COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Drader v. Abbotsford (City)*, 2013 BCCA 376

Date: 20130826
Docket: CA040071

Between:

Eugene Drader

Appellant
(Plaintiff)

And

City of Abbotsford

Respondent
(Defendant)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Madam Justice Garson
The Honourable Mr. Justice Harris

On appeal from: A decision from the Supreme Court of British Columbia, dated June 14, 2012, (*Drader v. Abbotsford (City)*, 2012 BCSC 873, Chilliwack Docket S14735).

Counsel for the Appellant:	D. Stander
Counsel for the Respondent:	P. Saul
Place and Date of Hearing:	Vancouver, British Columbia April 23-24, 2013
Place and Date of Judgment:	Vancouver, British Columbia August 26, 2013

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Harris

Summary:

The appellant, Eugene Drader, claimed damages including punitive damages from, and an injunction against, the City of Abbotsford (the "City"). He contended that the City was liable in nuisance, negligence, or breach of contract for the manner in which it drained water through his property. The property included a large steep ravine or gully. Part of the gully is eroding, imperilling the upper portions of the property. The appellant says this erosion is caused by excessive discharge of water through the gully from the City's ditch and drainage system. The trial judge dismissed his claim on several grounds, including that the claims against the City were settled in a previous action in 2001, and the City did not breach the terms of that settlement, and also that the City was immune from liability pursuant to ss. 288 and 315.2 of the Local Government Act, R.S.B.C. 1996, c. 323.

The appeal was dismissed on the basis that the trial judge made no palpable or overriding error in concluding that the City did not breach the terms of the 2001 settlement and that the settlement barred the claims.

Reasons for Judgment of the Honourable Madam Justice Garson:

Introduction

[1] The appellant, Eugene Drader, claimed damages including punitive damages from, and an injunction against, the City of Abbotsford (the "City"). He contends that the City is liable in nuisance, negligence, or breach of contract for the manner in which it drains water through his property. Mr. Drader's property includes a large steep ravine or gully. Part of the gully is eroding, imperilling the upper portions of the property. Mr. Drader says this erosion is caused by excessive discharge of water through the gully from the City's ditch and drainage system. The trial judge dismissed his claim on several grounds, including that the claims against the City were settled in a previous action in 2001, and the City did not breach the terms of that settlement, and also that the City was immune from liability pursuant to ss. 288 and 315.2 of the *Local Government Act*, R.S.B.C. 1996, c. 323.

[2] For the reasons that follow, I would dismiss the appeal on the basis that: the trial judge made no palpable and overriding error in concluding that the City did not breach the terms of the 2001 settlement and that the settlement bars the recent claims.

Background

[3] Mr. Drader owns property at 29325 Marsh McCormick Road in Abbotsford (the "Property"). Water runs along a ditch next to Marsh McCormick Road, through a culvert

below Mr. Drader's driveway, and into a ravine on the Property. The ravine continues onto Mr. Drader's neighbour's property. In 1996, Eugene Drader, his wife Julie Drader, and his company, D.K. Heli-Cropper Int'l. Ltd. (collectively referred to as "Drader") commenced an action against the City claiming damage to the Property (the "First Action") caused by the City's diversion of water down the ravine on the Property.

[4] The First Action alleged that in 1963, the City constructed a drainage ditch along the north side of Marsh McCormick Road and diverted water from that ditch into the ravine on the Property. It was alleged in the First Action that in 1992, the City constructed a dam which succeeded in diverting 100% of the Marsh McCormick Road ditch flow of water onto the Property.

[5] The First Action claimed that on or about April 23, 1996, a portion of the surface of the Property collapsed and slid down through the ravine. It was alleged that the diversion of the Marsh McCormick Road ditch water onto the Property was the cause of the landslide as it eroded and undermined the land. Drader sued the City for negligence, nuisance, and trespass, arising from the diversion of water onto the Property.

[6] Paragraphs 6−17 of the Amended Statement of Claim in the First Action provide as follows:

> 6. Abbotsford is the owner of, and is statutorily responsible for the management of, the road and road side lands directly adjacent to the south side of the Property.
>
> 7. In and around 1963. Abbotsford constructed a drainage ditch along the norther[n] perimeter of Marsh McCormick Road (the "Ditch") and created a notch 2/3 of the way down the souther[n] boundary of the Property which unnaturally diverted the flow of water from the Ditch into the Property (the "Diversion").
>
> 8. The neighbours upslope of the Property have created ditches on their properties to gather storm surface water, which, with the knowledge of the Defendant, they have directed, and continue to direct into the Ditch.
>
> 9. In and around February 1992, Abbotsford constructed a dam across the Ditch which has increased the Diversion by diverting 100% of the flow of water from the Ditch into the Property.
>
> 10. On or about April 23, 1996, a portion of the surface of the Property collapsed and slid down hill, through a ravine, and was deposited adjacent to the north side of the Property (the "Landslide").
>
> 11. The Diversion eroded and undermined the Property, and caused the Landslide.
>
> Negligence
>
> 12. Abbotsford owed a duty of care to the Plaintiffs to provide a safe and

effective drainage system for water flowing by their Property.

13. Abbotsford negligently failed to exercise this duty of care by creating the Diversion, which Abbotsford knew or ought to have known was incapable of safely and effectively draining water that flows by the Property.

Nuisance and Trespass

14. From about 1963 to the present, the Defendant has unnaturally diverted water onto the Property through the Ditch and the Diversion, which activity constitutes a nuisance and trespass of land.

15. As a result of the Defendant's actions in negligence, nuisance and trespass, the Plaintiffs, Eugene Drader and Julie Drader, have suffered and continue to suffer damages, including:

(a) great annoyance;

(b) discomfort;

(c) loss of enjoyment of the Property;

(d) damage to the Property both physical and aesthetic; and

(e) general and special damages.

16. As a result of the Defendant's actions in negligence, nuisance and trespass, the Plaintiff, D.K. Heli-Cropper Int'l Ltd, has suffered and continues to suffer damages, including:

(a) an interruption of its business, and resultant loss of business; and

(b) general and special damages.

17. The Plaintiffs have demanded that the Defendant abate the nuisance and cease trespassing on the Property, but to date, the Defendant has either refused or neglected to do so.

[7] Drader sought damages and an injunction to restrain the City from continuing to divert water onto the Property. Alternatively, Drader sought a declaration pursuant to s. 324 of the *Municipal Act*, R.S.B.C. 1996, c. 323, that the City had taken, expropriated, used, or injuriously affected a portion of the property by the exercise of its powers and claimed damages pursuant to s. 324 of the *Municipal* Act or s. 312 of the *Local Government Act*.

