IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Gemex Development Corp. v. City of Coquitlam,***
2009 BCSC 65

Date: 20090126
Docket: S045308
Registry: New Westminster

Between:

Gemex Developments Corp.

Plaintiff

And

City of Coquitlam, Don Buchanan, Robert Lee, Jason Cardoni, Her Majesty the Queen in Right of the Provincial Government of British Columbia as represented by the Ministry of Environment, Lands and Parks, Colin Stewart, Robert Edwards, Neil Peters, Her Majesty the Queen in Right of the Government of Canada as Represented by the Department of Fisheries and Oceans, C.D. Patterson, Scott Coultish, Markus Feldoff, Kon Johannson, Bruce Reid, David Griggs, Deborah Brown, Norm Cook, Jon Kingsbury, Louis Sekora, Soukup Land Surveying Inc., Dieter Soukup, Brian Robinson, Louella Hollington, Barry Elliott, CH2M Gore & Storrie Limited, Neil Nyberg, Frank Quinn, Tom Field, Shinji Goto, Richard Roe and Jane Doe

Defendants

Before: Master Caldwell

Reasons for Judgment

Counsel for the Plaintiff:	T.L. Spraggs
Counsel for the Defendants, CH2M Gore & Storrie limited, Neil Nyberg, Frank Quinn, Tom Field and Shinji Goto:	S. Brearley
Date and Place of Trial/Hearing:	February 14, 2008 New Westminster, B.C.

[1] This is an application brought by the defendants, CH2M Gore & Storrie Limited, Neil Nyberg, Frank Quinn, Tom Field, and Shinji Goto to amend their Statement of Defence to include a claim of *res judicata* and for dismissal of the plaintiff's claim pursuant to Rule 19(24) of the ***Rules of Court*** upon a finding of *res judicata*.

[2] The plaintiff owns a residential property in Coquitlam. In 1996 it had constructed a concrete wall or fence along three sides of its property. The fence was, according to many of the neighbouring residents, rather imposing. Public outcry and demonstration followed and city council called upon Gemex to show cause as to why the fence should not be removed.

[3] The defendants who bring this application were the city engineers (Nyberg and Quinn) and the consulting engineers (CH2M, Field and Goto). The plaintiff alleges that they each had a role in the assessment of the safety of the fence.

[4] This overall situation spawned three separate actions by the plaintiff.

[5] The first of these actions, S034541, named only the defendants who bring this application. That action came on for hearing before Slade J. by way of Rule 18A applications by the defendants and by the plaintiff. The action was dismissed. An appeal of this decision by the plaintiff was dismissed as was the plaintiff's subsequent application for leave to appeal to the Supreme Court of Canada.

[6] The second action, S035251, dealt with other allegations directed against the City of Coquitlam its mayor and two city councillors. That action dealt with different matters and issues and is not before me in this application.

[7] The third action, S045308, within which this application is brought, was commenced in February 1998. The allegations levelled against the Provincial government and its employees were dismissed by Wedge J. in March 2002. An application by the plaintiff for extension of time to appeal was dismissed in October 2002 by Low J.A. These "engineer" defendants apply for dismissal on the basis that the allegations against them in this third action are entirely or essentially the same as those which were before Slade J., are *res judicata* and should therefore be dismissed pursuant to Rule 19(24).

[8] The plaintiff opposes the application. It says first that such application relating to a finding of *res judicata* is not within the jurisdiction of a Master. A similar application was brought before Master Groves (as he then was) in the matter of ***Dick v. Vancouver City Savings Credit Union***, [2005] B.C.J. No. 588. At paragraph 10 of that decision Master Groves stated:

> The case of World Wide Treasure Adventures Inc. v. Trivia Games Inc. [1996] B.C.J. No. 21, a decision of the British Columbia Court of Appeal stands for the proposition that if it is plain and obvious that the doctrine of res judicata applies to the plaintiff's new action, that the action should be struck pursuant to Rule 19(24)(d).

[9] And at paragraph 17 he states further:

> In summary, the plaintiffs' claims against Vancouver City Savings Credit Union, Justin Stubbs, Colin Grant, Citizens Bank of Canada, and Westminster Savings Credit Union must be dismissed pursuant to

> Rule 19(24)(d) as it is plain and obvious that the doctrine of res judicata applies to the plaintiffs' action.

