

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Galloway v. North Okanagan (Regional District)*,
2025 BCSC 2126

Date: 20251029
Docket: S126643
Registry: Kelowna

Between:

Anita Christine Kathleen Galloway and Kalview Estates Ltd.

Plaintiffs

And:

Regional District of North Okanagan

Defendant

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiffs:

C. Hanman
A. Faulkner-Killam

Counsel for the Defendant:

T. McNeil-Hay
O. Verenca

Places and Dates of Trial:

Kelowna, B.C.
February 18-21, 24-27, 2025
Vancouver, B.C.
March 6 and 7, 2025

Place and Date of Judgment:

Kelowna, B.C.
October 29, 2025

Table of Contents

INTRODUCTION 4

RELEVANT BACKGROUND 4

 Parties and Key Witnesses..... 4

 The Property..... 5

 Okanagan Rail Trail..... 6

 Kalview Lease 6

 Appraisals of the Property Prior to Expropriation..... 7

 Environmental Assessments 7

ISSUE 1: WHAT COMPENSATION SHOULD BE PAID TO THE PLAINTIFFS FOR THE EXPROPRIATION OF THE PROPERTY? 9

 Legal Framework..... 9

 The Planning Evidence 10

 EMA/Aplin Martin Reports 11

 The Appraisal Evidence 12

 The CWPC Reports 13

 The Hughes Reports..... 14

 Analysis..... 15

 What use should be attributed to the Corridor Lands as a railway or rail trail at the Expropriation Date? 15

 What reliance can be placed on the Koch RAR Report 16

 What reliance should be placed on the PLG Report? 22

 Should any reliance be placed on the CWPC Report? 25

 Are the Hughes Reports reliable? 26

 What is the site area? 27

 What could be built on the Property? 27

 Which comparables are the most reliable? 28

 What costs should be allocated for access and extending services? 32

 Conclusion on Value 34

 Are the plaintiffs entitled to damages due to the “shadow” of the expropriation? 35

ISSUE 2: SHOULD ANY DISTURBANCE DAMAGES BE AWARDED? 36

 Legal Principles 36

 Position of the Parties 37

Analysis..... 38

ISSUE 3: CAN THE PLAINTIFFS RECOVER FOR LOSS OF OPPORTUNITY?... 39

ORDERS 41

Introduction

[1] This is an action for compensation under the *Expropriation Act*, R.S.B.C. 1996, c. 125 [Act]. The plaintiffs were paid \$170,000 (the “Advance Payment”) for 0.54 acres of vacant waterfront land with 636 lineal feet of shore, which was expropriated on February 20, 2019 (the “Expropriation Date”) by the defendant, the Regional District of North Okanagan (the “RDNO”).

[2] The Advance Payment was made to Ms. Galloway on February 14, 2019.

[3] The plaintiffs claim that they should have been paid an additional \$410,000 for the land value, a further sum of \$180,000 for the loss of the ability to obtain a permit or \$116,920.35 for disturbance damages, and interest, costs, and disbursements.

[4] The RDNO submits that the value of the subject property was \$376,000 on the Expropriation Date, that no disturbance damages should be awarded, or alternatively, a reduced amount, and that the claim for loss of profits should be dismissed, with costs and interest (excluding for a period time due to unreasonable delay) to the plaintiffs.

[5] The parties have agreed that the issues of interest and costs should be addressed after these reasons have been pronounced, if they cannot otherwise agree.

Relevant Background

Parties and Key Witnesses

[6] The plaintiff, Anita Christine Kathleen Galloway, was the registered and beneficial owner of one 0.54 acre irregularly shaped parcel along Kalamalka Lake (the “Property”) from April 24, 2007 to the Expropriation Date.

[7] The plaintiff, Kalview Estates Ltd. (“Kalview”) is a company incorporated in British Columbia with shareholders and directors from the Galloway family. At the Expropriation Date, Kalview was the holder of a lease which provided access to the

Property (the “Lease”), crossing over certain adjacent property (the “Corridor Lands”).

[8] Joshua Galloway, the son of Ms. Galloway, provided the historical background of the Property and its attempted use.

[9] The RDNO is a municipal government and an authority within the meaning of the *Act*, having the power to expropriate pursuant to the *Local Government Act*, R.S.B.C. 2015, c. 1. The District of Coldstream (“Coldstream”) is a local government, having authority over the regulation and approval of development and construction on the Property. The RDNO had no local government or approval powers in respect of the plaintiffs’ development of the Property.

