Umlah derived from the grow op study. I will not repeat the full extent of my reasoning here, but the principal basis for my finding of inadmissibility can be summarized as follows:

1. Grow op properties are not sufficiently comparable to property contaminated by sewage to undertake a reliable comparison. In this respect the defendant expert Mr. Rizzo notes, for example, that it is difficult to obtain insurance for grow op properties, but is not equivalently difficult to obtain insurance for a property contaminated by sewage;
2. It is difficult if not impossible to isolate stigma as a single variable in comparing properties due to the fact any pair of comparable properties

may have a variety of other differences which could in theory explain differences in sale prices;

3. Mr. Umlah did not undertake analysis to support his conclusion that the Williams Lake area is a balanced market and not a tight or heated market, which is a relevant factor in his stigma analysis; and

4. Mr. Umlah's quantitative analysis was originally prepared in a different, earlier report which was considered by the Court in *Ban*. Mr. Umlah simply imported it without modification into his report prepared for this matter. He did not update the analysis or conduct any further research beyond that undertaken in 2016.

[339] That said, I also found that Mr. Umlah was a qualified expert with respect to stigma and further found that his qualitative analysis based on his general prior experience in addition to his professional judgment and general opinion dealing with stigma was admissible. To the extent that both Mr. Umlah and Mr. Rizzo opined that stigma is a real economic phenomenon, I am confident proceeding on the basis that stigma can impact market value.

[340] Accordingly, the question arises as to what economic value to attribute to the stigma in this case. To the extent that I have ordered the CRD to remediate the Property, this should address a substantial portion of the stigma associated with the Property in this case, but not all of it. The fact is that this Property has been subject to four separate sewage floods since 2006, and the CRD has had a very poor track record of preventing such floods from occurring and remediating the damage when they do occur. A prospective purchaser in my view would have a reasonable concern, in the face of these facts, that the Property may be impacted by future floods even if it has been fully remediated at the time of sale. To the extent that this proverbial "Sword of Damocles" hangs over the Property, it is reasonable to conclude in my view that the market value of the Property has been impacted, even in a remediated state.

[341] With respect to assessing the amount of the market value impairment attributable to stigma, I must weigh the separate opinions of Mr. Umlah and Mr. Rizzo. In this respect, I note that the defendant raises legitimate concerns with Mr. Umlah's appraisal analysis, which including the following:

a) He mistakenly assumed that the plaintiffs' property was built in 2010, when it described in a BC Assessment document as being built in 1993;

b) His assumptions about the number of bedrooms and bathrooms were not consistent with information in BC Assessment document and a prior MLS listing from 2012 for the same property;

c) He was not aware there was a workshop on the plaintiffs' property and did not factor that into his analysis;

d) He was not aware of the 2012 MLS listing, where it was listed on the market for 161 days at an initial price of $295,000 reduced to $279,000 and did not sell, and did not take it into account in his analysis;

e) He failed to include a written explanation with respect to the adjustments he made to the values of comparable properties. The smallest of his adjustments was 37% and the largest was 111%, which was substantially above AIC guidance of 15-30%; and

f) He did not conduct sufficient research on the property and the area, including failing to travel to Williams Lake to visit the property, failing to interview the plaintiffs, and failing to contact local real estate agents.

[342] While Mr. Rizzo's report also contained weaknesses, including his own failure to describe with specificity his adjustments to comparable properties, I find his report on the whole to be more reliable. Therefore, I find that a stigma award within the range proposed by Mr. Rizzo to be appropriate. Mr. Rizzo assessed the value of the Property without stigma at $350,000 and opined that the market value attributable to stigma could range from +/- 0% to 10% of the market value.

[343] In my view, a value closer to the high end of Mr. Rizzo's range is appropriate in this case. I note in this regard that in 2016 the property tax assessment for the Property was changed from $317,000 to $165,400. In 2020, the Property value was assessed further downward to $114,268. Of course, assessment value does not necessarily correspond to market value, nor do these assessments account for the order in this case that the Property should be remediated. Nonetheless, they do give at least a general indication of the material impact of the sewage flooding on the value of the Property. Further, I must account

for the fact that, given the location of the Property at the end of the Sewer System, and the history of prior flooding events, there is simply no way to guarantee that further such events will not occur in the future even after all the repair and maintenance work I have ordered is completed.

[344] Taking into account all the foregoing, I assess the reduction in market value of the Property attributable to stigma, assuming the Property has been fully remediated, at $30,000.

4. Aggravated Damages

[345] Aggravated damages are an augmentation of non-pecuniary damages and are compensatory in nature. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 [*Hill*], the Supreme Court of Canada found that aggravated damages may be awarded in circumstances where the defendant's conduct has been particularly high-handed or oppressive.

[346] Aggravated damages differ from punitive damages in that punitive damages are intended to punish the defendant while aggravated damages are intended to compensate the plaintiff.

