IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Lewis v. Fraser-Fort George (Regional District),* 2017 BCSC 449

Date: 20170321
Docket: S0934704
Registry: Prince George

Between:

Katherine Joann Lewis, John Inman Orlowsky, Sarah Betty Urquhart, Rick Kenneth Urquhart and John Berkeley Ball

Plaintiffs

And

Regional District of Fraser-Fort George

Defendant

Before: The Honourable Madam Justice Church

Reasons for Judgment

In Chambers

Counsel for plaintiffs:	T.A.P. Matte
Counsel for defendant:	S.H. Haakonson
Place and Dates of Hearing:	Prince George, B.C. August 2 & 3, 2016 September 19, 20, 21, 22 & 23, 2016
Place and Date of Judgment:	Prince George, B.C. March 21, 2017

Introduction

[1] Katherine Joann Lewis, John Inman Orlowsky, Sarah Betty Urquhart, Rick Kenneth Urquhart and John Berkeley Ball (collectively, the "plaintiffs"), are all homeowners on Island Park Drive, in the Miworth area near Prince George, B.C. Their respective homes are located on three separate lots on the banks of the Nechako River and are within the boundaries of Regional District of Fraser-Fort George (the "defendant") and subject to its bylaws.

[2] On April 14, 1977, the defendant's Board of Directors met and passed a resolution that building permits be withheld from the area of development where the plaintiffs' homes were eventually located unless the applicant provided a letter indicating that he or she "had been informed of the hazards of erosion at that location and accepts responsibility for any result in damages".

[3] Between 1989 and 1992, the defendant issued building permits with respect to the plaintiffs' homes without obtaining such letters.

[4] In 1997 and in 2007, there were significant erosion events on the Nechako River that significantly impacted the plaintiffs' properties.

[5] The plaintiffs filed a writ of summons and statement of claim on June 2, 2009, seeking damages from the defendant on the grounds that it was negligent in failing to warn the plaintiffs of the risk of erosion on their properties and issuing building permits for construction without that warning.

[6] On December 5, 2014, the plaintiffs filed a notice of application seeking to have their claim heard and determined by way of a summary trial. The summary trial proceeded before me over a total of seven days in August and September, 2016.

[7] On March 16, 2015, the defendant filed a notice of application seeking dismissal of the plaintiffs' claim, on the grounds that it is statute-barred pursuant to the *Limitation Act*, R.S.B.C. 1996, c. 266 (the "*Limitation Act")* and the *Local*

Government Act, R.S.B.C. 2015, c. 1. The defendant's application was heard at the same time as the summary trial.

Background

(i) 1976 Erosion Event and Zoning Bylaws

[8] In 1975, the defendant issued building permits with respect to Lots 1 and 5, Island Park Drive. The building permit with respect to Lot 5, Island Park Drive was issued to Charles and Judith Freeman (para. 4, affidavit of T. McEachen, sworn December 20, 2013).

[9] Following an erosion event in 1976, Mr. Freeman wrote to the Water Investigation Branch of the Department of Environment of British Columbia ("BC Water Investigation Branch") seeking assistance to prevent further erosion of the high river bank beside his home. The BC Water Investigation Branch conducted an inspection of Mr. Freeman's property on November 3, 1976 and noted in a Memorandum dated December 22, 1976 that:

> The Freeman house is approximately 30 feet from the top of the bank so no river stabilization works would prevent the eventual loss of this house to the river. It is recommended that the house be moved back at least 200 feet from the bank.

[10] The BC Water Investigation Branch wrote to Mr. Freeman on January 14, 1977 and advised him that it could not provide funding for protection of this property. The letter to Mr. Freeman contained the following paragraph:

> Considering the very high cost which would be incurred to provide a reasonable degree of erosion protection for the subdivided area, and bearing in mind that if such work were to be carried out it would almost certainly encourage further development in this potentially hazardous area, we regret that we are unable to provide funding for protection of this area out of our very limited funds.

[11] On January 17, 1977, the BC Water Investigation Branch wrote to the defendant (the "1977 Department of Environment Letter") and provided a copy of its letter to Mr. Freeman, together with a summary of the findings of its investigation.

The penultimate paragraph of this letter, which was received by the defendant on January 24, 1977, states:

> This matter is being drawn to your attention in the hope that you may be able to prevent further compounding of this undesirable situation, there being a considerable number of undeveloped lots along this erosion prone bank.
>
> (Exhibit "A", affidavit of K. Jensen, sworn December 11, 2013)

[12] This letter was considered at least two board meetings of the defendant in early 1977 and on April 14, 1977, the Board of Directors of the Defendant passed the following resolution:

> Moved Director Moffat, seconded Director Taggart that Building Permits be witheld [*sic*.] from lots in D.L. 4204, Plan 18805, unless the applicant provides us with a letter indicating that he has been informed of the hazards of erosion at that location and accepts responsibility for any result in damages.
>
> (the "1977 Resolution"; Exhibit "B", affidavit of K. Jensen sworn December 11, 2013)

[13] Mr. Freeman apparently continued his efforts for funding assistance through his local MLA, Howard Lloyd. In a letter to Mr. Lloyd dated May 6, 1977, the Minister of the Environment, James A. Nielsen indicated that his Ministry was not in a position to offer assistance to Mr. Freeman to undertake erosion protection work on his property, as the works would have to be continuous along the bank of the subdivision, would require ongoing maintenance and could lead to a feeling of "false security, followed by development of homes adjacent to the bank which could result in disaster for the families involved. We have advised the Regional District of our concerns about future development along the bank".

[14] Mr. Freeman eventually obtained permission to install bank armoring or "rip rap" along the riverbank adjacent to his property in the summer of 1978.

[15] In 1986, the defendant adopted Zoning Bylaw No. 835, which amended and added as section 49 a provision to address flood damage and erosion protection. Section 49.1 provided that:

> Notwithstanding any other provision of this By-law, a building or structure shall not be located closer than:

> (a)…
>
> (b)…
>
> (c) 30m (100ft) from the NATURAL BOUNDARY of the following rivers or creeks;
>
> …, Nechako, …

[16] Note 1 of Zoning Bylaw 835 also provides that:

> The purpose of these conditions is to reduce the risk of injury, loss of life and property damage due to flooding and erosion. However, the Regional District does not represent to the owner or any other person that any building constructed or mobile home or unit located in accordance with the following conditions will not be damaged by flooding or erosion.

(ii) The Lewis/Orlowsky property

[17] The plaintiffs, Katherine Joann Lewis ("Dr. Lewis") and John Inman Orlowsky ("Mr. Orlowsky") live at 3075 Island Park Drive, Prince George, B.C., a property legally described as:

> PID: 010-876-016
> Lot 2 District Lot 4204 Cariboo District Plan 18805
>
> (the "Lewis/Orlowsky Property")

[18] Dr. Lewis and Mr. Orlowsky purchased this property in July 1991, after walking around the property and viewing it several times, including with a road engineer who was a colleague of Dr. Lewis. Although they were aware of the potential for erosion of the top part of the bank, their concerns were somewhat alleviated by the knowledge that the Nechako River flows were controlled by the Kenny Dam and they believed that a major erosion event was unlikely to occur. No one warned Dr. Lewis or Mr. Orlowsky of any risk or history of erosion of the river bank by the Nechako River (affidavit #1 of K.J. Lewis, para. 6).

[19] On August 6, 1992, Dr. Lewis applied for and obtained a building permit from the defendant to construct their home on the Lewis/Orlowsky Property. Dr. Lewis was not informed of the hazards of erosion at that location and she was not required to sign a letter accepting responsibility for any damage caused by erosion as a

condition of receiving a building permit from the defendant (affidavit #1 of K.J. Lewis, para. 9).

[20] Dr. Lewis and Mr. Orlowsky chose a building site for their home with a set back from the Nechako River in excess of that required by the defendant, to allow for the possibility for future erosion of the top of the steep river bank at the Lewis/Orlowsky Property. Construction of their home was completed, subject to inspection and approval by the defendant, and they were ultimately authorized to occupy their home in 1993.

[21] In May and June 1997, a significant erosion event occurred on the Nechako River and between two and four metres of the Lewis/Orlowsky Property eroded away.

[22] In May 1998, Dr. Lewis and Mr. Orlowsky received a letter from the Ministry of Environment, Lands and Parks which said the following:

> Several locations along the bank of the Nechako River near Prince George are actively eroding as a result of high water events in recent years. Your property has been identified by staff from the Ministry of Environment, Lands and Parks as an area where erosion may affect existing or future building construction.

[23] The letter went on to advise that the Ministry had engaged the services of GeoNorth Engineering Ltd. to undertake an assessment of the bank conditions and the potential for future erosion (Exhibit “E” - affidavit #1 of K. J. Lewis).

[24] The report of GeoNorth Engineering Ltd. was completed on June 30, 1998 (the “1998 GeoNorth Report”) and a copy was provided to Dr. Lewis and Mr. Orlowsky in the summer of 1998 (affidavit #1 of K.J. Lewis, para. 16).