The Property

[10] The parent parcel to the Property was acquired by Kalview in or around the 1980s. The parent parcel was subdivided by Kalview over a series of subdivisions, including the creation of the Greystone Drive subdivision in the immediate vicinity of the Property. The Property was a subdivision remainder. There was an error made in the Land Title Office which was corrected in or about October 2006 to reflect Kalview’s continued ownership of the Property.

[11] Ms. Galloway purchased the Property on or about April 7, 2007, for \$87,000.

[12] The Property was zoned R1: Residential Single Family under the Coldstream Bylaw No. 1382, 2002 (the “Zoning Bylaw”).

[13] The Property was benefited by several easements, including an easement over certain lots for the purpose of providing utilities to the Property, as well as a parking easement.

[14] From 2005 to 2017, the plaintiffs took various steps to develop the Property. The Galloways’ plan for the Property was development as a single-family dwelling, a private park, or moorage.

[15] On March 22, 2017, the RDNO issued a cease-and-desist letter in respect of tree-cutting by the plaintiffs on the Lease area.

Okanagan Rail Trail

[16] The parent parcel was severed by a railway line built in or about 1920. The railway corridor was operated as a railway with two train services per day until approximately 2013.

[17] In or about mid-2015, RDNO, along with two local governments, the City of Kelowna and the District of Lake Country, entered into contracts to purchase the Corridor Lands and other land making up the railway line. This was for the purposes of decommissioning the railway line, opening a recreational trail known as the “Okanagan Rail Trail”, and ensuring the availability of the properties for possible future development into a multi-modal transportation corridor.

Kalview Lease

[18] The key provisions of the Lease provided:

- a. the Lease had an initial term and renewal for 20 years;
- b. it charged significant and not nominal rent;
- c. the use was for a private roadway/pedestrian walkway; and
- d. the leased premises could consist of roadways and required the lessee to keep the Lease area “clear at all times for vehicular traffic”, including maintenance for snow removal (as set out in Schedule B of the Lease).

[19] On May 25, 2015, Kalview exercised an automatic right of renewal of the Lease. As a result, the Lease was renewed, commencing on September 1, 2015, for a further term of 10 years.

[20] As a portion of the Corridor Lands was subject to the Lease, the RDNO became the landlord under the Lease sometime in 2015.

[21] In a meeting on April 12, 2016, the RDNO expressed to the plaintiffs that it did not intend to enter into further renewals or extensions of the Lease after its expiry in 2025, to ensure the availability of the Corridor Lands for possible future development into a multi-modal transportation corridor.

[22] In late 2016, Coldstream refused to approve a Soil Removal and Deposit Permit Application for onsite relocation of soil on the basis that the consent previously obtained by the plaintiffs to access the Corridor Lands through the Okanagan Rail Trail, outside of the Lease area, was not obtained directly from the RDNO. Thereafter, the RDNO refused to permit such access.

Appraisals of the Property Prior to Expropriation

[23] An appraisal of the Property was completed at the time of its purchase by Ms. Galloway in 2007. The appraisal provided a fair market value of \$87,000, based on the assumption that no “habitable structure” could be built upon the Property.

[24] An appraisal of the Property was carried out by Joe Gourdine from Rivard Appraisals, dated August 25, 2017, which was not acceptable to either the plaintiffs or the RDNO.

[25] The RDNO commissioned an appraisal by Ross MacDougall of NCA Commercial Real Estate Appraisals & Consultants, which provided a value of \$170,000 for the Property. Based on this appraisal, the RDNO made the Advance Payment.

Environmental Assessments

[26] In 2009, the plaintiffs retained a firm called Ecoscape to provide an internal environmental assessment. Ecoscape concluded that the streamside enhancement and protection area (the “SPEA”), which is a setback from the water, applicable to the Property would be 15 metres. Given the narrow width of the Property, a 15 metre SPEA would mean that the Property could not be built on unless the plaintiffs obtained a variance to build within the SPEA.