[347] In *Thomson v. Friedmann*, 2008 BCSC 703, aff'd 2010 BCCA 277, the Court discussed the nature of aggravated damages at para. 29:

> Aggravated damages are a compensatory award that takes account of the intangible injuries such as distress and humiliation caused by a defendant's insulting behaviour. Aggravated damages are often claimed as compensation for mental distress caused by a defendant's behaviour. Aggravated damages will frequently cover conduct which would also be subject to punitive damages, but their role is compensatory. They are designed to compensate a plaintiff and are measured by the plaintiff's suffering such as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, and similar matters caused by the conduct of a defendant: *Vorvis v. Insurance Corp. of British Columbia*, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085.

[348] In *Fouad v. Longman*, 2014 BCSC 785, the Court summarized the nature of aggravated damages in the following terms, relying on the Supreme Court of Canada's decision in *Hill*:

> Aggravated damages may be awarded where the defendant has acted in a high handed or oppressive manner thereby increasing the humiliation and anxiety of the plaintiff from the libel. The key consideration in a finding of

> aggravating damages is the extent to which the defendant was motivated by actual malice which increased the injury to the plaintiff either by spreading further afield the damage to his reputation, or by increasing his mental distress or humiliation: Hill at para. 190.

[349] While it is clear that the Wards have suffered distress and anxiety as a result of the CRD's inaction relating to the 2015 Flood and the 2020 Flood, and are certainly entitled to great sympathy, I cannot conclude on all the evidence that the CRD acted in an "insulting", "high handed", or "oppressive manner", or that it was motivated by "actual malice". For the most part, the CRD's actions in this case appear to have been driven more by indifference and incompetence than by malice. This is certainly not to excuse the indifference of the CRD in the face of the Wards' reasonable complaints and concerns, which I found to be inadequate and in many respects callous. However, I must consider the CRD indifference in light of the relatively high applicable legal standard for aggravated damages.

[350] While there was credible evidence from Mr. Ward concerning Mr. Peddie's accusation on one day in 2015, that the Wards had contaminated their own Well (which Mr. Peddie denied initially in his testimony, but then admitted that he could not recall), I find that even if this did occur it was more reflective of a "one off" emotional event rather than of the CRD's overall approach to the Wards. For example, I saw no evidence that Mr. Minchau or Mr. Olsen manifested or felt any malice toward the Wards.

[351] In *Huff v. Price* (1990), 51 B.C.L.R. (2d) 282 (C.A.), the Court of Appeal explained that the analysis relating to aggravated damages also incorporates a requirement of reasonable foreseeability relating to the plaintiff's suffering:

> …aggravated damages are an award, or an augmentation of an award, of compensatory damages for non-pecuniary losses. They are designed to compensate the plaintiff, and they are measured by the plaintiff's suffering. Such intangible elements as pain, anguish, grief, humiliation, wounded pride, damaged self-confidence or self-esteem, loss of faith in friends or colleagues, and similar matters that are caused by the conduct of the defendant; that are of the type that the defendant should reasonably have foreseen in tort cases or had in contemplation in contract cases; that cannot be said to be fully compensated for in an award for pecuniary losses; and that are sufficiently significant in depth, or duration, or both, that they represent a significant influence on the plaintiff's life, can properly be the basis for the making of an award for non-pecuniary losses or for the augmentation of such an award. An award of that kind is frequently referred to as aggravated damages. It is, of course, not the damages that are

> aggravated but the injury. The damage award is for aggravation of the injury by the defendant's high-handed conduct.

[352] Thus, the Wards must also prove that it would have been foreseeable to the CRD that its conduct would cause Ms. Ward in particular to suffer in such a way. In this respect, I note that there was no evidence that Mr. Minchau in particular was aware of Ms. Ward's PTSD or particular psychological distress, or that a failure to resolve the flooding issues would worsen her specific condition. While it is true that both Mr. Minchau and Ms. Bastien (Ms. Ward's supervisor while she was Fire Chief) reported up to Ms. Bell, and that Ms. Bell was aware at a high level of the flooding issues on the Property, there was no evidence that Ms. Bell was actively involved in addressing the details of the situation or that she was advised of Ms. Ward's emotional suffering arising from the floods.

[353] Taking into account all the evidence, and the high legal standard applicable, I cannot conclude that an award of aggravated damages is appropriate in this case.

5. Punitive Damages

[354] Punitive damages are awarded against a wrongdoer for egregious behaviour or to provide deterrence. They are not compensatory in nature.

[355] In *Hill,* the Supreme Court of Canada explained the purpose of punitive damages as follows:

> 196 Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damages bear no relation to what the plaintiff should receive by way of compensation. Their aim is not to compensate the plaintiff, but rather to punish the defendant. It is the means by which the jury or judge expresses its outrage at the egregious conduct of the defendant. They are in the nature of a fine which is meant to act as a deterrent to the defendant and to others from acting in this manner. It is important to emphasize that punitive damages should only be awarded in those circumstances where the combined award of general and aggravated damages would be insufficient to achieve the goal of punishment and deterrence.
>
> 197 Unlike compensatory damages, punitive damages are not at large. Consequently, courts have a much greater scope and discretion on appeal. The appellate review should be based upon the court's estimation as to whether the punitive damages serve a rational purpose. In other words, was the misconduct of the defendant so outrageous that punitive damages were rationally required to act as deterrence?