[8] In 2001, the First Action was settled. The parties entered into a consent order dismissing the action. At the same time they signed a memorandum of settlement (the "MOS"), a right-of-way agreement (the "ROWA") and a release (the "Release"). I shall come to the particulars of these documents below, but in brief, the MOS provided that in consideration for the dismissal of the action: the City would pay $130,000 into a fund in order to remediate the property; the City would pay $45,000 to the Draders' solicitor in trust; and all parties agreed that a right-of-way would be registered against the Property

permitting the City to continue to drain water through the ravine for the purpose of accommodating the flow of water from the ditch bordering the north side of Marsh McCormick Road (the "ROW").

[9] The ROWA indemnified the City against actions regarding the ROW, unless the water flowing through the ROW exceeded the boundaries of the ROW or the volume of the water flow into the ROW exceeds 1.5 m³/s.

[10] The Release released and discharged the City from all actions arising from or in connection with the First Action.

[11] On May 13, 2004, Mr. Drader and his company commenced a fresh action (the "Second Action") against the City. Mr. Drader alleged that on or about January 29, 2004, and then, (as alleged in a subsequently amended claim), again on January 13, 2006, the City's ditch overflowed across the Property over areas outside of the ROW and caused damage to the Property. Mr. Drader pled at para. 10, "In addition, the water diverted from the Defendant's ditch through the Property has exceeded and continues to exceed a volume which can be safely and properly contained within the Statutory Right-of-way, and has caused, and continues to cause, damage to the Property." Mr. Drader claimed damages in negligence, nuisance and breach of contract.

[12] First, Mr. Drader pled that the City owed a continuing duty of care to properly maintain and repair its ditch, its ROW, and any lands affected by its ROW in order to provide a safe and effective drainage system for the water flowing through the Property emanating from the City's ditch. He pled that the City had breached its duty of care by permitting water in excess of 1.5 m^3/s to flow from the ditch into the ROW, contrary to the settlement agreement that concluded the First Action.

[13] At para. 13 and 14 of his claim in the Second Action, Mr. Drader described the damages arising from the alleged negligence:

> [13] The Defendant's failure to maintain its Ditch, and maintain a volume of water no greater than 1.5 cubic metres per second in the Ditch, has caused erosion and damage to the Property, and further undermined the slope on the Property directly above the Statutory Right-of-way.
>
> [14] The Defendant's continued use of the Statutory Right-of-way, despite the increased volume of water flowing into it from the Ditch, has caused and continues to cause erosion and undermining of the slopes directly adjacent to the Statutory Right-of-way, and has resulted in land slippages and landslides on the Property.

[14] Mr. Drader also pled nuisance as a consequence of the City continuing to divert excessive water onto the Property. He claimed the diversion of water adversely affected and damaged portions of the Property outside of the ROW.

[15] Finally, Mr. Drader also pled breach of contract referring to express or implied terms of the settlement. He pled at paras. 22 to 23 that the City had a duty to inspect, repair, and if necessary, replace the ROW and also not to exceed the 1.5 m^3/s volume of water. He pled that if it did exceed 1.5 m^3/s, the City would be responsible for any damage, and at para. 24, he pled:

> [24] The Defendant has breached the expressed or implied terms of the Settlement Agreement and its incorporated Statutory Right-of-way by:
>
> (a) failing to maintain its Ditch;
>
> (b) failing to maintain, repair, or replace its Statutory Right-of-way;
>
> (b) permitting a volume of water in excess of 1.5 cubic metres per second to flow from the Ditch through the Statutory Right-of-way, when the Statutory Right-of- way does not have the capacity to safely and properly handle that volume of water as a water course through the Property;
>
> (d) failing to inspect regularly the Statutory Right-of-way, to ascertain the impact it is having on the Property; and
>
> (e) failing to maintain and repair the portions of land on the Property directly adjacent to the Statutory Right-of-way, forming the slopes above the Statutory Right-of-way, to ensure that the Statutory Right-of-way continues to function, and that it does not damage the Property.
>
> (d) failing to inspect regularly the Statutory Right-of-way, to ascertain the impact it is having on the Property; and
>
> (e) failing to maintain and repair the portions of land on the Property directly adjacent to the Statutory Right-of-way, forming the slopes above the Statutory Right-of-way, to ensure that the Statutory Right-of-way continues to function, and that it does not damage the Property.

[16] Mr. Drader sought damages for past remedial work he undertook to stabilize the ravine and for all future repairs necessary to fully stabilize the Property.

[17] Mr. Drader also sought aggravated and punitive damages. He claimed that the City had acted in bad faith towards him.

[18] He also sought an injunction to restrain the City from continuing to divert water from its ditch into the Property through the ROW.

[19] The City defended the Second Action, the subject of this appeal. The City denied:

1. … that the ditch overflowed in January 2004, or in January 2006, but that if it did so, the water came from a ditch constructed by Mr. Drader along the western boundary of the Property;

2. … that the volume of water passing through the ROW was excessive;

3. … that it was negligent, created a nuisance or committed a breach of the settlement agreement; and

4. … all claims for damages and that it had acted in bad faith.

[20] The City denied its negligence and claimed that it was Mr. Drader's own conduct that caused or contributed to any damage suffered including removal of vegetation from the Property, disrupting the existing drainage system, constructing his own ditch which was inadequate and failing to inspect, maintain or repair his own ditch.

[21] The City also pled that the action was barred in whole or in part by operation of the MOS, the ROWA, and the Release.

[22] The City claimed that any decisions it made with respect to management and maintenance of drainage works were *bona fide* policy decisions and not subject to review by a court.

[23] The City also relied upon the immunity provisions in the *Local Government Act* at ss. 288 and 315.2.

Reasons for Judgment of the Trial Judge

[24] The Second Action was tried before Madam Justice Watchuk in June and August of 2011. Her reasons for judgment may be found at 2012 BCSC 873. She dismissed Mr. Drader's action on several bases.

[25] There were three main areas of alleged damage. The first was damage arising from the two overflow events of 2004 and 2006, which Mr. Drader said were caused by the blocked culvert or a culvert of inadequate capacity. The second was the continued slippage in the ravine or gully area covered by the ROW. Mr. Drader said that on an ongoing basis the water being diverted through the ROW was causing erosion to the Drader Property. The third area was damage attributable to down cutting and erosion

north of the stabilized area due to lack of repair work below it on the neighbouring property.

[26] In summary, the judge found that the 2004 and 2006 culvert flooding events, though arguably not covered by the 2001 settlement, were not the cause of the greater slippage in the ravine and ROW, and did not affect the overall stability of the Property. The judge also found that the blockage of the culvert was not the responsibility of the City. She also found that any damage from continued slippage in the ravine is covered by the 2001 settlement. The judge found, in the alternative, that the City would in any event not be liable for slippage in the ravine owing to the operation of the immunity defences available to the City under ss. 288 and 315.2 of the *Local Government Act*. Finally, the judge found that the slippage attributable to the lack of support on the neighbouring property is similarly either covered by the 2001 settlement or the City's various defences under the *Local Government Act*.