[27] In 2010, the plaintiffs retained Matt Davidson, then of Sage Environmental, to prepare a riparian area regulation assessment report. He concluded that the SPEA in the southern portion of the Property was only five metres, on the basis that the potential vegetation in that portion of the site was only “low cover”. Mr. Davidson submitted his report to the Province, which rejected the five metre SPEA because the southern portion of the site did not appear to be “low cover”. Mr. Davidson submitted further materials in an attempt to convince the Province to change its view, which it did not. The Province’s rejection specifically noted the presence of trees in the southern portion of the Property.

[28] In 2015, the plaintiffs had Mr. Davidson prepare an environmental best management plan for geotechnical work that they intended for the Property. Mr. Davidson recommended that the plaintiffs have an environmental monitor at the Property for this work, “to provide supervision with respect to suitable streamside construction practices...[and] confirm that the construction activities will not follow an impact and to ensure mitigation measures are followed and employed correctly.”

[29] In 2015, there was some work performed on the Property. The RDNO claims that the photographic evidence supports that significant vegetation, including what appears to be trees, were removed from the Property. Mr. Galloway denies that any vegetation was removed.

[30] In the spring of 2016, the plaintiffs hired a new qualified environmental professional (a “QEP”), Trina Koch, to prepare another riparian area report (the “Koch RAR Report”). Ms. Koch was not provided any information on the work done by Mr. Davidson, nor was she provided a copy of his report. Ms. Koch testified that she worked closely with Emmanuel Abecia of the provincial office of Forestry, Lands, and Natural Resources (the “FLNRO”). The Koch RAR Report identified 3,800 sq. ft. outside of the SPEA that would not cause a HADD, meaning a Harmful Alteration, Disruption, or Destruction of fish habitat: *Yanke v. Salmon Arm (City)*, 2011 BCCA 309 at para. 22.

[31] Ms. Koch was not tendered as an expert witness at trial. She gave evidence of the steps she took to complete the Koch RAR Report and her attempts to obtain clarity from Mike Reiley of the RDNO on the applicable zoning setbacks. She did not get any such clarity, so she cited the buildable area on the premise in testifying that the Property's "front" lot line is the lot line that is aligned to West Kal Road.

[32] The Ministry indicated its approval of the methodology used by Ms. Koch.

Issue 1: What compensation should be paid to the plaintiffs for the expropriation of the Property?

Legal Framework

[33] Section 30 of the *Act* requires that the RDNO compensate the plaintiffs for the market value of the Property on the date of expropriation: *Spera (Lynn Creek Holdings Ltd. v. North Vancouver (District), 2024 BCSC 1395 [Spera]* at para. 20.

[34] Section 31 of the *Act* sets out the basic formula for determining the market value of an expropriated property, which is based on its highest and best use as of the expropriation date:

- 31** (1) The court must award as compensation to an owner the market value of the owner's estate or interest in the expropriated land plus reasonable damages for disturbance but, if the market value is based on a use of the land other than its use at the date of expropriation, the compensation payable is the greater of
- (a) the market value of the land based on its use at the date of expropriation plus reasonable damages under section 34, and
 - (b) the market value of the land based on its highest and best use at the date of expropriation.

[35] Section 32 of the *Act* defines "market value":

- 32** The market value of an estate or interest in land is the amount that would have been paid for it if it had been sold at the date of expropriation in the open market by a willing seller to a willing buyer.

[36] Section 33 of the *Act* provides a series of exceptions which must not be taken into account when determining the market value of the land, including as follows:

- 33 In determining the market value of land, account must not be taken of
- (a) the anticipated or actual purpose for which the expropriating authority intends to use the land, ...
 - (d) an increase or decrease in the value of the land resulting from the development or prospect of the development in respect of which the expropriation is made,
 - (e) an increase or decrease in the value of the land resulting from any expropriation or prospect of expropriation,
 - (f) an increase or decrease in the value of the land due to development of other land that forms part of the development for which the expropriated land is taken, or
 - (g) any increase or decrease in value of the land that results from the enactment or amendment of a zoning bylaw, official community plan or analogous enactment made with a view to the development in respect of which the expropriation is made.

The Planning Evidence

[37] The plaintiffs retained Oleg Verbenkov of Pacific Land Group (“PLG”) to prepare a report to assess the highest and best approvable land use by evaluating the development potential of the Property. The report is dated June 8, 2022 (the “PLG Report”).