[25] After receipt of the report, Dr. Lewis and Mr. Orlowsky began taking steps to obtain government funding or assistance to move their home from its existing location to a new site further away from the river bank. They were unable to obtain such assistance and the cost of undertaking such a move was prohibitively expensive for them to bear alone (affidavit #1 of K.J. Lewis, para. 19). Instead, they

attempted to improve the stability of the riverbank by staking logs across the bank and planting vegetation.

[26] A more significant erosion event occurred in June 2007. As a result of high flows in the Nechako River, the river bank was undermined causing extreme erosion of the Lewis/Orlowsky Property.

[27] This time, Dr. Lewis and Mr. Orlowsky were able to obtain Provincial government assistance to move their home to a new location further away from the river bank and they took immediate steps to do so. Their home was moved to its new site in late June 2007 but could not be reoccupied while they waited for construction of a new foundation under the home, which was completed in September 2007. Dr. Lewis and Mr. Orlowsky also began taking steps to install rip rap to stabilize the river bank below the Lewis/Orlowsky Property. Despite various attempts, they were unable to obtain any provincial funding or assistance for the work they undertook in installing rip rap.

[28] In January 2009, Dr. Lewis and Mr. Orlowsky were involved in efforts to obtain funding to install rip rap below an empty lot along the same reach of the Nechako River. Based on information they had learned, they believed that the installation of rip rap at this location was essential to stabilization efforts below their own property. In the course of those efforts, Dr. Lewis recalled that one of the other property owners along Island Park Drive, Charles Freeman, had installed rip rap along the river bank below his property prior to Dr. Lewis and Mr. Orlowsky building their home (affidavit #1 of K.J. Lewis, para. 44).

[29] As a result of this recollection, Dr. Lewis approached Mr. Freeman and asked to see his permits with respect to installation of the rip rap. Dr. Lewis received a number of documents from Mr. Freeman, including a copy of the 1977 Resolution and the 1977 Department of Environment Letter and became aware for the first time of the warning of the Department of the Environment to the Defendant regarding future development of the “erosion prone bank”.

[30] Also included in the documents of Mr. Freeman was the Memorandum from the Water Investigation Branch dated December 22, 1976 which noted that the Freeman house was approximately 30 feet from the top of the bank and was too close to prevent eventual loss of the house into the river, unless it was moved at least 200 feet from the top of the bank.

[31] Dr. Lewis deposed that, upon reading these documents provided by Mr. Freeman, she realized for the first time that the defendant knew of the risk of erosion in 1977 and had passed a motion to refuse to issue a building permit for properties in that subdivision without obtaining a release from applicants (affidavit #1 of K.J. Lewis, para. 44(f)).

[32] After reading these documents, Dr. Lewis consulted with Mr. Orlowsky and their neighbors, Betty and Rick Urquhart and John Ball and they collectively decided to seek legal advice about a possible claim against the defendant.

[33] Dr. Lewis deposed that had she and Mr. Orlowsky been advised of the 1976 erosion event, warned of the risks of future erosion and advised to sign a waiver of future claims arising from erosion as a condition for obtaining the building permit from the defendant, they would not have built their home but rather would have sold the property and built elsewhere.

[34] Dr. Lewis and Mr. Orlowsky claim the following losses suffered as a result of the negligence of the defendant:

a. Net cost of moving their home	$ 57,513.49
b. Rip rap costs	$ 59,163.33
c. Their labour (associated with house move and rip rap (168 days at 8 hours per day and $10 per hour)	$ 13,440.00
d. Loss of part of their land	$ 25,562.00
e. Loss of river view & privacy	$ 35,000.00
f. Stigma to property	$ 40,000.00
TOTAL	**$230,678.82**

(iii) The Urquhart Property

[35] Sarah Betty Urquhart and Rick Kenneth Urquhart (the "Urquharts") live at 3125 Island Park Drive, Prince George, B.C., a property legally described as:

> PID: 010-876-016
> Lot 3 District Lot 4204 Cariboo District Plan 18805
> (the "Urquhart Property")

[36] The Urquharts purchased the Urquhart Property in approximately 1985 and began building their home in June 1990. They had lived in rented accommodation in the Nechako River area and determined that, as the river had never caused any problems at that location, they did not expect it to cause any problems at the Urquhart Property (affidavit #1 of S.B. Urquhart, para. 5).

[37] The Urquharts applied for and obtained a building permit from the defendant and were not advised that there had previously been erosion of the property, that there was a risk of erosion in the future or that they were required to sign a document accepting responsibility for any such risk (affidavit #1 of S.B. Urquhart, para. 8).

[38] The Urquharts moved into their home in December 1990. They did not notice any erosion of their property until the erosion event of 1997. In May and June 1997, approximately 8 metres of river bank on their property eroded away.

[39] The Urquharts received the 1998 GeoNorth Report in 1998 and contacted the defendant in an effort to obtain assistance to move their home, as recommended by the 1997 GeoNorth Report.

[40] Ms. Urquhart deposed in her affidavit at para. 14:

> Rick and I reviewed the GeoNorth Report and had many discussions with our neighbours, particularly Kathy Lewis, John Orlowsky and John Ball about what we, collectively, could and should do.

[41] She noted that, on reading the 1998 GeoNorth Report, she hoped that the 1997 erosion event would not be repeated because “apparently, there had been a very unusual series of conditions occur that year”.

[42] The Urquharts felt that they could not afford to move their home away from the river bank without financial assistance from the provincial government and made various efforts to apply for such funding between 1998 and 2007 but those efforts were unsuccessful. They made some attempts to stabilize the river bank by placing small logs at the base of the bank and planting grass and trees and between 1998 and 2007, the river bank portion of the Urquhart Property appeared to be very stable (paras. 17 and 18, affidavit #1 of S.B. Urquhart).

[43] In early June 2007, the Urquharts observed high water levels in the Nechako River and a significant portion of the river bank their property eroded away. By late June, they had obtained the necessary permits and began the work of moving their home to a new location that was further away from the river bank. The Urquharts also arranged for the installation of rip rap or armoring along the edge of the Nechako River below the Urquhart Property.

[44] In January 2009, Ms. Urquhart learned from Dr. Lewis of the existence of the 1977 Resolution. She deposed that she and her husband would not have built a house on that lot if they had been warned about the risk of erosion and the requirement to waive future claims arising from erosion as a condition for obtaining a building permit (paras. 36 and 39, affidavit #1 of S.B. Urquhart).

[45] The Urquharts claim the following losses suffered as a result of the negligence of the defendant:

a. Net cost of moving home	$ 66,464.51
b. Estimated costs of house move (not yet complete)	$ 5,664.93

c. Rip rap costs	$ 61,052.82
d. Mr. Urquhart's labour	$ 3,760.00
e. Loss of part of land	$ 30,000.00
f. Garage/reduced appearance	$ 29,994.00
g. Loss of river view and privacy	$ 35,000.00
h. Stigma to property	$ 40,000.00
TOTAL	**$271,936.26**

(iv) The Ball Property

[46] The plaintiff, John Berkeley Ball ("Mr. Ball") lives at 3245 Island Park Drive, Prince George, B.C., a property legally described as:

> PID: 010-876-016
> Lot 6 District Lot 4204 Cariboo District Plan 18805
>
> (the "Ball Property")

[47] Unlike the other plaintiffs, Mr. Ball did not build his home but rather, purchased it from Henry Johns and Gwyneth-Ann Johns in 1994. It was Mr. Henry Johns who applied for an obtained a building permit from the defendant in April 1989.

[48] Prior to purchasing the Ball property, Mr. Ball inspected the property carefully and confirmed that the home had been "properly set back from the Nechako River and the property boundaries". Mr. Ball also observed that there has been no significant erosion of the Ball Property, at least since the 1970 subdivision (affidavit #1 of J.B. Ball, para. 4).

[49] As a result of the erosion event in 1997, approximately 1 metre of the Ball Property eroded away. Mr. Ball deposed that he had anticipated that very minor erosion could and probably would occur but he did not anticipate an erosion event of the size and type that occurred in 1997 (affidavit #1, J.B. Ball, para. 9).

[50] Mr. Ball received a copy of the 1998 GeoNorth Report and carefully studied that report. He concluded as a result of his study and review, that if he and his neighbours did not protect the riverbank with some kind of armor, his home would likely be undermined by erosion within 50 years (affidavit #1, J.B. Ball, para. 11).

[51] Between 1997 and 2007, Mr. Ball spent time considering possible options for protection for the river bank, including rip rap and articulating mats. He also attempted to stabilize the river bank by planting vegetation in the hope of impeding future erosion.

[52] Mr. Ball's property suffered more significant erosion as a result of the 2007 erosion event. During this time frame, Mr. Ball and his neighbours, including Dr. Lewis and Mr. Orlowsky and Mr. and Ms. Urquhart, would meet and speak with one another. During the 2007 erosion event, Mr. Ball spoke with his neighbour, Ken Juelffs and Mr. Juelffs advised Mr. Ball that he had been required to sign a waiver of claims with respect to erosion when he built his home (affidavit #1 of J.B. Ball, para. 18).