[27] The judge provided a detailed account of the evidence of the expert witnesses, the points of disagreement between them, and her reasons for preferring the testimony of the experts who testified on behalf of the City.

[28] The judge summarized part of the opinion of Mr. Kokan, the plaintiff's expert, as follows:

> [88] The reports and evidence of Mr. Kokan conclude that the rock fill placed within the gully on the Property (which is the Right of Way on the Property) has been effective in stabilizing the area of the Ravine on the Property. Minor additions have been done to fill depressions. The 2004 and 2006 overflow events did not affect the stability of the Property.
>
> [89] It is Mr. Kokan's opinion that the ongoing erosion in the lower Ravine on the Neighbour Property is the cause of some of the slumping on the Plaintiff's Property. Down cutting in that part of the Ravine is releasing carpets of soil in the direction of the centre of the Ravine. This is progressing backwards toward the Property such that the western limit is below the cat track on the Property. The direction of movement is down slope and the shape of the affected area is long and narrow.
>
> [90] The work recommended by Mr. Kokan for the Neighbour Property is an update of what was originally contemplated by the Project described in the MOS and which was not then done. It is now referenced in 2011 dollars and with the longer 50 year return period. Notwithstanding the longer time period, the Project work completed on the Property remains effective.
>
> [Emphasis added.]

[29] As to the two culvert overflow events the judge concluded that they were caused

by the blocked culvert. She said:

> [208] I find that on both Overflow Events, the increase in water level in the Ditch west of the Culvert was caused by a blockage of the Culvert. The result was that most of the water flowed north into the Drader Ditch and overflowed the Driveway.

[30] At para. 210, the judge held that unless Mr. Drader could establish that the flow of water through the ROW exceeded 1.5 m^3/s, pursuant to s. 2(h) of the ROWA, he would be barred from pursuing a claim against the City for damage attributable to excessive water running through the ROW. Mr. Drader relied on his expert, Dr. Ramsay, to prove that the flow of water through the ROW exceeded 1.5 m^3/s. The judge entirely rejected Dr. Ramsay's opinion on this point (at para. 241). She also rejected Dr. Ramsay's opinion that the culvert was inadequate to handle normal flows of water (at para. 247). Generally, she preferred the evidence of the City's experts, Mr. Coles and Johnston to that of Dr. Ramsay, whom she found to be unreliable (at para. 250). She concluded the following in reference to Mr. Coles and Mr. Johnston:

> [252] On the basis of their evidence, I find that the flow of water through the Right of Way has not exceeded 1.5 m^3/s since March 26, 2001. Specifically it did not exceed 1.5 m^3/s on the dates of either of the two Overflow Events.
>
> [253] The capacity of the Culvert is as calculated by Mr. Coles and Mr. Johnston, between .25 and .26 m^3/s.
>
> [Emphasis added.]

[31] Turning to the various claims advanced, the judge first considered the claims advanced in nuisance in respect of the ditch. This claim, she noted, was not included in the pleadings and was based on the two overflow events of 2004 and 2006. The judge had found, as already noted, that the cause of these overflow events was the blocked culvert. She found that s. 288 of the *Local Government Act* applied to immunize the City from liability, but in any event, on the facts the judge found that the overflow caused by blockage of organic material was temporary and did not lead to the subsidence in the ravine.

[32] She then considered the appellant's claim in nuisance in respect of the ROW. It was alleged that the City committed nuisance by permitting an excessive amount of water through the ROW in breach of the ROWA, resulting in damage to portions of the Property outside of the ROW. The judge found that the ROWA was not breached. She accepted the opinions of the City's experts as to the volume of water flowing through the ROW. At para. 283, she found that the "drainage system has worked as contemplated

by the [settlement] agreements." She also concluded that there was no evidence of damage to the ROW by excessive water in any event (at para. 289).

[33] She concluded:

> [297] The provisions of the ROWA therefore bar any action in nuisance against the City because the factual bases for the application of the exemption from the hold harmless clause in s. 2(h) are not present.

[34] In the alternative, she said she would have found the City immune on the basis of s. 315.2 of the *Local Government Act*. The judge also rejected Mr. Drader's argument that he should be compensated pursuant to s. 33 of the *Community Charter*, S.B.C. 2003, c. 26. (It is unnecessary to deal with the immunity defences on appeal because, as I explain below, I would not accede to the appeal of the judge's finding that the ROWA was not breached.)

[35] Next, the judge turned to the claim in negligence concerning the maintenance of the ditch. The claims in negligence and nuisance depended on the same facts. The judge noted that Mr. Drader submitted that the City was negligent in failing to maintain the ditch (at para. 329). The City had adopted a policy of maintaining ditches only in response to complaints in January of 1995, noting that to do otherwise was prohibitively expensive given that Abbotsford has a network of about 1,000 km. of ditches. Section 4 of the ROWA established a similar "complaint driven" maintenance system in respect of the ROW and the Ditch. The judge found Mr. Drader did not give notice to the City about a blockage in the ditch (at para. 338).

[36] At para. 346, the judge held that policy decisions, such as the City's adoption of the complaint driven system of ditch maintenance, are not subject to a duty of care: *Jensen Contracting Ltd. v. North Cowichan (District)* (1998), 47 M.P.L.R. (2d) 105 (B.C.S.C.); *Just v. British Columbia*, [1989] 2 S.C.R. 1228.

[37] In any event the judge found that the overflowing ditch did not cause damage to the ravine.

[38] The judge next considered the claim in negligence relating to the ROW (at para. 348).

[39] Mr. Drader alleged that the City was negligent in failing to maintain the ROW and by allowing water exceeding 1.5 m^3/s to flow through the ROW. At para. 349, the judge

noted that the evidence established that the flow did not exceed 1.5 m^3/s. The judge concluded the indemnity provision in the ROWA applied. (Below, I conclude that this finding ought not to be disturbed on appeal and therefore it is unnecessary to detail the judge's further finding that, in any event, the City was entitled to immunity under s. 315.2 of the *Local Government Act*.)