[38] The PLG Report relies on the Koch RAR Report in the following fashion:

For simplicity, the development scenarios established in Section 6 of this report utilize the general findings of the [Koch RAR Report] but do not propose to vary the SPEA as she identified through the MoE Variance Protocol. While varying the SPEA may be an available option, this Highest and Best Land Use Assessment explores maximizing development through application of the applicable zoning requirements and where necessary, variances to the property setbacks that do not require SPEA variance.

[39] The PLG Report sets out the ten guidelines that must be addressed to obtain a development permit. It concluded that all the guidelines could be satisfied, such that issuance of a development permit by Coldstream would be required.

[40] The PLG Report considered the issue of access to the Property and concluded that if a driveway access was not permitted, alternative access was available by water from Kalamalka Lake.

[41] The PLG Report notes that services for utilities and water connections are typically connected to the community services where a property fronts a public road. However, since the Property lacks road frontage, alternative connections were necessary. A report from EMA Consulting Ltd. (“EMA”) was obtained to provide proposed alternative connections.

[42] The PLG Report proposed four different development scenarios for the Property which related to assumptions to which Zoning Bylaw setbacks were applicable. The PLG Report concluded that the highest and best use of the Property is of a two-storey single-family dwelling using the scenario with the least restrictive zoning setbacks. This allowed for the construction of a dwelling of 188 sq. m. or 3,800 sq. ft. outside of the SPEA.

[43] The RDNO did not tender any expert evidence in respect of planning issues.

EMA/Aplin Martin Reports

[44] Jeffery Glasser, an engineer with EMA, prepared two reports. The first report, dated August 10, 2008, was attached as an appendix to the PLG report and dealt with issues relating to the Property’s connection to existing municipal services.

[45] The second report prepared by Mr. Glasser, dated December 31, 2024 (the “EMA Costing Report”), reviewed a report titled “Aplin Martin Functional Service Report and Opinion of Probable Costs Summary”, dated November 13, 2024 (the “Aplin Martin Report”). Mr. Glasser was qualified as an expert in the field of civil engineering with specialization in land development, road design, municipal servicing, and the reasonableness or accuracy of costing for the installation of services and road systems in the Okanagan. In the EMA Costing Report, Mr. Glasser identified four areas of disagreement with the Aplin Martin Report relating to: sanitary and water service trenching, driveway surfacing, retaining wall design and costing, and shallow utility servicing. Mr. Glasser further estimated the probable construction costs at \$190,099.

[46] The Aplin Martin Report was not tendered as an expert report but was attached as “Schedule C” to the defendant’s appraisal report. In the Aplin Martin Report, the probable costs for sanitary sewer, waterworks, roadworks, hydro/tel civil works, and hydro/tel materials, with a 25 percent contingency, amounted to \$307,888.

[47] Mr. Glasser testified that a contingency is not included in a tender as a cost but is rather an amount identified in a preliminary cost assessment as a caution in respect of potential unforeseen challenges associated with the project.

The Appraisal Evidence

[48] As commented on in *Spera*, it is not necessary for the Court to accept the opinion of the appraisers. The Court may accept all, some or none of the opinions offered in arriving at its valuation: *Spera* at para. 72. Put another way, the principal consideration for the Court is the application of judgment to the evidence of value. This is not a purely mathematical exercise: *Cyprus Anvil Mining Corp. v. Dickson* (1986), 33 D.L.R. (4th) 641, 1986 CanLII 811 (BC CA) at paras. 51 and 54.

[49] The appraisal evidence for the plaintiffs is found in the report from Stuart Carmichael of CWPC Property Consultants, dated September 12, 2022 (the “CWPC Report”). For RDNO, it is found in the report from Sean Hughes of Kent Macpherson, dated November 21, 2024 (the “Hughes Report”). Both appraisers prepared rebuttal reports dated January 2, 2025 (respectively, the “CWPC Rebuttal Report” and “Hughes Rebuttal Report”).

[50] There is some common ground between the appraisers in that both agree to the definition of “highest and best use” as:

“the reasonably probable use of Real Property that is physically possible, legally permissible, financially feasible and maximally productive, and that results in the highest value”.

[51] There was also commonality in what was the highest and best use of the Property: Mr. Carmichael concluded that the Property is either for the development of a single-family dwelling or recreational park purposes, and Mr. Hughes concluded

that the “highest and best use of the subject property, [subject to assumptions] is as a holding property pending approval for the construct of a recreational residence”. In other words, they are in general agreement that the highest and best use of the Property is residential.