[10] After hearing an appeal of Master Grove's decision, Crawford J. stated at paragraphs 18-19:

> 18. There is a general principle against multiplicity of actions arising out of one event. The matters raised by the plaintiffs herein are inherent in the foreclosure proceedings. The master properly found the matters were *res* judicata. The master's order is properly made both in fact and in law.
>
> 19. Given Mr. Dick's lack of knowledge of the ***Supreme Court Rules*** and the time requirements, I would allow an extension of time for the appeal. But having considered the merits of the matter and having carefully reviewed the affidavits and argument filed by the plaintiffs, I find no error in the reasons of Master Groves and would accordingly dismiss the appeal.

[11] That decision may be found at [2006] B.C.J. No. 2049.

[12] In addition to the ***Dick*** decision, the applicants herein cite the decision of Gerow J. in ***Pye v. Pye*** 2006 BCSC 505. In that case Gerow J. confirmed that a Master has jurisdiction to make final orders where there is no dispute on the facts or law because in doing so the Master is not exercising a judicial or adjudicative function but rather is performing a procedural or administrative function. Madam Justice Gerow's decision was affirmed by Thackray J.A. in Chambers [2006] B.C.J. No. 1709 (C.A.).

[13] The plaintiff has provided no opposing authority on the matter of jurisdiction. There is, in my view, no dispute on the facts or the law. I find that a Master does have jurisdiction to deal with this application as presented.

[14] The plaintiff's second and only remaining opposition to the defendant's application focuses on the distinction between two engineering reports prepared by the defendant applicants. The first of those reports was dated March 29, 1996 and dealt with various issues of structural stability as they related to the eastern section of the wall. That report is specifically referenced by the plaintiff in its Statement of Claim in the third action, i.e. the action which is before me on this application. In this regard, I note the following paragraphs in the plaintiff's Statement of Claim in this action:

> 90. The defendant, the CITY OF COQUITLAM, through its engineers, the defendants, NEIL NYBERG and FRANK QUINN, enlisted the assistance of the defendant, CH2M GORE & STORRIE LIMITED, and CH2M Gore & Storrie Limited employees or principals, the defendants, TOM FIELD and SHINJI GOTO, to put forward an engineering report that would deem the fence unsafe and, therefore, under the powers granted to the City of Coquitlam under the ***Municipal Act*** and with the assistance of the Mayor, Council and others, would have the fence removed.
>
> 93. The City of Coquitlam, with the assistance of the defendants, made their engineering report available to the press and others before it was made available for review or comment to the plaintiff.
>
> 96. The report of the defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, indicated that the fence presented a 'public safety risk' and that those sections of the fence that presented a public safety risk should be removed or stabilized.
>
> 97. The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, were responsible for producing an engineering report bearing date 29 March 1996, which report was done in secret without the knowledge of the plaintiff, with a view to assisting the defendant, the CITY OF COQUITLAM, and the other defendants herein in stopping and/or removing the plaintiff's concrete fence by putting forward conclusions and recommendations in respect to its safety and the impact upon

the Coquitlam River which were not based upon a proper engineering report or proper engineering principles.

98. The 29 March 1996 report by the defendant, CH2M GORE & STORRIE LIMITED, was prepared by the defendant, TOM FIELD, who dealt with the environmental issues involving the hydrological impact of the fence as it interacted with the Coquitlam River.

99. The defendant, SHINJI GOTO, prepared calculations to support the position that the fence was not safe, which calculations were not done in accordance with properly accepted engineering purposes dealing with failure to analysis of an existing structure.

100. The defendant, NEIL NYBERG, should have known or did know that the fence did not require engineering design and was, in fact, safe, and, in fact, was not a nuisance.

101. The defendants, NEIL NYBERG and FRANK QUINN, instead of retaining professional engineers with high qualifications and extensive experience in dealing with the issues of structural safety and engineering failure analysis, utilized their municipal leverage to obtain a report from the defendant engineers, TOM FIELD and SHINJI GOTO, who were working for the defendant, CH2M GORE & STORRIE LIMITED, when they knew, or should have known, that the experience, background and knowledge of the defendant engineers, TOM FIELD and SHINJI GOTO, was inadequate to produce a proper engineering report to determine the safety of the then constructed fence.

102. The intention of the defendant city engineers, NEIL NYBERG and FRANK QUINN, was not to obtain an unbiased and proper report but was to produce a report that they hoped would allow their employer, the defendant, the CITY OF COQUITLAM, to use the engineering report that was produced to have the concrete fence removed by improperly utilizing an abuse of process and by conspiring with others to create a by-law that would have the fence taken down and/or removed.