[40] Last the judge considered the claim in negligence concerning the ravine below the Property. The judge found, at para. 358, that the MOS provided the City would pay for the "Project", which included remedial work in the ravine, including that part of the ravine that was on the neighbour's property. She held:

> [359] The Release must be interpreted in the context of the MOS which was executed on the same date. In the Release, the Plaintiff releases the City from the enumerated claims including those "... in any way resulting or arising from any cause, matter or thing whatsoever existing up to the present time ...".
>
> [360] The legal principle regarding the interpretation of a release is stated in *Keefer Laundry Ltd. v. Pellerin Milnor Corp.*, 2009 BCCA 273 at para. 59:
>
> > ... the interpretation of a release requires the Court to determine as a matter of fact what was in the parties' contemplation when the release was executed:
> >
> > > A release is a contract, and the general principles governing the interpretation of contracts apply equally to releases. However, there is also a special rule which is superadded onto regular ones. This rule comes from *London and Southwestern Railway v. Blackmore*, L.R. 4 H.L. 623, an 1870 decision of the House of Lords. The rule in *London and Southwestern Railway* holds that a release is to be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given. The rule allows the Court to consider a fairly broad range of evidence of surrounding circumstances in order to ascertain what was in fact in the specific contemplation of the parties at the relevant time, and it is not uncommon for a significant amount of extrinsic evidence to be examined when the rule is applied. However, like the law of contract, interpretation generally, the scope of permissible extrinsic evidence does not extend to evidence of the parties' subjective intentions; such evidence is strictly inadmissible.
>
> [361] The City submits that the subject matter of the 1996 Action and the settlement of that litigation expressly contemplated erosion of the stream bed within the Ravine on the Neighbour Property. It submits that the Plaintiff now seeks performance of remedial work which was expressly contemplated by the MOS but which the Plaintiff never carried out.
>
> [362] Pursuant to the MOS, the Plaintiff was paid an amount of $130,000 for the purpose of:
>
> > "... placing of rock fill for the purpose of restricting, as much as is practically possible, erosion of the bed of the stream which flows through

> the Ravine over property which includes but is not limited to the Drader property".
>
> [Emphasis added.]

[41] The judge concluded:

> [372] The Plaintiff's claim in negligence with regard to any damage arising from the water flow in the Ravine on the Neighbour Property is barred by the Release.

[42] The judge would also have dismissed the claim on the alternative grounds applying s. 315.2 of the *Local Government Act*.

[43] Mr. Drader also pled that the City was liable for breach of contract. The judge found no breach of the contracts, that is, the MOS and the ROWA.

Grounds of Appeal

[44] The plaintiff appeals on the following grounds:

> 1. The learned Trial Judge erred in law and fact by finding that section 288 of the *Local Government Act* immunized the Respondent from liability in nuisance, because its drainage system was "normally" handling the volume of water, and overflowed due to a blockage, rather than being a predictably inadequate drainage system which was unable to handle the volume of water it could receive.
>
> 2. The learned Trial Judge erred in law and fact by finding that section 315.2 of the *Local Government Act* gave immunity to the Respondent from any actions arising from its discharge of water into the Appellant's property, and by finding that it was the "most convenient natural water course or water way".
>
> 3. The learned Trial Judge erred in law and fact by finding that section 33 of the *Community Charter* did not apply in this case, by finding that the Appellant did not file a "timely claim", and by finding that the Respondent's drainage system was in place long before the present claim, so that no compensation can be ordered by the Supreme Court.
>
> 4. The learned Trial Judge erred in law and fact by finding that the Respondent's maintenance program, regarding its drainage systems, was a policy decision, not subject to a duty of care, thereby shielding the Respondent from liability in negligence, and by finding that the Respondent's policy #900-5-04 was a "complaint driven maintenance" program, based solely on reported complaints from citizens.
>
> 5. The learned Trial Judge erred in law by finding that section 315.2 of the *Local Government Act* grants the Respondent immunity from liability in negligence, even if the Appellant can show a breach of the Memorandum of Settlement and Right-Of-Way Agreement.
>
> 6. The learned Trial Judge erred in law and fact by finding that the Release of 2001 barred any future negligence claims against the Respondent by the Appellant, arising from either damage to the ravine on the Appellant's property, or damage to the ravine on neighbouring property causing resultant damage to the

Appellant's property.

7. The learned Trial Judge erred in law and fact by finding that the dispute between the Appellant and the Respondent, which arose in 2004, was not within the ambit of the dispute resolution provision of the Memorandum of Settlement, and by finding that, therefore, the Respondent was not in breach of contract, and did not act in bad faith, by objecting to the involvement of Mr. Justice Burnyeat in a summary resolution of the dispute.

8. The learned Trial Judge erred in law by finding that there was no implied term of safety in the Right-Of-Way Agreement, and by finding that, in any event, the Respondent had general immunity from liability in the circumstances, even as an easement holder.

9. The learned Trial Judge erred in law by failing to find breaches of contract by the Respondent, and, consequently, by failing to even consider the Respondent's liability to the Appellant for damages for mental distress.

Discussion

[45] For the reasons that follow, I would dismiss this appeal. In my view, the 2001 settlement between Mr. Drader and the City constitutes a complete bar to the within proceedings with respect to damage or slippage in the ROW. I conclude that the trial judge made no error in finding that the City did not breach the terms of the settlement agreement, which included the consent dismissal order, the Release, the MOS and the ROWA. Further, I would not interfere with the trial judge's finding that any damage arising from the blocked culvert in 2004 and 2006 is not connected to the complaints of slippage in the ROW, and is not the legal responsibility of the City. Having reached these conclusions, it is unnecessary to consider any of the remaining grounds of appeal.

1. Settlement bars the action

[46] On appeal, Mr. Drader argues that the judge erred in her interpretation of the settlement agreement. He alleges that the Release (set out below), specifically dealt with all claims "existing up to the present time", but did not bar future claims arising from new damage to his property.

[47] The City relies on the settlement agreement as a bar to the action (absent a breach of the agreement, which I shall come to in the section below, entitled "No Breach of the Settlement Agreement"). The City contends that the Release should be interpreted in the context in which it was executed: *Keefer Laundry Ltd. v. Pellerin Milnor Corp*., 2009 BCCA 273 at para. 59. According to the City, when the Release was executed in 2001, the parties contemplated past and future claims for damage arising from the diversion of water from the ditch into the ravine, including damage caused by erosion of

the ravine on both the Property and the neighbouring property. I set out above at paras. 4–7 and 9–14 the claims advanced in the within action as well as the First Action. Part of the context in which the release must be interpreted involves an understanding of what was at issue in the First Action. Both statements of claim, that is the one in the First Action, and the one in the Second Action, assert that the same drainage system that diverts water from the same roadway through the same ravine has caused erosion that imperils the same Property. Both claims assert negligence, and nuisance and allege that the City has diverted excessive amounts of water into the Property.