[53] After this event, Mr. Ball retained GeoNorth Engineering Ltd. to advise him how best to protect his property from future erosion events. He received this report in August 2007 and began the process to obtain the necessary government approvals to install rip rap on the edge of the river bank below his property, as recommended by GeoNorth Engineering Ltd. Those approvals were granted in November 2007 and the rip rap was installed between November 2007 and November 2008.

[54] In discussions with Dr. Lewis in January or February 2009, Mr. Ball advised Dr. Lewis of the information he had learned from Ken Juelffs regarding the

requirement that he sign a waiver prior to issuance of a building permit by the defendant.

[55] Mr. Ball deposed that if anyone had warned him of the prior erosion event in 1976 or the requirement that a person obtaining a building permit from the defendant had to sign a waiver of liability, he would not have taken the risk of purchasing the property from Mr. and Ms. Johns (p. 33, affidavit #1 of J.B. Ball).

[56] Mr. Ball claims the following losses suffered as a result of the negligence of the defendant:

a. Rip rap costs	$111,225.67
b. His labour associated with rip rap (180 hours at $20 per hour	$ 3,600.00
c. Loss of part of land	$ 10,000.00
d. Stigma to property	$ 40,000.00
TOTAL	**$164,825.67**

(v) The 1998 GeoNorth Report

[57] The 1998 GeoNorth Report (Exhibit “F”, affidavit #1 of K.J. Lewis) was commissioned by the Provincial Ministry of Environment, Lands and Parks in response to the 1997 erosion event. The engineers were tasked with conducting an assessment of the risk to individual structures within three selected areas including Island Park Drive, Lots 1-6, Plan 18805, D.L. 4204 (Exhibit “E”, affidavit #1 of K.J. Lewis).

[58] In the introduction to the report, the authors noted that:

> The Nechako River has been partially regulated since construction of the Kenny Dam by Alcan Smelters and Chemicals Ltd. (Alcan) in the early 1950s.

> As a result of reduced flow there has been comparatively little bank erosion in the Miworth-Prince George area. During November, 1996 a combination of higher than average flow and sudden cold snap led to an ice jamming in the Lower Nechako River resulting in severe flooding and localized bank erosion in Prince George. Subsequent sustained high flows during May and June, 1997 caused severe bank erosion at Miworth and Prince George, beyond any experienced in recent years.

[59] Under the heading "Observations and Analyses" the report noted that high river flows during May and June 1997 included 17 days when the flow exceeded 1000 m3/s and a further 72 days when it exceeded 800 m3/s and these flows caused continuous toe erosion and sloughing of the slope at Island Park Drive. The peak flow measured at a gauge at Isle Pierre was 1010 m3/s.

[60] The authors of the report noted that there had been occasions prior to 1997 when this level of peak flow had been equalled or exceeded, including in 1976 when the peak flow was measured at 1050 m3/s.

[61] The authors conducted an analysis of the historical data and concluded that:

> The analyses show that the high flows that occurred during summer, 1997 are not unprecedented, are not statistically unusual and were last exceeded in 1976.

[62] The report observed that the crest of the bank along Island Park Drive had moved 20 to 25 metres over the period between 1946 and 1996.

[63] With respect to risk to existing houses, the report noted that several houses were close to the crest of the slope and none were undermined at that time but an erosion event similar to that which occurred in 1996/1997 could make Lots 2, 3 and 5 on Island Park Drive unsafe. The report noted that:

> We can not [*sic*.] predict when erosion equal to that resulting from the 1996/1997 events will recur.

[64] The report went on to recommend set back distances from the crest of the slope and suggested that a setback distance from a seasonal high-water mark might not be appropriate because this method did not take into account the horizontal distance made up by the slope. The report went on to say that:

> We recommend the following setback distances, assuming that the life expectancy of a house is 50 years, that the period between 1946 and 1996 represents average channel behaviour and applying a factor of safety of 1.5:
>
> …
>
> Island Park Drive - 35m;
>
> ...

[65] The homes on the Lewis/Orlowsky Property and the Urquhart Property were 13.7 metres and 11.1 metres respectively from the crest of the slope as of November 1997 (Exhibit "I" affidavit #1 of K.J. Lewis). Both homes had been constructed at or exceeding the setback requirements of the defendant.

[66] Page 10 of the report notes, in relation to Island Park Drive:

> All five of the houses in this reach will be undermined within 50 years at the current erosion rates.

[67] The authors also noted that, while they did not expect erosion to be perceptible on an annual basis, "…the sustained high flows of 1997 and instances of severe ice jam related velocities are unpredictable events and could recur in any given year".

[68] GeoNorth Engineering Ltd. recommended that homeowners at high risk along Island Park Drive relocate their houses, as the cost to do so was less expensive than installing rip rap.

Legal Issues

[69] The issues for determination with respect the defendant's notice of application are as follows:

1. When did the plaintiffs' cause of action accrue?

2. Was the running of time postponed pursuant to the provisions of section 6 of the *Limitation Act* and, if so, when did time being to run?

3. Did the plaintiffs commence this action within the applicable limitation period under the *Limitation Act*?

4. Is the plaintiffs' action statute-barred due to their failure to comply with the notice provisions under section 286 of the *Local Government Act*?

[70] The issues for determination with respect to the plaintiffs' notice of application are as follows:

1. Was the defendant negligent in failing to warn the plaintiffs of the risk of erosion to their properties and issuing building permits without that warning?

2. If so, did the negligence of the defendant cause the plaintiffs' loss?

3. If so, what is the correct calculation of damages?

Suitability for Summary Determination

[71] The plaintiffs submit that both notices of application are suitable for summary determination. The defendant submits that, while its notice of application with respect to dismissal of the plaintiffs' claims on the limitation issue is suitable for summary trial, the plaintiffs' notice of application is not suitable. The defendant submits that there are too many gaps or conflicts in the evidence on key issues for this court to achieve a just and fair result. The defendant refers specifically to issues related to Mr. Urquhart's credibility.

[72] Rule 9-7(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 (the "Rules") provides:

> (2) A party may apply to the court for judgment under this rule, either on an issue or generally, in any of the following:
>
> (a) an action in which a response to civil claim has been filed;
>
> (b) a proceeding that has been transferred to the trial list under Rule 22-1(7)(d);
>
> (c) a third party proceeding in which a response to third party notice has been filed;

> (d) an action by way of counterclaim in which a response to counterclaim has been filed.

[73] Rule 9-7(15) provides:

> On the hearing of a summary trial application, the court may
>
> (a) grant judgment in favour of any party, either on an issue or generally, unless
>
> (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
>
> (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
>
> (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
>
> (c) award costs.

[74] Summary trial provisions in the Rules authorize a judge in chambers to give judgment in any case where she can decide disputed questions of fact on affidavits "… unless it would be unjust to decide the issues in such a way": see *Inspiration Mgmt. Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at para. 39(B.C. C.A.).

[75] The Court of Appeal in *Inspiration Mgmt.* set out the test to be applied:

> 52. ... If the chambers judge can find the facts, then he must give judgment as he would upon a trial unless for any proper judicial reason he has the opinion that it would be unjust to do so.
>
> The test for R. 18A ... is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.

[76] Chief Justice McEachern, writing for the court in *Inspiration Mgmt.*, also addressed the issue of conflicting evidence in summary trials, restating the approach taken in *Placer Dev. Ltd. v. Skyline Explor. Ltd*. (1985), 67 B.C.L.R. 366.

> 42. … I am far from saying that the judge is precluded from finding facts where he has before him affidavits which conflict. The ability of the judge to find the necessary facts and to decide if it is just to resolve the issues before him will to a large extent depend on the nature and quality of the material

> before him. I think the rule contemplates that the judge may make the necessary findings of fact on conflicting evidence.

[77] In *Inspiration Mgmt.*, the court quoted from *Soni v. Malik* (1985), 61 B.C.L.R. 36 (B.C. S.C.), at para. 40 confirming that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so".

[78] In determining whether it would be unjust to proceed summarily, the court identified a number of relevant factors to consider:

> 48. In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[79] Subsequent cases have added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices; see *Dahl v. Royal Bank of Canada et al.,* 2005 BCSC 1263 at para. 12, aff'd on appeal.2006 BCCA 369.

[80] The court may grant judgment on the hearing of a summary trial application "unless the court is unable" to find the facts necessary to decide the issues of fact or law: see *Dahl* at para. 10. In other words, this court may grant judgment on a summary trial application if I can find the facts necessary to decide the issues, even where there is a conflict in the evidence.

[81] In this case there are relatively few conflicts in the evidence, both with respect to the defendant's notice of application to dismiss the plaintiffs' claims and with

respect to the plaintiffs' notice of application for summary judgment. Although the defendant points to a number of conflicts in the evidence of Mr. Urquhart regarding the enquiries he made and when he made them, I have concluded that the nature of those conflicts are such that I am still able to find the necessary facts a resolve the conflicts in the evidence

[82] Rule 9-7(15) also states that the court may give judgment on a summary trial application "unless the court is of the opinion that it would be unjust to decide the issues on the application".