103. The defendants owed a duty to the plaintiff to produce engineering reports that were factually correct and engineeringly sound.

104. The engineering reports of the defendants made negligent misrepresentations and negligent assumptions resulting in negligently produced calculations that were in breach of the duty owed to the plaintiff, Gemex Developments Corp., and without

consultation with them, causing the plaintiff, or intended to cause the plaintiff, damage to its property and financial loss, as well as, financial hardship to the plaintiff.

105. The particulars of the said negligence is as follows:

a) Utilizing the British Columbia Building Code (BCBC92), the National Building Code (NBC90 Supplement) and the CSA A23.3-M94 Design of Concrete Structures in presenting a report based upon design requirements for a fence when no design requirements were required;

b) In utilizing the NBC90 Supplement the Defendants failed to make use and utilize the comments put forward in the Introduction to Chapter 4 (p. 133), which are as follows:

"*The purpose of these Commentaries is to make available to the designer detailed design information which will assist in the use of the National Building Code. The Commentaries are provided as background information, and in some cases, as suggested approaches to certain design assumptions, but not as mandatory requirements.["]*

"Because the information provided in these Commentaries cannot cover all conditions or types of structures that occur in practice, and also because new information may become available in the future, the designer should try to obtain the latest and most appropriate design information available. For unusual types of structures, specialized information such as theoretical studies, model test or wind tunnel experiments may be required to provide adequate design values."

c) The engineers applied a safety factor of 2 in respect to the safety of the tipping over of the fence due to wind, when the defendant, NEIL NYBERG, and the Mayor and Council of the defendant, the CITY OF COQUITLAM, accepted a safety factor of 1 in granting approval to the subdivision of the premises located at civic address 2003 Como Lake Avenue, in the City of Coquitlam, in the Province of British Columbia;

d) The plan profile of the fence, as indicated in the engineering reports and used in the calculations, was not accurate;

e) The number of buttresses and the spacing of the buttresses was not properly taken into consideration.

f) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, failed to consider the effect, in their calculations, where the original chain link fence, including its supporting steel posts, were encased in the concrete.

g) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, failed to consider in their calculations the corner effects in respect to dealing with the safety of the fence;

h) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, failed to consider the anchoring effect on the corners of the fence, when supported by chain link fencing;

i) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD, and SHINJI GOTO, failed to consider the effect of the trees, debris, ground effect and other obstructions in front of the fence;

j) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD, and SHINJI GOTO, failed to consider the fact that the fence was not completed but was in an incomplete state, as was the ground around it, and the effects of future landscaping around the fence were not taken into consideration;

k) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, failed to consider the effect of houses adjacent to the fence in respect to the effect of these houses upon wind velocities;

l) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, did not properly account for the fact that the fence had a very low profile and, therefore, applied an exposure factor that was too large;

m) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, failed to consider, when dealing with the frequency of fence tipping over under a certain wind velocity, the direction that the wind must strike the particular fence and, in particular, the effect upon the increased wind velocity necessary due to the wind travelling in different directions;

n) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD, and SHINJI GOTO, failed to consider the effect upon the wind of the surrounding local terrain and, particularly, within a shot distance, the neighbouring, much higher ground;

o) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD, and SHINJI GOTO, failed to consider the effect upon the wind of the house, being built upon the Plaintiff's property when the house was completed;

p) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, failed to consider the effect of the adjoining forest;

q) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD and SHINJI GOTO, assumed that the fence was vertical and did not measure or check to see the slope on the fence surface;

r) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD, and SHINJI GOTO, failed to consider the effect of additional concrete poured at the base of the four (4) foot concrete protrusions;

s) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD, and SHINJI GOTO, failed to consider the effect of the fence being built below the adjoining level of the terrain;

t) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD, and SHINJI GOTO, failed to use historical wind data; and,

u) The defendants, CH2M GORE & STORRIE LIMITED, TOM FIELD, and SHINJI GOTO, failed to take into consideration the chance of human activity in the proximity of the fence in the case of high winds.

106. The defendants, CH2M GORE & STORRIE LIMITED, NEIL NYBERG, FRANK QUINN, TOM FIELD, and SHINJI GOTO, failed to intercede or stop any of the municipal activities to remove the plaintiff's concrete fence as a safety hazard, even though their own calculations indicated that it would not blow over unless the wind was 148.2 kilometres per hour and they were aware that the maximum wind force since 1955, a period of over forty (40) years, at Vancouver International Airport was 129 kilometres per hour.