[48] Another part of the factual context in which the settlement documents must be interpreted involves the work on the neighbouring property. Mr. Drader and his expert acknowledged that they were aware the settlement funds were paid in part for remedial work on the neighbour's property (at paras. 362–369). Mr. Drader could not at first obtain the neighbour's consent to the work. Instead, he expended all the funds on his own property. Subsequently, the neighbour provided consent, but Mr. Drader now seeks in this action, additional funds to pay for the recommended work on the neighbouring property.

[49] I begin this discussion by setting out the pertinent provisions of the various settlement documents, which were set out in the trial judge's reasons at para. 43:

> 1. The Minutes of Settlement ("the MOS"):
>
> WHEREAS each of these actions relate to a landslide which occurred on April 23, 1996 in a ravine (the "Ravine") located at 29325 Marsh McCormick Road (the "Drader Property");
>
> ...
>
> AND WHEREAS as a part of such a settlement all parties except for the Greater Vancouver Regional District wish to provide for certain renovation work to be carried out within the Ravine and to establish a Ravine Renovation Trust Fund from which to pay for that work (the "RRTF");
>
> ...Action No. S6532 will be referred to as the "Drader Action", Action No. C970690 will be referred to as the "GVRD Action" and Action E.C.B. No. 39/97 will be referred to as the ("Expropriation Action");
>
> 1. <u>Settlement of the Drader Action</u>
>
> With respect to the Drader Action, the parties to that action agree as follows:
>
> (a) The Plaintiffs shall forthwith execute and forward to the Defendant a Consent Dismissal Order and a full Release ...;
>
> (b) The Plaintiffs shall grant to the Defendant a right-of-way through the Ravine for the purpose of accommodating the flow of water from the ditch which borders the north side of Marsh McCormick Road and which enters the Ravine at its southerly end and flows in a north easterly direction through the Ravine ...;

(c) Except as the Right-of-Way may expressly provide, it shall not constitute any restriction or limitation upon those rights which the Defendant may have under Section 560 of the *Municipal Act.*

...

(e) Immediately upon registration of the Right-of-Way at the Land Title Office, to occur no later than the Disbursement Date, the Defendant shall:

(i) pay to the Plaintiffs' solicitor, Brent Lokash, in trust, an amount of $45,000; and

(ii) pay to the RRTF an amount of $130,000.

...

4. Administration of the RRTF

All parties agree that:

(a) the RRTF shall be an interest bearing trust account ...;

(b) the RRTF shall be used to pay all costs incurred from and after February 28, 2001 related to the placing of rock fill for the purpose of restricting, as much as is practically possible, erosion of the bed of the stream which flows through the Ravine over property which includes but is not limited to the Drader Property (the "Project"). These costs shall include but not be limited to the costs of design, administration, permit application, materials and labour;

(c) No work on the Project shall be carried out on any property but the Drader Property without the written consent of the property owners;

(d) It is the intention of the parties that the Project shall be a compromise of the work recommended by GeoPacific Consultants Ltd. in a report to D.K. Heli-Cropper Int'l Ltd. dated November 21, 2000 and the work recommended by Golder Associates in a report to Messrs. Alexander, Holburn, Beaudin & Lang dated January 9, 2001;

(e) ... No party shall be obliged to contribute any additional funding to the RRTF for whatever purpose. The cost of the Project shall not exceed $130,000;

(f) Immediately after the RRTF has been fully funded, Mr. Matt Kokan of GeoPacific Consultants Ltd. ("GeoPacific"), shall be retained and instructed by Eugene Harold Drader to proceed with the Project by preparing a design and a budget and completing all necessary permit applications by July 1, 2001 at the latest;

...

(k) Upon completion of the Project and payment of all related costs, any funds still remaining in the RRTF, including any interest which may have accrued, shall be paid directly to Eugene and Julia Drader or as they may direct.

5. Dispute Resolution

All parties agree that:

(a) each of them will make their best efforts to do everything necessary to ensure that the Project is completed in accordance with this Memorandum.

(b) to the extent that a dispute arises among the parties concerning the rights and obligations of the parties set out in this Agreement, which the parties in good faith cannot resolve on their own, the dispute shall, at the instance of any one party, be submitted to Mr. Justice Grant Burnyeat of the Supreme Court of British Columbia for summary resolution. For this purpose all parties agree that notwithstanding the dismissal of the Drader and GVRD Actions, Mr. Justice Burnyeat shall remain seized with both of these matters. All parties consent to be bound by any Order which Mr. Justice Burnyeat may make. ...

(Underlining added by the trial judge.)

2. The Statutory Right of Way ("the ROWA"):

EUGENE HAROLD DRADER ... (the "Grantor");

CITY OF ABBOTSFORD ... (the "City");

A. ... Grantor is the registered owner ...;

B. The Grantor will construct and maintain the Works defined herein;

C. The City requires, and the Grantor has agreed to grant to the City, the Statutory Right-of-Way defined herein;

...

1. ... Grantor does hereby grant, in perpetuity, to the City a Statutory Right-of-Way and the full, free, uninterrupted, and unrestricted right and liberty at all times to:

(a) ... lay down, construct, operate, inspect, maintain, alter, enlarge, remove, repair, replace, renew, or otherwise service the Statutory Right of Way running from the road side ditch running along Marsh McCormmick Road (the "Ditch"), through a notch and adjacent to the Ditch and then through the Lands, which the Statutory-Right-of-Way permits the discharge of water from the Ditch through the Lands, together with all ancillary attachments and fittings.

(the "Works")

to facilitate the construction, operation, and maintenance of the Works;

(b) bring on to the Statutory Right-of-Way all materials and equipment it requires or desires for the foregoing purposes;

(c) clear the Statutory Right-of-Way and keep it clear of anything which, in the opinion of the City, constitutes, or may constitute, an obstruction to the use of the Statutory Right-of-Way or to the Works;

(d) cross over the Lands for reasonable access to the Statutory Right-of-Way, and make reasonable ancillary use of the Lands in respect of the Works; and

(e) do all acts which, in the opinion of the City, are incidental to the foregoing.

2. The Grantor hereby covenants and agrees with the City:

...

(f) to construct and, subject to Section 4, maintain, at its own costs, the Works and the Statutory Right of Way to

standards acceptable to the City;

(g) that, should the Grantor fail to maintain the Works as required herein, the City may, but is not obligated to, at any time upon 30 days written notice from the City to the Grantor, and at any time, if in the opinion of the City, an emergency exists, at the cost of the Grantor take whatever action the City, in its sole discretion, deems necessary to bring the Works up to standards acceptable to the City, the costs of which may be added to the municipal taxes on the Lands; and

(h) subject to Section 5, to indemnify and hold harmless the City from and against all manners of action, causes of action, claims, debts, suits, demands, and promises whatsoever at law or at equity, whether known or unknown, which the Grantor now has, or may at any time have by reason of the granting, existence or use of the Statutory Right-of-Way or of the Works, or of the carrying out of or failing to carry out of the construction or maintenance of the Works or of the flooding of the Lands or any damages to any improvements on the Lands thereon.