[83] I agree with the defendant that its notice of application seeks to have the court decide a discrete issue, namely the issue of postponement under the *Limitation Act*. I do not, however, agree with the defendant's submission that the plaintiff's notice of application for summary judgement is not suitable for summary determination. It involves consideration of essentially all of the same evidence as would be considered in relation to the defendant's notice of application. The issues to be determined in the plaintiffs' notice of application are not unduly complex, and a summary trial does not create an unnecessary complexity in the resolution of the dispute. In my view, summary determination of both of these applications balances "proportionality and efficiency with the necessity of ensuring a fair and just process": see *Morin v. 0865580 B.C. Ltd*., 2015 BCCA 502 at para. 16.

[84] I have concluded that the evidence before the court is sufficient to make necessary findings of fact to enable a determination of the plaintiffs' notice of application for summary judgement and the defendant's notice of application seeking dismissal of the claim pursuant to the *Limitation Act*. The evidence relevant to these issues has been presented in these applications. The defendant relies on the evidence of the plaintiffs. The law can be applied to the evidence and the facts as found from the evidence. I also find that it is not unjust to resolve these matters summarily rather than to moving them forward to trial. Both matters are suitable for determination by way of summary trial.

Defendant's Notice of Application

(i) When did the plaintiffs' cause of action accrue?

[85] The parties agree that the provisions of the *Limitation Act* apply to the facts in this case. They also agree that the applicable limitation period is six years from the date that the cause of action accrued. They do not, however, agree about when the plaintiffs' cause of action accrued. The plaintiffs submit that their cause of action did not accrue until early 2009 when they became aware of the existence of the 1977 Resolution and thus became aware that the defendant had failed to comply with the 1977 Resolution when it issued the building permits with respect to their properties.

[86] The defendant submits that the plaintiffs' cause of action accrued on the date when the building permits for their respective homes were issued by the defendant, that is between April 27, 1989 and August 6, 1992 and thus the limitation periods with respect to each of the plaintiffs' claims expired between April 27, 1995 and August 6, 1998 unless the plaintiffs can establishment postponement of the running of the limitation period pursuant to section 6 of the *Limitation Act*.

[87] The defendant further submits that even if the plaintiffs can establish postponement of the running of time, by the summer of 1998, upon receipt of the 1998 GeoNorth Report, the plaintiffs had facts within their means of knowledge sufficient to satisfy the requirements of section 6 of the *Limitation Act* and therefore, the limitation period began to run and had expired in the summer of 2004, approximately 5 years prior to the commencement of this action.

[88] The traditional rationale of limitation statutes is based on certainty, evidentiary and diligence rationales. Madam Justice McLachlin, as she then was, for the majority in *Novak v. Bond*, [1999] 1 S.C.R. 808, considered the application of the limitation period in medical negligence matters and in doing so, cited La Forest J. in *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6

> 64. Statutes of limitations have long been said to be statutes of repose. . . The reasoning is straightforward enough. There comes a time, it is said,

> when a potential defendant should be secure in his reasonable expectation that he will not be held to account for ancient obligations. . . .
>
> The second rationale is evidentiary and concerns the desire to foreclose claims based on stale evidence. Once the limitation period has lapsed, the potential defendant should no longer be concerned about the preservation of evidence relevant to the claim.
>
> . . .
>
> Finally, plaintiffs are expected to act diligently and not "sleep on their rights"; statutes of limitation are an incentive for plaintiffs to bring suit in a timely fashion.

[89] The Court in *Novak* also addressed the apparent harshness of the application of limitation statutes. In this respect, Iacobucci and Major JJ., dissenting in the result, noted at para. 8 (later cited with approval in *Wewaykum Indian Band v. Canada*, 2002 SCC 79 at para. 121):

> 8. Almost all applications of limitations statutes will seem harsh. But their finality should not obscure their value. They bring needed stability to society by enabling potential defendants to plan their affairs in the safe assumption that stale claims cannot be raised against them. They minimize the risk that evidence relevant to the claim will be lost. In addition, they are an incentive for plaintiffs not to "sleep on their rights". See *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549, at para. 34.

(ii) The *Limitation Act*

[90] Section 3(5) of the *Limitation Act* provides that the limitation period for bringing a claim in negligence causing economic loss is six years "after the date on which the right to do so arose".

[91] Section 6(4) of the *Limitation Act* defines the necessary conditions for a limitation period to start:

> (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> > (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and

> (b) the person whose means of knowledge is in question ought, in the person's own interest and taking the person's circumstances into account, to be able to bring an action.

[92] Section 6(5)(a) and (b) define "appropriate advice" and "facts".

> (5) For the purpose of subsection (4),
>
> (a) **"appropriate advice"**, in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
>
> (b) **"facts"** include
>
> (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
>
> (ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,

[93] Pursuant to s. 6(6) of the *Limitation Act*, the burden of proof is on the individual claiming the benefit of the postponement.

[94] The British Columbia Supreme Court in *Ounjian v. St. Paul's Hospital*, 2002 BCSC 104, considered the application of the postponement provisions in a medical negligence action. In *Ounjian*, the defendants brought a summary judgment application seeking to have the action against them dismissed on the basis that the lawsuit was barred by operation of the *Limitation Act*. The plaintiff underwent surgery on October 30, 1995. The plaintiff experienced numbness in her legs following the procedure but did not commence an action until May 1998. The court allowed the application and dismissed the claim noting that a reasonable person in the plaintiff's position, having taken appropriate advice, would have known that she had a reasonable prospect of success.

[95] In dismissing the case, the court noted that:

> 25. The Plaintiff knew shortly after she awoke from the anesthetic that there had been a failed surgery which may well have been caused by the negligence on the part of the doctors and nurses. … She knew at that point that she had suffered damage that may well have been caused by negligence on the part of the doctors and nurses. She had every reason to suspect that the injury was caused by the negligence and was at that point she had the facts referred to in s. 6(4) within her means of knowledge.

[96] In *Ounjian*, the court set out a framework for analysis of the postponement provisions of the *Act* as follows:

> 21. The four components can be paraphrased within the context of the present circumstances as follows:
>
> 1. The identity of the defendant is known to the plaintiff.
>
> 2. The plaintiff has certain facts (including the facts set out in s. 6(5) (b)) within her means of knowledge.
>
> 3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
>
> 4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in her own interests and taking her circumstances into account, to be able to bring an action.
>
> All four of these components must be satisfied before the running of time with respect to the limitation period begins running. Thus, if a plaintiff is able to demonstrate that any one of the four components had not been satisfied before two years prior to the commencement of the action (in the case of a two year limitation period), the action will not be statute barred (at para. 21).

[97] It is also clear from the jurisprudence that ignorance of the extent of damage will not of itself serve to postpone the running of the time in which to commence an action.

[98] This principle was applied in *Landels v*. *Interior Health Authority*, 2005 BCSC 1182, where the court was asked to postpone the limitation period in a case involving a plaintiff who was aware that she was injured but had not appreciated the full extent of her injury until after the expiry of the two year limitation period.

[99] The court in *Landels* outlined the governing principles as follows:

> 33. …
>
> (1) The general rule is that time runs from the date of the injury.
>
> (2) The exact extent of the loss of the plaintiff need not be known for the cause of action to accrue. Once the plaintiff knows that some damage has occurred and has identified the tortfeasor [authorities omitted], the cause of action has accrued. Neither the extent of damage nor the type of damage need be known.

> (3) Time does not begin to run until ... "a reasonable person would consider that someone in the plaintiff's position, acting reasonably in light of his or her own circumstances and interests, could — not necessarily should — bring an action." ... The question becomes "in light of his or her own circumstances and interests, at what point could the plaintiff reasonably have brought an action?" The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling. …

[100] The court in *Landels* concluded that the plaintiff's cause of action was complete on October 31, 2001 and noted that:

> 36. By "cause of action" I mean the fact, or combination of facts, which give rise to a remedy in law. The gravity of the injury was not clearly defined by medical science until 3 July 2002, or, perhaps, January 2005. Delayed knowledge of the extent of the injury does not alone delay the running of the limitation period.

[101] The BC Court of Appeal has also provided guidance on the determination of the "facts within the plaintiff's means of knowledge" as set out in s. 6(4) of the *Limitation Act.* In the case of *Karsanjii Estate v. Roque*, [1990] 3 W.W.R. 612 (B.C. C.A.), the court noted that:

> 109. [t]he question is not whether [a claimant] knew or ought to have known [of a breach of duty], nor whether a reasonable person in his position would have made the effort to discover it, but whether and when [the claimant] had the "means" of knowing it, that is to say whether and, if so, when he could have discovered it.