107. The defendants, CH2M GORE & STORRIE LIMITED, NEIL NYBERG, FRANK QUINN, TOM FIELD, and SHINJI GOTO, knowing the fence would not blow over in the wind, tried to obtain the support of certain Coquitlam councilors by advising them that the concrete fence would blow over if the wind was 105 kilometres per hour and indicated that this would happen on a very frequent basis.

108. The defendants, CH2M GORE & STORRIE LIMITED, NEIL NYBERG, FRANK QUINN, TOM FIELD, and SHINJI GOTO, failed, when dealing with the impact of the fence on the Coquitlam River, to consider the following:

    a) The historic river elevation and river banks;

    b) Recent alterations to the river banks on the plaintiff's property caused by the installation of a storm sewer outflow into the river;

    c) The effect of the various cross-sectional wetted areas of the river at the various times historically and as projected into the future;

    d) The impact on the river volume of the Coquitlam Dam and the water mains feeding from the Coquitlam Dam to serve the population of the lower mainland of British Columbia;

    e) The actual effect the fence would have on the river and river flows in the event of 1 in 10, 1 in 50 and 1 in 100 year floods;

    f) The effect upon the adjacent home dwellings in the event of 1 in 10, 1 in 50 and 1 in 100 year floods if the fence was not in place; and

    g) The structural integrity of the fence.

[15] The second of those engineering reports was dated September 1996 and also dealt with various stability issues, but this time regarding the western section of the wall. That report was specifically referenced by the plaintiff in its Statement of Claim in the first action i.e. the action which was dismissed by Slade J. I note the following paragraphs from the plaintiff's Statement of Claim in that first action:

31. The City of Coquitlam, through its engineers, the Defendants, Neil Nyberg and Frank Quinn, enlisted the assistance of the Defendant, CH2M Gore & Storrie Limited, and CH2M Gore & Storrie Limited employees or principals, the Defendants, Tom Field and Shinji Goto, to put forward an engineering report that would deem the fence unsafe and, therefore, under the powers granted to the City of Coquitlam under the ***Municipal Act*** and with the assistance of the Mayor, Council and others, would have the fence removed.

34. The City of Coquitlam, with the assistance of the Defendants, made their engineering report available to the press and others before it was made available for review or comment to the Plaintiff.

37. The report of the Defendants, CH2M Gore & Storrie Limited, Tom Field and Shinji Goto, indicated that the fence presented 'a public safety risk' and that those sections of the fence that presented a public safety risk should be removed or stabilized.

39. The Defendants owed a duty to the Plaintiff to produce an engineering report that was factually correct and engineeringly sound.

40. The engineering report of the Defendants made negligent misrepresentations and negligent assumptions resulting in negligently produced calculations that were in breach of the duty owed to the Plaintiff, Gemex Developments Corp., and without consultation with them causing financial loss, as well as, financial hardship to the Plaintiff.

41. The particulars of the said negligence is as follows:

    a) Utilizing the British Columbia Building Code (BCBC92), the National Building Code (NBC90 Supplement) and eth CSA A23.3-M94 Design Concrete Structures in presenting a report based upon design requirements for a fence when no design requirements were required;

    b) In utilizing the NBC90 Supplement the Defendants failed to make use and utilize the comments put forward in the Introduction to Chapter 4 (p. 133), which are as follows:

    "*The purpose of these Commentaries is to make available to the designer detailed design information which will assist in the use of the National Building Code. The Commentaries are provided as background information, and in some cases, as suggested*

approaches to certain design assumptions, but not as mandatory requirements.["]

"Because the information provided in these Commentaries cannot cover all conditions or types of structures that occur in practice, and also because new information may become available in the future, the designer should try to obtain the latest and most appropriate design information available. For unusual types of structures, specialized information such as theoretical studies, model test or wind tunnel experiments may be required to provide adequate design values."

c) The engineers applied a safety factor of 2 in respect to the safety of the tipping over of the fence due to wind, when the defendant, Neil Nyberg, and the Mayor and Council of the City of Coquitlam accepted a safety factor of 1 in granting approval to the subdivision of the premises located at civic address 2003 Como Lake Avenue, in the City of Coquitlam, in the Province of British Columbia;

d) The plan profile of the fence, as indicated in the engineering report and used in the calculations, was not accurate;

e) The number of buttresses and the spacing of the buttresses was not properly taken into consideration.