[52] The appraisers further agree that the best approach to estimating value is the Direct Comparison Approach, based on a price per sq. ft. There was considerable overlap in the comparable data used by the appraisers.

[53] The essential differences between the appraisers’ conclusions flow from the following:

- a. the extent and nature of the available building site as either conventional home or recreational cabin, determined by the SPEA and zoning setbacks;
- b. servicing; and
- c. access.

The CWPC Reports

[54] Mr. Carmichael provides values under three scenarios to account for the planning process not yet completed at the time of his appraisal:

- Scenario One – assumes the Property will accommodate the building of a single-family dwelling relying on the PLG Report, with a market value of \$760,000;
- Scenario Two – assumes that the Property is sold as is, with the potential to accommodate the building of a single-family dwelling as detailed in the PLG Report, with a market value of \$525,000; and
- Scenario Three – takes into account the suitability of the Property for recreational park purposes, with a market value of \$580,000.

[55] Mr. Carmichael concludes that the market value lies somewhere within the three values and opines that the market value should be \$580,000.

[56] In the CWPC Rebuttal Report, Mr. Carmichael looks at the median values of: the Hughes Report comparable sales data, supporting a median value of \$39.19 per sq. ft.; the comparables used in both reports, supporting a median value of \$47.34 per sq. ft.; and, the Hughes Report adjusted comparable sale data, supporting a median value of \$43.00 per sq. ft. He concludes that if Mr. Hughes had used a value consistent with the comparable sales data in the Hughes Report prior to adjusting for road and servicing costs (which costs have yet to be undertaken), Mr. Hughes' value estimate would be \$40.00 per sq. ft less the cost of \$13.00 sq. ft., equalling a value of \$27 per sq. ft or \$633,933.

[57] Mr. Carmichael further points out that Mr. Hughes' estimate of market value using water frontage did not accord with the waterfront comparable sales data in the Hughes Report. Mr. Hughes used a value of \$482.76 per foot whereas the comparable sales support an average of \$7,522 per foot and a median of \$4,973 per foot.

The Hughes Reports

[58] Mr. Hughes opines that the Property is a very narrow parcel, but with substantial frontage on Kalamalka Lake. In his view, due to the narrow site dimensions, the development of a home on the Property would be extremely challenging. However, he conceded that it may be possible to get variances of riparian setbacks due to hardship. His view was that while the development of a conventional home was very unlikely, it may be possible that a recreational or a modest dwelling could be built or located on the Property. He concludes that the highest and best use of the Property is a holding property pending approval for the construction of a recreational residence.

[59] Mr. Hughes opines that based on the market evidence, the value of the Property, with developed vehicular access and services, lies in the range of \$20 to \$30 per sq. ft., with a mid-point of \$25 per sq. ft. He notes that the costs of

developing access and extending services to the Property must be considered in the valuation. For this reason, he deducts the estimated costs of extending services of approximately \$13 per sq. ft. From there, he provides a range of values for the Property: based on \$7 per sq. ft., being \$165,000; based on \$12 per sq. ft., being \$280,000; and, based on \$17 per sq. ft., being \$400,000. He concludes that the market value of the Property is \$280,000.

[60] In the Hughes Rebuttal Report, Mr. Hughes raises a number of concerns about the CWPC Report. He notes the issue of the use of the phrase “Special Assumptions” in the CWPC Report and highlights that this is not a recognized term. Mr. Hughes emphasizes the CWPC Report’s assumption that leasehold access will be renewed, noting that leasehold access is a material property characteristic because non-renewal would result in a loss of legal access to the Property. Mr. Hughes also criticizes the CWPC Report for failing to consider any adjustment for the cost of constructing physical access to the Property. In particular, Mr. Hughes says that in its reliance on the PLG Report, the CWPC Report assumed that the driveway construction scenarios therein were not only probable, but feasible, without considering the cost or feasibility of such a project. Respecting these assumptions, Mr. Hughes notes that none of the sales data contained in the CWPC Report was impacted by a leasehold right of access, nor did the CWPC Report reference any adjustments for the diminishing leasehold access tenure. In sum, Mr. Hughes opines that the CWPC Report contains “too many significant deficiencies and errors to meet the Reasonable Appraiser test or to support a reliable conclusion”.

Analysis

What use should be attributed to the Corridor Lands as a railway or rail trail at the Expropriation Date?