[102] This court in *Sun-Rype Products Ltd v. Archer Daniels Midland Co.*, 2007 BCSC 640, found that those facts falling within the plaintiff's means of knowledge are those facts actually known and those facts which would become known if he took such steps as would have been reasonable in the circumstances. The court went on to say:

> 53. Where a plaintiff has an initial basis for making an inquiry - at the very least, a "reasonable" inquiry requires some action to investigate on the part of the plaintiff: *Tessler v. Telemark Enterprises Ltd.* [1992] B.C.J. No. 2393 (B.C.S.C.). On the other hand, I accept what the plaintiffs say that there must be some reasonable basis for a person in their position to seek out the facts that would lead to knowledge of the defendant's liability.

[103] The “means of knowledge” test also relates to the issue of "appropriate advice”. The Court of Appeal in *Levitt v. Carr*, [1992] 4 W.W.R. 160 (B.C. C.A.), made the following comments regarding the “appropriate advice” aspect of the test as follows:

> 51. …“Appropriate” must therefore refer to the nature of the inquiry to be made as revealed by the facts within the means of the plaintiff’s knowledge. In this sense “appropriate” means suitable in the circumstances of those facts. This generalization is broad enough to accommodate the variety of causes of actions s. 6(3) addresses.

[104] The court went on to state the following:

> 57. We think it clear that those who drafted the British Columbia statute rejected simple ignorance of the existence of a cause of action as sufficient to postpone the running of time. The solution adopted by the Law Reform Commission and by the legislature was to introduce another level of abstraction: notional advice by notional advisors. This advice is given the conceptual status of facts and, when added to those within the plaintiff’s means of knowledge, forms the body of information upon which the reasonable man decides whether an action on the cause of action would have a reasonable prospect of success and whether the plaintiff ought to be able to bring that action.

[105] The fourth component of the *Ounjian* analytical framework in respect of the issue of postponement is whether in the circumstances the plaintiff ought in his own interests to be able to bring an action. In the case of *Novak v. Bond*, [1999] 1 SCR 808, the Supreme Court of Canada noted that:

> 39 Section 6(4)(b) requires the court to adopt the perspective of a reasonable person who knows the facts that are within the plaintiff’s knowledge and has taken the appropriate advice a reasonable person would seek on those facts. Time does not begin to run until this reasonable person would conclude that someone in the plaintiff’s position <u>could</u>, acting reasonably in light of his or her own circumstances and interests, bring an action. The question posed by s. 6(4)(b) therefore becomes: “in light of his or her own particular circumstances and interests, at what point could the plaintiff reasonably have brought an action?” The reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff’s own interests and circumstances were serious, significant, and compelling. Purely tactical concerns have no place in this analysis.

[106] The court went on to note:

> 90 I conclude that delay beyond the prescribed limitation period is only justifiable if the individual plaintiff's interests and circumstances are so pressing that a reasonable person would conclude that, in light of them, the plaintiff could not reasonably bring an action at the time his or her bare legal rights crystallized. The task in every case is to determine the point at which the plaintiff reasonably could bring an action, taking into account his or her own interests and circumstances.

[107] The question of what constitutes "serious, significant and compelling" circumstances was considered by the BC Supreme Court in *Cowen v. Gray*, 2001 BCSC 487, where the plaintiff, after filing a claim two and a half years after the two year limitation period had expired, claimed that is was unable to bring an action due to the injuries she suffered in a motor vehicle accident after taking medication prescribed for her by the defendant. The court concluded that although the plaintiff suffered from a loss of short term memory and several physical illnesses, her circumstances did not meet the requirements of s. 6(4)(b) and were not so "serious, significant, and compelling" as to warrant the postponement of the running of time. The court found that the costs and strains of litigation would likely have been difficult for her, but there was no evidence to suggest they would have been overwhelming or that her circumstances combined to make it "unfeasible" for her to initiate an action earlier than she did.

Discussion

A) The Plaintiffs' Position

[108] The plaintiffs submit that, pursuant to the provisions of s. 6(4) of the *Limitation Act*, time did not begin to run until early 2009 because:

> 1. The identity of the defendant was not known to the plaintiffs. While the plaintiffs had various dealings with the defendant from the time that their respective building permits were issued and throughout the two major erosion events, they did not become aware of any potential wrongdoing until early 2009 when they became aware of the 1977 Resolution. The plaintiffs submit that until that time, the plaintiffs could not identify a defendant or potential defendant;

2. The plaintiffs did not have knowledge of the facts, including that the defendant owed them a duty of care to warn them of the erosion risk and not to issue the building permits without warning and a waiver, until early 2009. The plaintiffs further submit that they did not have facts within their means of knowledge to consider that they might have a claim against the defendant. The plaintiffs submit that the 1997 erosion event and the subsequent 1998 GeoNorth Report did not provide information or facts from which the plaintiffs would have regarded as showing that they had a cause of action against the defendant. It was not until Dr. Lewis obtained a copy of the 1977 Resolution in January 2009 that the plaintiffs sought legal advice and realized that the defendant owed them a duty of care and, in failing to warn them of the prior erosion event and the risk of future erosion at the time they applied for their building permits, may have breached that duty of care; and

3. The plaintiffs accept the evidence of the defendant that copies of the defendant's 1977 Resolution related to erosion issues and the attachments, including the 1977 Department of Environment Letter were, at all times, available to the public upon request but they submit that, prior to January 2009, there was no reasonable basis for them in their position to seek out the facts that would lead to knowledge of the defendant's liability.

B) The Defendant's Position

[109] The defendant submits that the 1977 Resolution did not *create* a duty of care but rather represented an acknowledgement on the part of the defendant that it ought to warn property owners of erosion risks and obtain a form of indemnity from them.

[110] The defendant submits that because the 1977 Resolution acknowledged the duty to warn, rather than creating it, the limitation period began to run on the date that the building permits were issued by the defendant. If the running of time was not be postponed, and the limitation periods with respect to each of the plaintiffs would have expired six years later, namely between April 1995 and August 1998.

[111] The defendant submits that the plaintiff has failed to establish that the running of time was postponed in accordance with the requirements of section 6 of the *Limitation Act,* but suggests that if there was postponement, time began to run again in 1998, after each of the plaintiffs received and reviewed the 1998 GeoNorth Report. The defendant submits that the facts contained in the 1998 GeoNorth Report contained facts that were within the plaintiffs' actual knowledge and having received advice with respect to the facts in that report, a reasonable person would regard the facts as showing that an action would have a reasonable prospect of success and they ought to be able to bring an action.

[112] The defendant submits that a reasonable person would have regarded the following facts in the 1998 GeoNorth Report as showing that an action would have a reasonable prospect of success:

1. The top of each page referred to "Nechako River Bank Erosion, Miworth and Prince George, B.C.";

2. The report stated that the high flows that occurred in in the summer of 1997 and which caused the erosion to the plaintiffs' properties were noted to be not unprecedented, not statistically unusual and the peak flows had been last previously exceeded in 1976. The report included a statement that "…the sustained high flows of 1997 and instances of severe ice jam related velocities are unpredictable events and could recur in any given year";

3. The report noted with respect to Island Park Drive that the crest of the bank at that location had moved 20 to 25 metres over the period between 1946 and 1996;

4. The report stated that an erosion event similar to that which occurred in 1996/1997 could make the houses on Lots 2, 3 and 5, Plan 18805, Block A, D.L. 4204, Island Park Drive unsafe and the authors of the report could not predict when erosion equal to that resulting from the 1996/1997 would recur. The report noted that all five of the houses in the reach of the river along

Island Park Drive would be undermined within 50 years at current erosion rates;

5. Page 9 of the report noted:

> We recommend the following setback distances, assuming that the life expectancy of a house is 50 years, that the period between 1946 and 1996 represents average channel behaviour and applying a factor of safety of 1.5:
>
> …
>
> Island Park Drive - 35m; and
>
> ...

6. The defendant submits that the 1998 GeoNorth Report provided the plaintiffs with facts and information that:

a. There had been a prior high peak river flows similar to those that caused the 1997 erosion event;

b. The crest of the bank along Island Park Drive had moved 20-25 metres over the 50 years prior to 1996;

c. All five of the houses along Island Park Drive would be undermined within 50 years.at current erosion rates but an erosion event similar to 1996/1997 would make the houses on the Lewis/Orlowsky property and the Urquhart Property unsafe; and

d. The recommended setback was 35 metres from the crest of the slope and set back from the seasonal high water mark was not appropriate as it did not take account of the horizontal distance made up by the slope.

[113] The defendant submits that the plaintiffs, having learned these facts and particularly that the engineering experts recommended a setback of 35m from the crest of the slope, should have realized that this was considerably more than the setback required by the defendant's bylaw and should have made enquiries as to why the defendant would allow them to build their houses within 100 feet of the seasonal high water mark or the natural boundary of the river.

[114] The defendant submits that for the purposes of section 6(4) of the *Limitation Act*, the facts falling within the plaintiffs' means of knowledge are those facts actually known to them and those which would have become know if they took such steps as would have been reasonable for them to take in their circumstances. (*Levitt* v. *Carr*, 66 BCLR (2d) 58). The defendant submits that a reasonable person, having learned the facts contained in the 1998 GeoNorth Report, would have realized that something was amiss and would have made diligent enquiries of the defendant. The defendant submits that diligent enquiries would have led to discovery of the 1977 Resolution and the 1977 Department of Environment Letter, both of which "would generally be available to the public on the appropriate request" (para. 7, affidavit of K. Jensen sworn December 11, 2013).