f) The Defendants failed to consider the effect, in its calculations, where the original chain link fence, including its supporting steel posts, were encased in the concrete;

g) The Defendants failed to consider in their calculations the corner effects in respect to dealing with the safety of the fence;

h) The Defendants failed to consider the anchoring effect on the corners of the fence, when supported by chain link fencing;

i) The Defendants failed to consider the effect of the trees, debris, ground effect and other obstructions in front of the fence;

j) The Defendants failed to consider the fact that the fence was not completed but was in an incomplete state, as was the ground around it, and the effects of future

landscaping around the fence were not taken into consideration;

k) The Defendants failed to consider the effect of houses adjacent to the fence in respect to the effect of these houses upon wind velocities;

l) The Defendants did not properly account for the fact that the fence had a very low profile and, therefore, applied an exposure factor that was too large;

m) The Defendants failed to consider, when dealing with the frequency of fence tipping over under a certain wind velocity, the direction that the wind must strike the particular fence and, in particular, the effect upon the increased wind velocity necessary due to the wind travelling in different directions;

n) The Defendants failed to consider the effect upon the wind of the surrounding local terrain and, particularly, within a shot distance, the neighbouring, much higher ground;

o) The Defendants failed to consider the effect upon the wind of the house, being built upon the Plaintiff's property when the house was completed;

p) The Defendants failed to consider the effect of the adjoining forest;

q) The Defendants assumed that the fence was vertical and did not measure or check to see the slope on the fence surface;

r) The Defendants failed to consider the effect of additional concrete poured at the base of the four (4) foot concrete protrusions;

s) The Defendants failed to consider the effect of the fence being built below the adjoining level of the terrain;

t) The Defendants failed to use historical wind data; and,

u) The Defendants failed to take into consideration the chance of human activity in the proximity of the fence in the case of high winds.

[16] It is readily apparent that the allegations in paragraphs 90, 93, 96, 103, 104, and 105 (third action) are substantively identical to those at paragraphs 31, 34, 37, 39, 40, and 41 respectively, excepting only the dates of the referenced reports. In each case these paragraphs form the heart of the plaintiff's claim against these defendants.

[17] The plaintiff argues simply that that difference or distinction alone defeats the claim of *res judicata* and entitles it to a separate trial in the third action.

[18] The applicants/defendants argue that a broader application of *res judicata* is appropriate, is supported on the law and the facts and should result in the dismissal of the plaintiff's claim.

[19] The defendants cite ***Bjarnarson v. Manitoba***, [1987] M.J. No. 277 which distils a set of requirements from the Supreme Court of Canada decision in ***Town of Grandview v. Doering*** (1975), 61 D.L.R. (3d) 455 as follows:

> 1. There must be a final decision of the a court of competent jurisdiction in the prior action;
>
> 2. The parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action (mutuality);
>
> 3. The cause of action in the prior action must not be separate and distinct; and
>
> 4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised due diligence.

[20] There is no issue as to points 1 and 2; both are satisfied in the present case. Points 3 and 4 were the subject of prior comment by the British Columbia Court of

Appeal. In the case of ***Lehndorff Management Ltd. v. L.R.S. Development Enterprises Ltd.*** (1980) 19 B.C.L.R. 59 at paragraph 16:

> This passage has been much quoted with approval and followed in the Courts of England and Canada. These subsequent decisions appear to explain the "special circumstances" or "special cases" which render the principle of res judicata inoperative as those where the question of law or fact, which is the subject of the later litigation, is not identical with, or inextricably involved with, the question of law or fact previously decided. The maxim res judicata does not apply to distinct causes of action (Hall v. Hall and Hall's Feed & Grain Ltd. (1959) 15 D.L.R. (2d) 638), but it does apply where the second action arises out of the same relationship, and the same subject matter, as the adjudicated action although based upon a different legal conception of the relationship between the parties (Morgan Power Apparatus Ltd. v. Flanders Installations Ltd. (1972) 27 D.L.R. (3d) 249 B.C.C.A.). It also applies not only to points on which the Court in the first action was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the first litigation and which the parties, exercising reasonable diligence, might have brought forward at the time (Winter v. Dewar (1929) 2 W.W.R. 518 B.C.C.A.). The principle of res judicata would also apply if the issue in the present action was one of the several issues essential for the determination of the whole of the first case, though merely a step in that decision rather than the main point of it (Fidelitas Shipping Co. Ltd. v. V/O Exportchleb (1965) 2 All E.R. 4).