3. The City hereby covenants and agrees with the Grantor that should the City maintain the Works pursuant to Section 2(g), the City will do all works and things hereby authorized to be done by the City over, through, under, and upon the Statutory Right-of-Way in a good and workmanlike manner ...;

4. The City covenants and agrees that upon receipt of prior written notice from the Grantor that maintenance is required in that area of the Statutory Right of Way, to:

(a) Maintain the Ditch; and ...

5. Should:

(a) the water flow from the Ditch through the Statutory Right of Way exceed the boundaries of the Statutory Right of Way; and

(b) the volume of water flow through the Ditch into the Statutory Right of Way exceed 1.5 cubic metres per second; and

(c) damages occur to the Statutory Right of Way or the Lands that are caused by 1 and 2;

the Grantor shall have no obligation to indemnify and hold the City harmless as set out in Section 2(h);

...

7. It is mutually understood, agreed, and declared by and between the parties hereto that:

(a) all expenses incurred in the initial construction of the Works and the maintenance and repair thereof shall be borne and

paid by the Grantor;

(b) despite anything herein contained, there are hereby reserved to the City all its rights and powers of expropriation or other powers reserved to the City or enjoyed by it, by or under any Act of the Legislature of the Province of British ...;

[Underlining added by the trial judge.]

3. Release

FULL AND FINAL RELEASE

FOR, AND IN CONSIDERATION of the payment to D.K. Heli-Cropper Int'l Ltd., and EUGENE HAROLD DRADER and JULIE ANN DRADER, (together the "Releasor") or to their solicitors, Brent Lokash, of the Province of British Columbia, the sum of $1.00, the receipt of whereof is hereby acknowledged; THE RELEASOR DOES HEREBY REMISE, RELEASE, AND FOREVER DISCHARGE, the CITY ("Releasee"), of and from any and all actions, causes of action, claims, suits, liens, debts, demands, damages, interest, costs, expenses and compensation of whatsoever kind and howsoever arising, whether known or unknown, and which the Releasor now has or any time hereafter can, shall or may have in any way resulting or arising from any cause, matter or thing whatsoever existing up to the present time, and in particular, but without restricting the generality of the foregoing, of and from or in connection with the subject matters of an action commenced by the Releasor as Plaintiff against the Releasee as Defendant in the Supreme Court of British Columbia Action No. S6352, Chilliwack Registry.

IT IS FURTHER UNDERSTOOD AND AGREED that for the consideration herein the Releasor expressly agrees not to make any further claim or take any further proceedings with respect to any matters which are the subject this Release against the Releasee or any other persons, companies, corporations or other legal entities whom might claim contribution or indemnity from the Releasee either in the Provinces of Canada, or elsewhere.

[Emphasis added.]

[50] These three documents, the MOS, the ROWA, and the Release, along with the consent dismissal order, are intended to be read together. The MOS contains the particulars of the overall settlement, including the establishment of the settlement fund, registration of the ROW on the Property's title, and the dispute resolution mechanism the parties would use to address future disagreements regarding the terms of the settlement.

[51] The ROWA gives the City the right to divert water through the Property via the roadside ditch, through the notch, and then through the ROW. The ROWA also contains a "hold harmless" clause at paragraph 2(h). Paragraph 5 contains an exception to

paragraph 2(h). For convenience I repeat it. It reads:

> 5. Should:
>
> (a) the water flow from the Ditch through the Statutory Right of Way exceed the boundaries of the Statutory Right of Way; and
>
> (b) the volume of water flow through the Ditch into the Statutory Right of Way exceed 1.5 cubic metres per second; and
>
> (c) damages occur to the Statutory Right of Way or the Lands that are caused by 1 and 2;
>
> the Grantor shall have no obligation to indemnify and hold the City harmless as set out in Section 2(h);

The parties agree that in the event these three conditions are met, Mr. Drader may commence proceedings against the City. (I will discuss this section in greater detail below, under the heading “No Breach of the Settlement Agreement”.)

[52] Mr. Drader’s position on appeal is that the trial judge incorrectly concluded that the settlement agreement, and the Release in particular, was prospective. He also contends, at para. 79 of his factum, that the settlement document,

> did not deal with claims for damage to the Appellant’s lands, which might be occasioned by erosion and subsidence on neighbouring, down-slope lands, below his property - if damage occurs in that area of the ravine, which then impacts on the Appellant’s property above, this is not contemplated by the Release and the Respondent should be liable for it.

In oral submissions, Mr. Drader stated that “not much” had been settled in 2001. In his view, the settlement covered only the ROW, and prospective damage that was not contained within the ROW was not contemplated. If I understand Mr. Drader’s argument correctly, he says that the judge erred in failing to make a finding that the cause of what is, undoubtedly, a significant slope failure, was excessive discharge of water through the gully. Further, he contends the judge erred in failing to find that the cause of the slope failure was not wholly contained within the ROW, and thus not covered by the settlement agreement. Mr. Drader’s position is the Release does not apply prospectively and does not apply to damage on the Property caused by erosion on the neighbouring property.

[53] In her reasons, the trial judge held that the evidence suggested Mr. Drader prospectively released the City from damage to the Property caused by the diversion of water through the ROW, including damage arising from the erosion of the ravine on the neighbour’s property :

> [371] On the basis of the evidence, I conclude that when the Release was

> executed in June 2001, it was contemplated by all parties that what was being settled was all of the Plaintiff's claims for damages, past and future, arising from the diversion of water from the Ditch into the Ravine, including damages caused by the erosion of the Ravine on both the Plaintiff's property and the Neighbour Property.