[115] The defendant relies on the decision of the BC Court of Appeal in *Millstream Enterprises Ltd*. *v. Corporation of City of New Westminster*, [1994] B.C.W.L.D. 112.

[116] In that case, a fire destroyed a building owned by the plaintiff in 1988. The building had been damaged by fire some 10 years earlier and at that time, the plaintiff learned during repairs of the damaged area that it did not contain fire stops. The plaintiff was sued in negligence by tenants of the suites in the damaged area and, in the course of that litigation, a report was prepared as to the causes of the 1978 fire. The report concluded that the lack of firestops caused the fire to spread and the authors identified the effect of "failure to comply with the building by-law". The plaintiff eventually paid to have the fire stops put into the area that had been damaged by the fire, noting in his affidavit evidence that "it was required by the City of New Westminster and therefore my insurance did not cover it." The plaintiff deposed that he did not consider whether the rest of the building had fire stops or whether the rest of the building had been inspected for firestops. When fire destroyed the entire building in 1988, the plaintiff discovered that the entire building had been built without sufficient firestops contrary to the defendant's building by-law and the building was not inspected at the time of construction, which was also contrary to the building by-law. The plaintiff sued the City of New Westminster alleging that the City was negligent in failing to inspect the premises at the time it

was constructed and failing to ensure that fire stops were installed in accordance with the by-law.

[117] The trial judge found that there was no evidentiary basis for finding that the plaintiff could have been aware of the City's negligence prior to the 1988 fire and dismissed the defendant's application to dismiss the action as out of time. On appeal, the Court of Appeal concluded that in the aftermath of the 1978 fire, a reasonable owner of the building would have had reason to make further enquiries and a competent solicitor would have advised the plaintiff on facts known in April 1980 that, in failing to inspect the building when it was constructed in 1964, the City had breached its duty of care, that breach had caused injury to the plaintiff and an action against the City had a reasonable prospect of success. The Court of Appeal concluded that by April 1980 there were facts available to the plaintiff, both known and imputed, which a reasonable person would regard as showing an action against the City had a reasonable prospect of success. Thus, time began to run in April 1980 and had expired by November 1988 when the writ of summons was issued. The Court of Appeal set aside the trial judgement and dismissed the plaintiff's action against the City.

[118] The defendant submits that, as in *Millstream*, the facts necessary were discoverable upon reasonable enquiry. The facts surrounding the 1997 erosion event and the information contained in the 1998 GeoNorth Report provided the plaintiffs with a means of knowledge, such that a reasonable person would conclude, after receiving notional advice, that there was a claim against the defendant and the claim had a reasonable prospect of success.

Analysis

[119] I agree with the submission of the defendant that, unless the running of time was postponed, the plaintiffs' cause of action accrued when the defendant issued building permits for their homes without complying with the 1977 Resolution and specifically, without warning them of the risk of toe erosion on each of their properties. I also agree with the submission that the duty of care of the defendant

arose on January 24, 1977 when the defendant received the 1977 Department of Environment Letter, which advised the defendant:

> This matter is being drawn to your attention in the hope that you may be able to prevent further compounding of this undesirable situation, there being a considerable number of undeveloped lots along this erosion prone bank.
>
> (Exhibit "A", affidavit of K. Jensen, sworn December 11, 2013)

[120] The evidence establishes that by January 24, 1977, the defendant was aware that there had been an erosion event in 1976 that had caused such significant erosion to the Freeman property and that the Department of Environment warned against encouraging "further development in this potentially hazardous area".

[121] After receipt of this warning, the defendant passed the 1977 Resolution requiring building permit applicants to provide a letter acknowledging that they had been informed of the hazards of erosion at the location and accepted responsibility for any damage that occurred as a result.

[122] The defendant owed a duty of care to the plaintiffs to warn them of the risk of erosion and not to issue building permits for the construction of their home without providing that warning. As per the principles set out in the case of *Kamloops v. Nielsen*, [1984] 2 SCR 2, and applied in *Grewal v. The Corporation of the District of Saanich*, 1989 CarswellBC 129, the defendant owed a private law duty to the plaintiffs to warn or prevent construction where it knew there was a significant risk of erosion. This duty was owed directly to the Lewis/Orlowsky plaintiffs and the Urquhart plaintiffs as applicants for building permits in 1992 and 1990. This duty was also owed to Mr. Ball as a subsequent purchaser, because the relationship between the defendant and Mr. Ball was sufficiently close that the defendant ought reasonably to have had him in contemplation.

[123] There is uncontroverted evidence that the defendant failed to warn the Lewis/Orlowsky plaintiffs and the Urquhart plaintiffs of the hazards of significant erosion of their properties when it issued them their building permits in 1992 and 1990 respectively.

[124] The defendant submits that with respect to Mr. Ball, he has failed to provide any evidence from the vendor of his property, Henry Johns, as to whether he signed any kind of waiver or release when he obtained the building permit for the home now owned by Mr. Ball. While it is true that there is no affidavit evidence of Henry Johns with respect to whether he received information about the erosion risk from the defendant or was required to sign a letter accepting responsibility for any damage, I note that the building permit issued to Mr. Johns is attached as Exhibit E to the affidavit of K. Jensen sworn December 11, 2013. The building permit makes no reference to Mr. Johns being informed of the hazards of erosion and there is no attached letter from Mr. Johns accepting responsibility for any damage caused as a result. No such letter has been produced by the defendant. While there is no direct evidence from Mr. Johns, I have inferred from the building permit issued to Mr. Johns by the defendant and the absence of any letter from Mr. Johns accepting responsibility for any damage caused by erosion that the defendant did not comply with the 1977 Resolution when it issued the building permit to Henry Johns in April 1989. This inference would be consistent with the uncontroverted evidence before me that the defendant failed to comply with the 1977 Resolution when it issued the building permit to the Urquhart plaintiffs in June 1990, only 14 months later.

[125] The failure of the defendant to warn the plaintiffs of the hazards of erosion prior to issuance of their building permits was a breach of the duty of care owed to the plaintiffs by the defendant.

[126] As a result of the breach of duty of care by the defendant, the plaintiffs' cause of action arose. The question is whether the running of time with respect to that cause of action was postponed and, if so, when time began to run again.

[127] I have concluded based on the evidence before me that at the time the building permits were issued by the defendant for the plaintiffs' properties, the facts within the plaintiffs' knowledge were not such that a reasonable person knowing those facts and having taken appropriate advice on them would regard them as

showing that an action on the cause of action would have a reasonable prospect of success and they ought to be able to bring an action.

[128] The plaintiff, Dr. Lewis, deposed that when she and Mr. Orlowsky were deciding whether to buy the property in 1991, they had concerns about the potential erosion of the top part of the river bank but received advice from a friend who was an engineer that the river flows were controlled by the Kenny Dam and therefore significant erosion of the river bank would be unlikely to occur (affidavit #1 K.J. Lewis, para. 6). The plaintiff, Ms. Urquhart deposed that she and Mr. Urquhart visited their property over the course of approximately 5 years prior to their application for a building permit and did not observe any change to the river bank (affidavit #1 S. B. Urquhart, para. 6). None of the plaintiffs were advised that there had been previous erosion or that there was a risk of future erosion. The existence of a duty owed by the defendant to the plaintiffs was not a fact within their means of knowledge at the time that they applied for and obtained their building permits. Therefore, although the defendant breached its duty of care when it issued the building permits, time did not begin to run against the plaintiffs.

[129] That situation changed, however, in 1998 after each of the plaintiffs received and considered the 1998 GeoNorth Report. The plaintiffs deposed that after careful review of the 1998 GeoNorth Report, they each concluded that the 1997 erosion event would not be repeated because there had been a “very unusual series of conditions that year;” (affidavit #1 S.B. Urquhart, para. 15; affidavit #1 K.J. Lewis, para. 17).

[130] Having carefully reviewed the 1998 GeoNorth Report, that conclusion was quite simply unreasonable. The report very clearly describes the 1997 erosion event as “not unprecedented” and “not statistically unusual” and the peak flows of 1997 had been exceeded on four previous occasions. The report concluded that the sustained high flows of 1997 could recur in any given year and that all five houses on Island Park Drive would be undermined within 50 years. The author of the report recommended that all houses at risk be moved away from the river bank and that

the recommended setback be 35m from the crest of the slope rather than 30m from the natural boundary.

[131] The plaintiffs do not dispute that the 1977 Resolution was at all times available to the public upon request but they submit that they had no reason to make enquiries of the defendant until after the 2007 erosion event.