[21] The Nova Scotia Court of Appeal expressed or clarified the principle in the case of ***Hoque v. Montreal Trust Co. of Canada*** (1997), 162 N.S.R. (2d) 321 at paragraph 37:

> Although many of these authorities cite with approval the broad language of Henderson v. Henderson, supra, to the effect that any matter which the parties had the opportunity to raise will be barred, I think, however, that this language is somewhat too wide. The better principle is that those issues which the parties had the opportunity to raise and, in all the circumstances, should have raised, will be barred. In determining whether the matter should have been raised, a court will consider whether the proceeding constitutes a collateral attack on the earlier findings, whether it simply asserts a new legal conception of facts previously litigated, whether it relies on "new" evidence that could have been discovered in the earlier proceeding

> with reasonable diligence, whether the two proceedings relate to separate and distinct causes of action and whether, in all the circumstances, the second proceeding constitutes an abuse of process.

[22] The questions to be answered therefore are:

1. Do the first and third actions arise from separate and distinct causes of action? And

2. If so, could or should they have been dealt with in the first action before Slade J. or does this third action constitute an abuse of process?

[23] It is clear from a review of the Statement of Claim in the first action that it mentions only the September 1996 report. In spite of this fact, there are numerous references within the Statement of Claim to "the fence" without any limitations as to which portion of the "the fence" is being referred to. Similarly, the Statement of Claim in the third action mentions only the March 29, 1996 report but also makes numerous references to "the fence" without further limitations or restrictions. In addition and as previously mentioned, the substantive allegations levelled against the applicants/defendants herein and the same entities as the only defendants in the first action are virtually identical save that they relate to the reports of different dates regarding different sections of the same fence.

[24] In dealing with the 18A application in the first action it is clear that Slade J. had before him argument and evidence relating to both the eastern and western sections of the fence and more importantly he had before him and considered both the March and the September reports. In this regard I note from his decision the following paragraphs:

2. This action against the City's engineers, Neil Nyberg and Frank Quinn, and against CH2M Gore & Storrie limited, Tom Field and Shinji Goto, consulting engineers (CH2M, Field and Goto, will be referred to as CH2M), relates to their respective roles in the assessment of the safety of the fence. [Emphasis added]

3. In March 1996, the City retained CH2M to investigate the hydrological impact and structural stability of a concrete wall then under construction on the East boundary of Gemex property. The report, dated March 29, 1996, was forwarded to Mr. Quinn, the Assistant City Engineer. [Emphasis added]

4. The March 29, 1996 report raised concerns over the hydrological impact of the wall on flows of the Coquitlam river in the event of flood conditions. Concerns were also raised over the structural stability of the wall, including stability under seismic or high wind loading. [Emphasis added]

7. In September 1996, the City retained CH2M to provide another report. The subject of this report was a concrete wall on the western boundary of the Gemex property. Walls were also under construction on the south and north boundaries. Once again, the City indemnified CH2M.

8. The CH2M report on the west wall was delivered on September 20, 1996, to the attention of Mr. Quinn. This report also raised concerns over the stability of the wall in high wind conditions.

9. Mr. Nyberg was the City Engineer when the reports were commissioned and received. Mr. Quinn was the Assistant City Engineer. His responsibilities included the hiring of consultants by the City Engineering Department. [Emphasis added]

10. The Engineering Department had been directed by resolutions of City council to obtain independent engineering reports. Messrs. Quinn and Nyberg worked together to obtain the reports from the selected consulting engineer, CH2M. Neither were assigned any responsibility for the drafting of the reports, performance of design checks, or verification of the calculations made by CH2M. They performed no such role. In their affidavits, both Mr. Quinn and Mr. Nyberg depose that they gave no instructions to CH2M of any conclusions sought by the City in these reports. [Emphasis added]

11. Messrs. Nyberg and Quinn attended the City council meeting on September 23, 1996, at which the CH2M report dated September 20 was presented. Council resolved to issue a

notice of hearing to Gemex, pursuant to s. 936 of the Municipal Act, 1979. This was notice of a hearing by council to consider whether it should order that Gemex cause the wall, as depicted in sketch plans within the March 29, 1996, and September 20, 1996, reports, to be modified in compliance with "accepted engineering practices", or removed. The notice invited Gemex to make representations at this public meeting. [Emphasis added]