[54] I agree with the City that there was a substantial body of evidence upon which the trial judge could base this conclusion, including:

> In the MOS, the amount of $130,000 was paid by the Respondent for the purpose of "placing of rock fill for the purpose of restricting, as much as is practically possible, erosion of the bed of the stream which flows through the Ravine over property which includes but is not limited to the Drader property".
>
> …
>
> It was the stated within the MOS that the parties intended the work to be a compromise of two expert reports including the report of GeoPacific Consultants Ltd. (Mr. Kokan), dated November 21, 2000.
>
> …
>
> In his report of November 21, 2000, Mr. Kokan recommended treatment of the bottom of the Ravine extending beyond the limits of the Appellant's property across the neighbour property as shown in a survey drawing attached to the report.
>
> …
>
> The testimony of the Appellant that in 2001 the settlement funds were used to apply rock to a depth of approximately three metres to the Right of Way on the Property but no funds were spent for rehabilitation work on the neighbour's property.
>
> …
>
> In the present action, Mr. Kokan delivered a report dated September 12, 2007, in support of the Appellant's claim for damages. In his report, Mr. Kokan shows the work which he recommended and for which the Appellant seeks to charge the Respondent in a survey drawing.
>
> …
>
> In his testimony, Mr. Kokan confirmed that the additional work which he was recommending had the same intent as the work which he had recommended in 2000. This evidence is confirmed by a comparison of the work proposed in his two reports completed in 2000 and 2007.
>
> …
>
> At the same time the Appellant executed the Release, he also executed the ROWA, which contains at paragraph 2(h) an indemnification and hold harmless provision which in our submission is inconsistent with the Appellant's argument that the Release did not apply to future claims relating to the Right of Way.
>
> …
>
> At the time the Appellant executed the Release, he had in contemplation all of the essential facts and circumstances which underlie the present claim including the

> existence of the Ditch, the Berm, the Notch, the flow of ditch water from the Ditch into the Ravine and the knowledge that that flow caused erosion in the Ravine. None of those facts and circumstances had changed from the time the Release was executed until the date of trial. We submit that all of the damages claimed in the present action arise from those facts and circumstances.
>
> …
>
> We submit that there was a substantial body of evidence upon which the Trial Judge based her finding that at the time the Release was executed, the parties intended to include in the Release all of the claims advanced in the present litigation. In doing so, the Trial Judge committed no palpable and overriding error.

[55] In my view, the clear wording of the Release expressly relieves the City from any claim for damages arising from diversion of water onto the Drader property described in the underlying proceedings. The emphasized portions of the settlement agreement, set out above, when read together with Mr. Drader's statement of claim from the First Action, indicate that the Release was intended to operate prospectively. I agree with the City's submission that the settlement agreement as a whole is intended to operate on a prospective basis.

[56] Mr. Drader also says his position that the Release does not extend to future damages is supported by the dispute resolution provisions in the MOS, which contemplate that a future dispute might arise.

[57] This argument cannot prevail. I would observe that there are two aspects to the settlement agreement, one being the resolution of past and future claims arising from the discharge of water from Marsh McCormick Road, and the second being the "Project", defined as the work recommended by the engineers to support the ravine. The dispute resolution provisions in the MOS relate to disputes arising from the Project, not from future erosion or subsidence of the Property.

[58] In other words, the "Project" as defined in the settlement agreements included work on the neighbouring property. In 2001 the parties clearly contemplated that without support on the neighbour's property, the ravine may continue to erode. Despite not immediately securing the agreement of the neighbour to this work, Mr. Drader went ahead with the work on his own property. He expended all the settlement funds on this work. Now that the neighbour has agreed to the work, Mr. Drader seeks further damages from the City. But that claim is barred by the settlement.

2. Settlement is no bar because respondent breached the settlement

[59] Mr. Drader also argues that even if the 2001 settlement agreement was to operate prospectively, the City breached the settlement.

[60] Mr. Drader argues that the volume of water discharged through the statutory ROW created by the settlement agreement exceeded the maximum allowable volume under the settlement and he is therefore entitled to damages. The trial judge found as a fact that the City did not breach the settlement agreement. As I explain in more detail below, there was evidence to support her finding and I would not disturb that finding on appeal.

[61] There are two aspects to this argument. The settlement agreement specified the maximum amount of water that could be diverted through the ravine was 1.5m³/s. The judge accepted the opinions of the City's experts that the water volume discharged through the ravine never exceeded that amount. A separate issue was the question of the capacity of the culvert (not specified in the settlement). Mr. Drader argued that the two overflow events were caused by inadequate capacity in the culvert to handle the volume of water running through the ditch. As I have already said, the judge dismissed the claim that the culvert capacity was inadequate, finding instead that it was temporarily blocked.

[62] She held that the overflow events were caused by a blocked culvert not an excessive amount of water:

> [208] I find that on both Overflow Events, the increase in water level in the Ditch west of the Culvert was caused by a blockage of the Culvert. The result was that most of the water flowed north into the Drader Ditch and overflowed the Driveway.

[63] On appeal, Mr. Drader says the City breached the settlement by failing to provide a culvert with a capacity of 1.5m³/s, and if the City had done so, the overflow events would not have happened – even if the culvert was blocked.

[64] Thus, he is not taking issue with the judge's finding that the culvert was blocked and that caused the overflow. He says the culvert was too small.

[65] In response, the City says this argument was not made at trial, but in any event, there was clearly no contractual obligation requiring the City to ensure the capacity of the entire drainage system was 1.5m³/s. The reference to 1.5m³/s in para. 5(b) of the ROW did not include the ditch or the culvert. I agree with the City's argument on this point. Moreover, the judge found as a fact that the two overflow events were not the cause of the ravine erosion.

[66] She also found that the flow of water through the ROW did not exceed the amount specified in the settlement agreements:

> [252] On the basis of their evidence, I find that the flow of water through the Right of Way has not exceeded 1.5 m^3/s since March 26, 2001. Specifically it did not exceed 1.5 m^3/s on the dates of either of the two Overflow Events.
>
> [253] The capacity of the Culvert is as calculated by Mr. Coles and Mr. Johnston, between .25 and .26 m^3/s.

[67] She said:

> [275] The reference of the Plaintiff to the diversion of water in excess of 1.5 m^3/s through the Right of Way as a basis for its claim in nuisance raises the issue of the interpretation of paragraph 5 of the ROWA. Paragraph 5 is an exemption from the "hold harmless" clause in paragraph 2(h). …
>
> [276] Paragraph 2(h) of the ROWA states the agreement of the Plaintiff to indemnify and hold harmless the City from any and all claims, including in nuisance, arising out of the granting, existence or use of the Right of Way or the Works.
>
> [277] The exception to this is on the occurrence of all three pre-conditions set out in paragraph 5: if the water through the Right of Way exceeds the boundary of the Right of Way; if the volume of water flowing into the Right of Way exceeds 1.5 m^3/s; and if damages occur to the Right of Way or the lands which are caused by the first two conditions. Then the Plaintiff has no obligation to indemnify the City and hold it harmless pursuant to ss. 2(h) of the ROWA. The Plaintiff in those circumstances would be free to pursue an action against the City.

[68] She summarized her conclusion that the drainage system worked as contemplated:

> [283] The drainage system has worked as contemplated by the agreements executed on the settlement of the 1996 Action as is evidenced by the fact that there were only two Overflow Events, both of which were caused by a blockage and that Mr. Kokan and Mr. Bradshaw agree that the Project completed on the Property has been effective.