[356] Punitive damages are not commonly awarded in cases involving failures such as negligent construction or breaches of contractual obligation. Rather they are reserved for the worst cases of human behaviour causing serious and deliberate damage: *Mundell* at para. 65.

[357] The test for punitive damages is found in *Whiten v. Pilot Insurance Co.,* 2002 SCC 18 [*Whiten*]:

> 36 Punitive damages are awarded against a defendant in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency": *Hill v. Church of Scientology of Toronto*, 1995 CanLII 59 (SCC), [1995] 2 S.C.R. 1130, at para. 196. The test thus limits the award to misconduct that represents a marked departure from ordinary standards of decent behaviour. Because their objective is to punish the defendant rather than compensate a plaintiff (whose just compensation will already have been assessed), punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment).

[358] In *Whiten*, the Supreme Court of Canada stated at para. 94 that the following points are important in determining whether an award of punitive damages is appropriate:

> [94] (1) Punitive damages are very much the exception rather than the rule, (2) imposed *only* if there has been high-handed, malicious, arbitrary or highly reprehensible misconduct that departs to a marked degree from ordinary standards of decent behaviour. (3) Where they are awarded, punitive damages should be assessed in an amount reasonably proportionate to such factors as the harm caused, the degree of the misconduct, the relative vulnerability of the plaintiff and any advantage or profit gained by the defendant, (4) having regard to any other fines or penalties suffered by the defendant for the misconduct in question. (5) Punitive damages are generally given only where the misconduct would otherwise be unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. (6) Their purpose is not to compensate the plaintiff, but (7) to give a defendant his or her just desert (retribution), to deter the defendant and others from similar misconduct in the future (deterrence), and to mark the community's collective condemnation (denunciation) of what has happened. (8) Punitive damages are awarded only where compensatory damages, which to some extent are punitive, are insufficient to accomplish these objectives, and (9) they are given in an amount that is no greater than necessary to rationally accomplish their purpose. (10) While normally the state would be the recipient of any fine or penalty for misconduct, the plaintiff will keep punitive damages as a "windfall" in addition to compensatory damages. (11) Judges and juries in our system have usually found that moderate awards of punitive damages, which inevitably carry a stigma in the broader community, are generally sufficient.

[359] In this case, I find no evidence that the actions of the CRD or its employees were malicious or sufficiently outrageous to be deserving of punishment. I note that, over the years, the CRD did compensate the Wards for earlier floods and also made efforts to remedy the risk, including installing the Backflow Preventer, upgrading the Lift Station, and making repairs to the Known Manhole.

[360] While their efforts to address the flooding issues on the Property were clearly insufficient, and negligent in some important respects, I find on the whole that this was not attributable to malicious intent. The fact that the CRD is responsible for a large geographical area and operates within a relatively tight budget envelope also cannot be discounted as a factor.

[361] Under all the circumstances, I conclude that a punitive damages award is not appropriate in this case.

6. Special Damages

[362] The parties have resolved pecuniary damages between March 14, 2015 and August 21, 2015, and these have been paid by the CRD to the Wards.

[363] The only remaining item of special damages is the cost of hay, which the Wards estimate at $3,000 to $5,000 per year. The Wards have settled with the CRD for hay costs incurred to March 16, 2016, but seek an additional amount of $2,000 for the balance of 2016 and $4,000 per year for the years 2017-2020. The total amount claimed is $18,000.

[364] I accept the testimony of the Wards that they have had to incur hay costs due to the negative effect of the sewage on the Pasture. However, I note that this figure is an estimate by the Wards and was not supported by documentation. Under the circumstances, I assess the cost of hay at $12,000.

G. *LOCAL GOVERNMENT ACT*

[365] I pause to note here that s. 744 of the *Local Government Act*, R.S.B.C., c. 1, as amended (formerly s. 288 of the *Local Government Act*, R.S.B.C., c 323), states that a regional district board is not liable in any action based on nuisance if the damages arise, directly or indirectly, out of the breakdown or malfunction of a sewer system.

[366] In their original Response to Civil Claim, filed May 18, 2017, the CRD relied upon this defence. However, in their ARANCC, filed September 16, 2020, the CRD expressly withdrew their reliance upon this provision. Further, the CRD expressly admitted liability in nuisance, at least between March 14, 2015 and August 21, 2015.

[367] Since the CRD has chosen not to rely upon this provision, it does not appear to be directly at issue in this case. However, even if it were applicable to the nuisance claim, I note that it does not apply to either the trespass claim or the negligence claim, which in my view are sufficient to ground the remedies granted in this case. Accordingly, the application of this provision would have no impact on the ultimate result in this case, and I make no ruling concerning such application.

V. ORDER

[368] In addition to the injunctive relief set out in paras. 313 and 314 above, the Wards are entitled to the following awards of damages against the CRD:

Non-pecuniary Damages	$35,000
Diminution in Value of Property	$30,000
Special Damages	$12,000
TOTAL	**$77,000**

[369] I grant the parties leave to speak to the issue of costs and pre- and post-judgment interest.

"M. Taylor J."