12. The notice of hearing, together with a draft order under s. 936 of the Municipal Act, was delivered to Gemex under cover of a letter from the City solicitor. The notice specified that the public hearing would take place on October 8, 1996, at the council chambers. The solicitor's letter advised Gemex that council would consider all evidence available to it concerning the safety of the wall. CM2H's reports of March and September 1996, were delivered to Gemex by the City solicitor at the time of delivery of notice of the October 8th hearing. [Emphasis added]

14. The City solicitor responded to Mr. Spragg's letter on October 1st. She advised that only council had authority to adjourn the hearing. She invited Mr. Spraggs to contact CH2M with any questions on the March and September 1996 reports. The defendant Tom Field was identified as the contact person. Mr. Spraggs was advised that only council had the authority to "withdraw" the reports. [Emphasis added]

15. The Writ of Summons and Statement of Claim in this proceeding were filed in the New Westminster Registry on October 3, 1996, and were served on that day. By letter dated October 7, the City solicitor advised Mr. Spraggs of the City's position that it would proceed with the hearing. The City solicitor's letter repeats a previous invitation to Gemex to provide expert reports describing any alleged errors or omissions in the reports. She advised also that council had directed a two week adjournment of the hearing to October 22, 1996. This was to give Mr. Spraggs's client an opportunity to obtain expert reports and advice. [Emphasis added]

17. The hearing proceeded on October 22nd. Mr. Spraggs, representing Gemex, tendered a report from O & S Engineering International Inc. This report contains an analysis of the wall structures resistance to wind and seismic forces. The author of the O & S report concluded that the "fence" is stable in both wind and earthquake. [Emphasis added]

20. On October 28, 1996, at a special meeting, the City of Coquitlam council resolved to accept the O & S and CH2M

reports, and find that the wall does not currently pose a public nuisance or safety hazard. This ended the proceedings initiated under s. 936 of the Municipal Act. [Emphasis added]

25. For the most part, the facts alleged in the Statement of Claim do not distinguish among Messrs. Nyberg and Quinn, and CH2M. The claims of breach of fiduciary duty and abuse of process appear to be grounded in the assertion that Messrs. Nyberg and Quinn sought a report from CH2M that would deem the wall unsafe, in order to establish a basis for the exercise of council's power under the Municipal Act to have the wall removed. As for the claim against CH2M, it is asserted that it deliberately produced a report "affecting the plaintiff without due care and attention, with a view that it would cause damage to the plaintiff's property, as well as, financial loss ...". [Emphasis added]

26. The claim based on negligence, in relation to all the defendants, is grounded in particulars which allege that they applied incorrect building codes and standards, and failed to take into account certain relevant considerations in the production of the report (CH2M), and the delivery of the report to council by Messrs. Nyberg and Quinn.

30. The claim against Messrs. Nyberg and Quinn must be considered in the light of s. 755.1 of the Municipal Act, R.S.B.C. 1979, c. 290, which was in effect at the time. Subsections 1-3 of that section state:

> 1. No action for damages lies or shall be instituted against a municipal public officer or former municipal public officer for anything said or done or omitted to be said or done by him in the performance or intended performance of his duty or the exercise of his power or for any alleged neglect or default in the performance or intended performance of his duty or exercise of his power.
>
> 2. In this section "municipal public officer" means ...
>
> (i) an officer or employee of a municipality, ...
>
> 3. Subsection 1 does not provide a defence where
>
> (a) the municipal public officer has, in relation to the conduct that is the subject matter of the action, been guilty of dishonesty, gross negligence or malicious or wilful misconduct

32. The claim of wilful misconduct is based, primarily, on allegations that Messrs. Nyberg and Quinn commissioned the September 1996 report from CH2M knowing or believing that CH2M would deliver a negative report, as:

    1. It had concluded in its March 29, 1996, report that a similar wall located on the Gemex property was unsafe.

    2. Messrs. Nyberg and Quinn accepted CH2M's request for an indemnity.

33. There is no direct evidence to support a finding that Messrs. Nyberg and Quinn, or either of them, requested the September report from CH2M with the intention that a report adverse to Gemex interests be produced. Such a motive could not be inferred from the fact that a previous report, the March 1996 report, raised a concern over the stability of the portion of the wall which was the subject of the earlier report. There is nothing in the evidence to suggest that Messrs. Nyberg and Quinn, or either of them, did anything in their communications with CH2M that would impede or otherwise affect the exercise by CH2M of its independent professional judgment in relation to either report.

35. As for negligence, Mr. Spraggs argues that Messrs. Nyberg and Quinn were negligent in providing to council a report which failed to utilize the appropriate construction standards in the analysis of the structural stability of the cement wall.