[132] In my view, the information contained in the 1998 GeoNorth Report was such that the plaintiffs would have had reason to make enquiries of the defendant and could have discovered the existence of the 1977 Resolution. The identity of the defendant was always known to the plaintiffs and the plaintiffs had within their means of knowledge facts that, with appropriate advice, would show that an action against the defendant would have a reasonable prospect of success. The plaintiffs knew that their homes were constructed too close to the crest of the slope and would have to be moved or they would be undermined within 50 years or possibly sooner because a significant erosion event could recur in any given year. As the court noted in *Sun-Rype Products Ltd v. Archer Daniels Midland Co.,* 2007 BCSC 64:

> [50] Time begins to run as soon as facts indicating the existence of a cause of action against a potential defendant are within a plaintiff's means of knowledge even though the plaintiff has not discovered those facts: See *Kruse v. Firth* (1991), 1991 CanLii 590 (BCCA), 58 B.C.L.R. (2d) 145 at 155 (C.A.) 1991 6 W.W.R. 651. [emphasis added]
>
> [51] The Court must determine when a party in the plaintiff's position could first have discovered the relevant "facts" in the sense both that it would have reason to seek them out and, had it done so, would have learned them: *Leavitt v. Carr* (1992). 1991 CanLii 1086 (BCCA), 66 B.C.L.R. (2d) 58 (C/A/), [1992] 4 W.W.R. 160.

[133] Had the plaintiffs exercised due diligence when they first learned of the facts in the 1998 GeoNorth Report, they could have discovered the information that they subsequently stumbled upon in 2009 following discussions with Mr. Freeman.

[134] Knowing those facts and having taken the appropriate advice, a reasonable person would regard those facts as showing a cause of action against the defendant, for permitting the plaintiffs' houses to be built too close to the crest of the slope and the resulting loss or damage suffered by the plaintiffs, including the cost of

having to move their houses. The evidence before me suggests that the interests and circumstances of the plaintiffs in 1998 were such that they ought to have been able to bring an action against the defendant. While the affidavit materials refer to efforts by the plaintiffs to secure provincial emergency funding to assist in moving their homes and the involvement of the defendant in securing such funding, I have concluded that the plaintiffs had the practical ability to bring an action against the defendant and there was no serious, substantial or compelling reason to prevent commencement of the action within the limitation period.

[135] In my view, time began to run against the plaintiffs with respect to this action against the defendant in the summer of 1998. Accordingly, the limitation period under the *Limitation Act* expired in the summer of 2004, almost five years prior to the commencement of this action.

Section 286 of the *Local Government Act*

[136] The defendant also seeks an order dismissing the plaintiffs' claims on the grounds that the plaintiffs failed to comply with the provisions of s. 286 of the *Local Government Act*.

[137] Section 286 provides that:

> (1) A municipality is in no case liable for damages unless notice in writing setting out the time, place and manner in which the damage has been sustained, is delivered to the municipality within 2 months from the date on which the damage was sustained.
>
> …
>
> (3) Failure to give the notice or its insufficiency is not a bar to the maintenance of an action is the court before whom it is tried, or, in the case of an appeal, the Court of Appeal, believes
>
> (a) there was a reasonable excuse, and
>
> (b) the defendant has not been prejudiced in its defence by the failure or insufficiency.

[138] The plaintiffs admit that they did not provide notice of their claims to the defendant pursuant to s. 286. They rely on the provisions of subsection (3) and submit that the plaintiffs have a reasonable excuse and the defendant has not been

prejudiced in its defence. The plaintiffs submit that they required the defendant's cooperation and assistance to obtain financial assistance from the provincial government program in order to install rip rap along the empty lot. The plaintiffs concluded that if they gave notice to the defendant in accordance with s. 286, the defendant would withdraw its cooperation and assistance, which would jeopardize the funding and ultimately place their homes at further risk.

[139] The plaintiffs also submit that the defendant suffered no prejudice as a result of the plaintiffs' failure to give notice. They point to the fact that the defendant was involved throughout both erosion events, having staff on hand during the time period when the damage occurred, overseeing the moving of the Lewis/Orlowsky home and the Urquhart home and supervising the installation of rip rap on the empty lot.

[140] Plaintiffs' counsel referred me to the decision of the BC Court of Appeal in *Thauli v. Delta (Municipality)*, 2009 BCCA 455, in which the court considered what constitutes "reasonable excuse". In that case, the court concluded that:

> 50 The determination of whether there is a reasonable excuse is contextual. The question is whether it is reasonable that the plaintiff be excused, having regard to all the circumstances.

[141] I am persuaded by the submissions of the plaintiffs that, having regard to all the circumstances, the plaintiffs have shown a reasonable excuse for their failure to give notice pursuant to s. 286.

[142] I am also satisfied that the defendant has not been prejudiced in its defence by the plaintiffs' failure. It is clear from the evidence before me that the defendant had actual knowledge of both erosion events and the impact of these events on the plaintiffs.

Conclusion

[143] The defendant is entitled to the orders sought in paras. 1, 2 and 4 of the notice of application filed March 15, 2015, as follows:

1. This action is statute-barred pursuant to the provisions of s. 3(5) of the *Limitation Act*;

2. The plaintiffs' claims are dismissed as they have been brought after the expiry of the applicable limitation period; and

3. The defendant is entitled to costs pursuant to Rule 14-1, subject to either party wishing to make submissions on the issue of costs.

The Plaintiffs' Notice of Application

[144] If I am wrong in concluding that the plaintiffs' action is statute-barred, the evidence before me establishes that the defendant owed the plaintiffs a duty of care and that the defendant breached that duty of care by failing to warn the Lewis/Orlowsky plaintiffs and the Urquhart plaintiffs of the risks of erosion and not issue building permits for construction of their homes without that warning. The evidence clearly establishes on the balance of probabilities that:

1. The defendant knew about the 1976 erosion event and was aware of the risk of further erosion having received a warning from the Department of Environment on January 24, 1977;

2. The defendant passed resolutions restricting use and development of the plaintiffs' properties; and

3. The defendant failed to comply with those resolutions and failed to warn of the risks of significant erosion when it issued building permits for each of the plaintiffs' properties.

[145] The plaintiffs submit that they all suffered loss or damage as a result of the breach of duty of care by the defendant. The Lewis/Orlowsky plaintiffs and the Urquhart plaintiffs deposed that they would not have built their homes at all, had they been warned of the risk of significant erosion at the time that they applied for their building permits. As a result of the breach of duty of care by the defendant, the Lewis/Orlowsky plaintiffs and the Urquhart plaintiffs claim that they have suffered

losses, including the costs incurred to move their homes further away from the river bank, the costs to install rip rap on the river bank, the loss of land, river view and privacy and stigma to the properties. The plaintiff, John Ball deposed that he would not have purchased his home from Mr. & Mrs. Johns if he had been warned of the risk of erosion. As a result of the breach of duty of care by the defendant, Mr. Ball claims that he suffered losses, including the cost of installing rip rap, loss of land and stigma to his property.

[146] The defendant submits that the plaintiffs have failed to establish causation. It submits that the receipt and review of the 1998 GeoNorth Report represents a break in the chain of causation because the plaintiffs failed to take any steps to follow the recommendations in the report until after the 2007 erosion event, by which point the costs to move their homes and install rip rap had increased significantly.

[147] The defendant submits that the plaintiffs' calculation of damages does not flow from the breach of duty owed by the defendant and they are not entitled to claim damages for the cost to move their homes and to install rip rap along the river bank because the 1998 GeoNorth Report recommended either moving the homes or installing rip rap but not both. With respect to the Lewis/Orlowsky property and the Uquhart property, the defendant submits any damages awarded should be limited to the cost to move their respective homes had they followed the recommendations in the 1998 GeoNorth Report immediately. The defendant submits that had these plaintiffs followed those recommendations immediately, the cost to move their homes would have been $42,000 per home, as described in the 1998 GeoNorth Report. With respect to the Ball Property, the defendant submits that this home was not constructed in an "at risk" location and was not required to be moved and therefore, Mr. Ball is not entitled to damages with respect to any breach of duty of care by the defendant.

[148] The calculation of damages is somewhat complicated by the fact that during the course of the summary trial, I concluded that the appraisal reports that were

prepared with respect to each of the plaintiffs' properties did not comply with the requirements of Rule 11-6(1) and excluded the appraisal reports.

[149] Despite this, the plaintiffs submit that this court can still assess damages, even if it "amounts to guess work". Counsel for the plaintiffs relies on the case of *Penvidic Contracting Co*. *v. International Nickel Co. of Canada*, [1976] 1 S.C.R. 267, as authority for the proposition that where there is clear evidence of breach, the mere fact that are difficulties in proving with certainty that amounts of the losses does not relieve the defendant of the responsibility for paying damages, even if the amount is a matter of estimation.

[150] Relying on that proposition, the plaintiffs submit as follows:

> 1. With respect to the Lewis/Orlowsky plaintiffs, there is evidence that several metres of their property eroded away in 1997 and again in 2007 and the foundation of their home that remained after their home was moved fell into the river as a result of further erosion. There is also evidence that their home has been moved as far away from the river bank as possible and the installation of rip rap is thus necessary to prevent further erosion as the home cannot be moved any further away from the river bank;
>
> 2. Similarly, with respect to the Urquhart plaintiffs, there is evidence that metres of their land eroded away in 1997 and again in 2007. Their home has also been moved as far away from the river bank possible and thus the installation of rip rap was necessary to protect their home from being undermined in the future; and
>
> 3. Although the plaintiff, John Ball did not have to move his home, he too lost part of his land due to erosion in 1997 and 2007 and installed rip rap to minimize the risk of further erosion in the future.