[69] The plaintiff relied on the evidence of Dr. Ramsay who opined that the ROW did not accommodate the flow of water from the ditch (and thus supporting Mr. Drader's argument that the City breached the ROWA). He calculated that the flow of water through the ROW exceeded 1.5m^3/s on January 29, 2004, and January 13, 2006 (the two overflow events). He said the excess water caused erosion in the ravine and in turn that caused damage to the Property above the ravine.

[70] Both Mr. Coles and Mr. Johnston were called as defence experts and were sharply

critical of the calculations, methodology, and conclusions of Dr. Ramsay. The City also took issue with his expertise in the specific area of storm water management noting that his expertise was more closely associated with oil and gas, and chemical processing industries. Under cross-examination Dr. Ramsay admitted that he did not have the expertise to opine generally on the stability of the ravine (at para. 219). The trial judge carefully reviewed Dr. Ramsay's evidence, and the criticism levelled at it by the City's experts, and concluded:

> [233] The purpose for which the Plaintiff relies upon Dr. Ramsay's opinion is to establish that the flow from the Ditch into the Right of Way during the Overflow Events exceeded 1.5 m^3/s. Despite that purpose, Dr. Ramsay's report contains no analysis of the flow in the Ditch on either January 29/30, 2004 or January 13, 2006. The City submits that the omission by Dr. Ramsay to conduct a simple flow analysis based on the actual rainfall on the two overflow dates is a fundamental flaw in his opinion.
>
> [234] With regard to the calculation of flow, Mr. Coles testified that the data used by Dr. Ramsay in the TR-55 program, including rainfall data, watershed characteristics and area were similar to those which he had identified. The single exception noted by Mr. Coles was Dr. Ramsay's choice of the rainfall distribution type. Dr. Ramsay explained that the critical feature of this item is "the timing and intensity of that storm". He agreed that it is a "very sensitive parameter".
>
> …
>
> [238] The issues raised by the City are valid. One of the most concerning is the method of calculating flow. It is my conclusion that, and I agree with the City that, notwithstanding inconsistent results achieved through the Rational Method and inconsistent results reflected by the use of a type IA storm, Dr. Ramsay tailored his calculations to generate abnormally high flow numbers based, apparently, on his understanding of the Overflow Events. He sought results that reflected his understanding of those events.
>
> [239] Although he considered that the culvert under the Road at 29095 Marsh McCormick Road may have become blocked, he did not consider that the Culvert under the Driveway may have been blocked. He assumed that the Culvert was fully operational and sought a higher flow volume. Further he did not analyze the actual flow on the dates of the Overflow Events.
>
> [240] Dr. Ramsay indicates that he analyzed flow on the basis of the TR-55 model, the results of which he then calibrated to attain consistency with what he described as "observational evidence". In describing why he disregarded the Rational Method results, he replied: "What do we have to do here in order to make these numbers consistent with this evidence of flooding over the driveway."
>
> [241] By incorporating the Type III storm, the use of the TR-55 model is not helpful and the results are not reliable. I conclude that Dr. Ramsay tailored his analysis to achieve an outcome based upon his calculation of the capacity of the Culvert and the two Overflow Events. I cannot rely on Dr. Ramsay's report as it relates to the volume of water flow.
>
> [242] Finally the City submits that Dr. Ramsay's Report contains fundamental errors of calculation.

> [243] Dr. Ramsay calculates that the Culvert "can only accommodate a peak flow of approximately 1.2 m³/s ...". He references an attachment to his report, which is an excerpt from a design data manual issued by the American Concrete Pipe Association. Dr. Ramsay does not provide his actual calculations to arrive at the 1.2 m³/s figure.
>
> [244] In his report Mr. Coles analyzed the capacity of the Culvert, using first a computer program HY-8 and subsequently a culvert design chart issued by the British Columbia Ministry of Transport Design Guide. Mr. Coles calculated that the maximum capacity of the Culvert was between 0.21 and 0.25 m³/s. Using the British Columbia Ministry of Transport Design Guide, Mr. Coles concluded that a culvert more than twice the size of the Culvert would be required to accommodate a flow of 1.2 m³/s. Dr. Ramsay did not challenge these conclusions in his reply nor was Mr. Coles' evidence challenged on cross-examination.
>
> [245] Mr. Johnston's report also analyzed the capacity of the Culvert. He concluded that "the unobstructed capacity of the Culvert under this surcharged inlet condition is approximately 0.26 CMS. This capacity would be lower if debris or sediment was allowed to accumulate at the Culvert inlet."
>
> [246] Both Mr. Coles and Mr. Johnston, using various alternate means of calculation, conclude that Dr. Ramsay's calculation of the capacity of the Culvert is significantly in error overstating the capacity by as much as five times. I agree.
>
> [247] With respect to erosion, Dr. Ramsay confirmed that his expertise did not extend to an analysis of the stability of the Ravine as a whole. His opinion that "increased water flow will increase erosion", which appears throughout his report, is self-evident. His opinions involving geoscience exceed the area of his expertise and the area of his qualification as an expert witness. I cannot rely on his evidence in this regard.
>
> [Emphasis added.]

[71] As the City says, there was a substantial body of evidence to support the trial judge's conclusion that she could not rely on the opinion of Dr. Ramsay. That left the opposing and prevailing opinions of Mr. Cole and Mr. Johnston. I would not accede to the ground of appeal that the judge erred in finding the City did not breach the settlement agreement.

3. Culvert overflow events not covered by the 2001 settlement

[72] As I have now said several times, the judge did not accept Mr. Drader's argument that the culvert overflow events were caused by a lack of capacity in the culvert, or that the overflow was connected to the ravine erosion.

4. Other grounds of appeal

[73] It follows from my conclusion that the trial judge made no error in finding that the settlement agreement did apply prospectively, that the City did not breach the 2001 settlement, and that the culvert overflow were isolated events, not causative of the more

general damage and in any event not the responsibility of the City, that I do not need to consider the remaining grounds of appeal related to the defences available to the City under the *Local Government Act*.

[74] Mr. Drader says also that the judge erred in finding that the City did not breach the dispute resolution provisions of the MOS by objecting to a hearing of the Second Action by Mr. Justice Burnyeat. The agreement specified how the remediation fund was to be administered and paid. Under the heading "Dispute Resolution", the parties set out a mechanism to resolve disputes as to their respective rights and obligations to complete the Project. They agreed they would refer the matter to the specified Supreme Court judge. The dispute resolution is very clear with respect to the Project. Project is a defined term as set out in para. 4(b). It is somewhat puzzling as to how the parties felt that the judge would retain any jurisdiction once the consent dismissal order was entered, but I find it unnecessary to consider this argument, as I have concluded this appeal must be dismissed on the grounds mentioned already. In any event, no damage could flow from the fact the dispute was not heard by the judge specified in the settlement.

Disposition

[75] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Mr. Justice Harris"