36. I will, in my analysis of this basis for a claim in negligence against Messrs. Nyberg and Quinn, assume that there was such a failure on the part of CH2M.

37. The argument fails for this reason: it was not within the scope of Messrs. Nyberg and Quinn's duties to their employer, the City of Coquitlam, to analyze or comment on the CH2M reports. The City council requested, in each case, that the engineering department obtain independent engineering reports. Their role was to facilitate the commission of the reports, and their delivery to council, nothing more. If they were not required by their employer to analyze and comment on the impugned reports, there would be no basis for finding that they owed a duty of care to do so to their employer, much less to Gemex.

39. Tempting though it is to comment expansively on this theory of tort law, it will suffice to say that Messrs. Nyberg and Quinn had no authority to "withdraw" the report. They had been directed to

> obtain the reports by council. The reports were received and passed on to council. Council acted on the reports by resolving to require Gemex to show cause why the wall should not be ordered modified or removed. Decisions as to whether to "withdraw" the reports were outside the authority and duties of these defendants.
>
> 45. The onus is on Gemex, as plaintiff, to prove negligence on a balance of probabilities. Gemex claims that CH2M, by using the British Columbia Building Code as the basis for its analysis of wind and seismic effects on the wall, failed to carry out its professional duties in accordance with the applicable standard of care. In short, Gemex claims that British Columbia Building Code has no application to an analysis of the structural stability of a free standing concrete wall.
>
> 49. The Hooley, Schubak Ltd. report, like the others obtained by Gemex, is critical of CH2M's use of the building code. The Hooley and Schubak report embarks on a detailed and highly theoretical analysis. This leads to a conclusion that the structure is stable. In doing so, the authors take into account information on the structure of a significant portion of the wall which was not available to CH2M. Gemex was invited to provide just this sort of information to CH2M before the scheduled date for the show cause hearing, and refused or neglected to provide the information.
>
> 50. The evidence relied upon by Gemex falls far short of proof of negligence on the part of CH2M to the level of probability. Neither the standard of care nor negligence is proven.

[25] In addition to clear reference to and consideration of the reports, Slade J. comments extensively on and makes clear findings regarding the roles and duties of these defendants especially Messrs. Nyberg and Quinn. Mr. Justice Slade does not distinguish any difference in the Nyberg/Quinn roles or duties as they relate to the different reports. I find it impossible to see how a second hearing addressing precisely the same issues before a new judge could be appropriate.

[26] Regarding CH2M Gore & Storrie Limited, Tom Field and Shinji Goto, Slade J. finds at paragraph 42 that there “is no evidence probative of an intention on the part

of CH2M to produce a false report." Again, at paragraph 50 Slade J. finds that "the evidence relied upon by Gemex falls far short of proof of negligence on the part of CH2M to the level of probability. Neither the standard of care nor negligence is proven." Again, in the face of such findings I find it difficult to see the plaintiff's opposition as other than an attempt to lead more and/or better evidence as to the issues of standard of care and negligence in this third action. In spite of this, no evidence or argument was presented to me to suggest that such other or better evidence was available regarding the third action nor to explain why, if such now exists, it was not reasonably available at the time of the hearing before Slade J. Absent such evidence or at least argument, it would seem that this is precisely the type of mischief which the cited cases of ***Bjarnarson***, ***Lehndorff Management Ltd.***, ***Town of Grandview***, and ***Hoque*** seek to avoid.

[27] Finally, Slade J. found in the first action that the plaintiff's claim was solely for the economic loss and he went on to find that there was no relational proximity between the plaintiff and CH2M. Thus, Slade J. held that recovery for pure economic loss was not available to plaintiff. Although this was a major point relied upon by the applicants, no evidence or argument was presented by the plaintiff indicating that its actual claim in this action related to other than pure economic loss.

[28] In all of the circumstances I find that the issues sought to be raised by the plaintiff here are issues which the plaintiff had the opportunity to and should have raised in the first action and hearing. I find that it constitutes a collateral attack on earlier findings and that it constitutes an abuse of process. The statement of

defence is amended to include the defence of *res judicata* and the plaintiff's claim as against these defendants is accordingly dismissed.

[29] Special costs have been sought by the applicants but I am not satisfied that in the circumstances the actions of the plaintiff warrant my exercising my discretion in favour of such an award. The applicants are entitled to their costs at Scale B.

"Master Caldwell"