[151] The Supreme Court of Canada in *Snell v*. *Farrell*, [1990] 2 S.C.R. 311 at para. 30, noted that causation need not be determined by scientific precision and it is

essentially a practical question of fact best "answered by ordinary common sense rather than abstract metaphysical theory".

[152] With respect to the Lewis/Orlowsky plaintiffs and the Urquhart plaintiffs, I have concluded that "but for" the breach of duty of care by the defendant, they would not have incurred the cost to move their homes further away from the riverbank or the cost to install rip rap along the river bank. I accept their evidence that had the defendant warned them of the risks of significant erosion at the time that they applied for their building permits, they would not have built their homes at all but rather would have found a different property on which to construct their homes. In my view, once the building permits were issued to them by the defendant in breach of its duty of care, and they built their homes on those lots in compliance with the defendant's building regulations, the losses that they subsequently incurred for moving their homes and installing rip rap flowed directly from the defendant's breach.

[153] I do not agree with the defendant's submission that any assessment of damages for the cost of moving their homes should be limited to the amount estimated in the 1998 GeoNorth Report, namely $42,000 per home. I also reject the submission that the Lewis/Orlowsky plaintiffs and the Urquhart plaintiffs should not be entitled to recover damages for the costs they incurred to install rip rap as well as the cost to move their homes because that was the recommendation made in the 1998 GeoNorth Report. Although these plaintiffs did not move their homes until after the 2007 erosion event, it is clear from the evidence that they participated in steps to try to secure funding to enable them to move their houses, as they did not have the financial resources to do so otherwise. Following the 1997 erosion event, the defendant, on behalf of home owners along that stretch of the Nechako River, applied to the provincial government cost sharing fund in three consecutive years but their applications were unsuccessful. It was not until the 2007 erosion event when the situation became more urgent that the province agreed to contribute an amount towards relocation of the Lewis/Orlowsky home and the Urquhart home and the relocations were able to take place.

[154] Despite the fact that the 1998 GeoNorth Report recommended either relocating the homes most at risk or installing rip rap, in the aftermath of the 2007 erosion event, it became clear to the plaintiffs and the defendant that installation of rip rap was necessary to protect the homes at their new locations. Exhibit "N" to the affidavit #1 of K.J. Lewis, is a copy of the Application Form - Flood Protection Program of the Province of British Columbia Emergency Program that was completed by the defendant and submitted on July 30, 2008. In that application, the defendant sought provincial funding for installation of rip rap along the riverbank of Island Park Drive. The attachment in support of the application noted that:

> Even with the relocation of two houses, the Urquharts and Lewis/Orlowsky's, the owners continued to watch their property slide into the river. Being at the specific location on the bend of the river, they could see the rest of their property disappearing downstream and their houses at their new locations once again being threatened.
>
> At their own cost, the Urquharts and Lewis/Orlowsky's added onto the bank protection project instituted by the neighbours.
>
> Subsequently, the Balls downstream of Freemans and the Wards upstream of Lewis/Orlowsky's have installed some rip rap bank protection.

[155] The evidence of the plaintiffs, in my view, establishes that the costs incurred by the Lewis/Orlowsky plaintiffs and the Urquhart plaintiffs to both move their homes in 2007 and install rip rap in 2008 flowed directly from the defendant's breach of duty of care.

[156] With respect to the Lewis/Orlowsky damages, I would have allowed the following:

a. Net cost of moving their home	$ 57,513.49
b. Rip rap costs	$ 59.163.33
c. Labour associated with house move etc.	$ 13,440.00
TOTAL	**$130,116.82**

[157] I would not have awarded damages for loss of part of their land and loss of river view and privacy because I am not satisfied that the Lewis/Orlowsky plaintiffs have established that the defendant's breach of duty of care caused those losses. It is arguable that they would have incurred those losses in any event simply by virtue of their ownership of the land, rather than as a direct result of the defendant's breach of duty. With respect to the claim for damages for stigma to property, while it is reasonable to infer that there has been a decrease in value of the property as a result of the 1997 erosion event and the 2007 erosion event as well as the risk of future erosion, there is insufficient evidence before me to calculate damages for any such loss.

[158] With respect to the Urquhart damages, I would have allowed the following:

a. Net cost of moving their home	$ 66,464.51
b. Rip rap costs	$ 61,052.82
c. Mr. Urquhart's labour	$ 3,760.00
TOTAL	**$131,277.33**

[159] I would not have awarded damages for loss of part of their land and loss of river view and privacy because I am not satisfied that the Urquhart plaintiffs have established that the defendant's breach of duty of care caused those losses. As with the Lewis/Orlowsky plaintiffs, it is arguable that they would have incurred those losses in any event simply by virtue of their ownership of the land, rather than as a direct result of the defendant's breach of duty. With respect to the claim for loss of garage/reduced appearance and damages for stigma to property, while it is reasonable to infer that there has been a decrease in value of the property as a result of the 1997 erosion event and the 2007 erosion event as well as the risk of future erosion, there is insufficient evidence before me to calculate damages for any such loss.

[160] The situation of the plaintiff, John Ball is slightly different from that of the other four plaintiffs. Mr. Ball did not apply for and obtain a building permit from the defendant. The previous owner, Henry Johns, applied for and obtained the building permit and Mr. Ball purchased the home from Mr. and Mrs. Johns in May 1994. For the reasons I have already noted, I have inferred that the defendant breached its duty of care by failing to warn Mr. Johns of the risks of significant erosion when it issued him a building permit. As the defendant noted in its submission, successive purchasers or property are attributed the knowledge or means of knowledge of a predecessor in title.

[161] Unlike the other four plaintiffs, Mr. Ball's home was not constructed on an "at risk" location and did not require relocation as a result of either the 1997 erosion event or the 2007 erosion event. The 1998 GeoNorth Report did, however, identify the Ball Property as one of five houses which would be undermined within 50 years at current erosion rates. The defendant submits that neither the 1998 GeoNorth Report nor the 2007 GeoNorth report recommend the installation of rip rap at the Ball Property and any losses incurred by Mr. Ball in the installation of rip rap are not compensable.

[162] The 2007 GeoNorth report details the author's observations of erosion at each of his site visits on July 3 and August 20, 2007 and specifically that by the second site visit, significant erosion of the bank had occurred, with a loss of between 6 metres and 9 metres of bank width adjacent to the Ball Property. The report author notes on page 2 that:

> At the time of the second review, the high bank had eroded to about two-thirds the height of the crest. I expect the final slope erosion back of the crest, by ravelling of sand and gravel in the lower portions of the slope followed by collapse of the upper silt, to reflect the lateral erosion that occurred at river level this year. This will cause the collapse of a treed strip between 9m and 13m width at the tip of the high bank and all of the slope between the crest and river's edge over the next few months to few years. <u>If the bank is not stabilized</u>, the ravelled material will be removed by Nechako River, including all of the benefits of the partially vegetated slope presently remaining.
>
> [emphasis added]

[163] It is clear from both the 1998 GeoNorth Report and the 2007 GeoNorth Report that Mr. Ball's home, while not in imminent danger, remained at risk and would be undermined within 50 years and bank stabilization through installation of rip rap was necessary to prevent further significant erosion of the bank that might otherwise shorten the time to such undermining. In my view, the costs incurred by Mr. Ball to install rip rap on the river bank below his property are losses that he would not otherwise have incurred but for the breach of duty of care of the defendant.

[164] I would also have allowed a claim for loss of land. Mr. Ball deposed that he would not have bought his property had he been warned about the risk of significant erosion and therefore, he would not have incurred this loss except for the defendant's breach of duty of care. Although there is no expert evidence before me with respect to the value of the land lost due to erosion, on the basis of *Snell* , I am satisfied that the sum of $10,000 represents a reasonable estimate of damages for this loss.

[165] With respect to the Ball damages, I would have allowed the following:

a. Rip rap costs	$111,225.67
b. Labour associated with rip rap (at $10 per hour)	$ 1,800.00
c. Loss of land	$ 10,000.00
TOTAL:	**$123,025.67**

[166] For the reasons that I have already noted, I would not have allowed the claim for damages for stigma to land.

Summary

[167] The defendant is entitled to the orders sought in paras. 1, 2 and 4 of the notice of application filed March 15, 2015, as follows:

> 1. This action is statute-barred pursuant to the provisions of s. 3(5) of the *Limitation Act*;
>
> 2. The plaintiffs' claims are dismissed as they have been brought after the expiry of the applicable limitation period; and
>
> 3. The defendant is entitled to costs pursuant to Rule 14-1, subject to either party wishing to make submissions on the issue of costs.

"The Honourable Madam Justice Church"