[61] As of the Expropriation Date, the railway no longer operated. The RDNO purchased the Corridor Lands four years prior to the Expropriation Date, by which point the trail had also been in use by the public for approximately three years. As noted in the Ministry’s letter dated October 11, 2016, denying the inquiry request, the

plaintiffs conceded that the actual trail corridor of the Okanagan Rail Trail was, and had for some time been, fully in place and operational as at the Expropriation Date.

[62] The stated purpose of the expropriation in the Expropriation Notice was:

3. The work or purpose for which the interest in land is required is for:
 - (a) Okanagan Rail Trail continuity.

[63] This stated purpose, particularly the RDNO's use of the word, "continuity", supports the proposition that the Okanagan Rail Trail predates the expropriation. Accordingly, I accept that the expropriation was not for the purpose of establishing the Okanagan Rail Trail, but was rather for the purpose of extending or altering the same.

[64] When assessing the value of the Property, I should also consider the reality that the Corridor Lands was no longer in use as a railway. I agree with the RDNO's submission that ignoring the RDNO's purchase of the Corridor Lands and establishment of the Okanagan Rail Trail, prior to the Expropriation Date, would create a "counterfactual" scenario and be contrary to s. 32 of the *Act*. As such, due consideration must be given to the issues of the plaintiffs' access to the Property and the length of that access. I accept the evidence of the RDNO that upon the expiry of the Lease in 2025, no further lease extensions would have been granted.

What reliance can be placed on the Koch RAR Report

[65] The RDNO points out that the Koch RAR Report was not tendered as an expert report and Ms. Koch was not qualified to give expert evidence at trial. I note that the preparation of the Koch RAR Report was not for the purposes of litigation. It was a report prepared by the plaintiffs as part of their plans to develop the Property. The issue is what reliance can be placed on a report made prior to the trial and not prepared to comply with the requirements of Rule 11-7 of the *Supreme Court Civil Rules*, B.C. Reg. 165/2024 [*Rules*].

[66] The RDNO also asserts that Ms. Koch was supposed to identify potential vegetation on the site, and in her evidence she only identified actual vegetation at

the site and did not inquire as to whether other vegetation was removed. This is not entirely accurate since Ms. Koch testified in that she did look for “evidence of disturbance”. The RDNO argues that the Koch RAR Report in only assessing the existing vegetation does not meet the requirements of the *Riparian Areas Regulation*, B.C. Reg. 376/2004, [*Regulation*] since s. 1 refers to both existing and potential riparian vegetation.

[67] The RDNO submits that the Koch RAR Report was not capable of being accepted because it departed from the RAR methodology by proposing an SPEA variance and due to Ms. Koch only addressing current and not potential vegetation. The RDNO submits that since the Koch RAR Report departed from the RAR methodology, it was not an “assessment report” which could be relied on to form the basis of a development approval. Reliance is placed on the Court of Appeal’s decision in *Cowichan Valley (Regional District) v. Wilson*, 2023 BCCA 25 [*Wilson*], which found that it was not unreasonable for a local government to refuse a development permit where the supporting QEP report was significantly flawed due to non-compliance with the required assessment methodology under the *Regulation*. The RDNO also argues that the uncertain status of the Koch RAR Report, given the other plaintiffs’ experts reliance on the same, affects the weight attributable to those other reports.

[68] Part 11 of the *Rules* provides a complete code for the admissibility of expert evidence in trials: *Cowichan Tribes v. Canada (Attorney General)*, 2021 BCSC 980 at para. 14. However, pursuant to R. 11-1(1)(b), Part 11 does not apply to a witness giving evidence in an action in relation to a matter if that witness is an individual whose conduct is in issue in the action. In this case, Ms. Koch’s evidence is not captured by the exclusion in R. 11-1(1)(b) because her conduct was not in issue in the action before me. This is unlike the decision in *Marchand (Litigation guardian of) v. Public General Hospital Society of Chatham* (2000), 51 O.R. (3d) 97, 43 C.P.C. (5th) 65, which dealt with evidence given by a nurse who was a defendant in the action.

[69] The plaintiffs submit that a witness who has expert qualifications may also be asked an opinion, if relevant, to his expertise, or in this case, the scope of her duties: *Bilfinger Berger (Canada) Inc. v. Greater Vancouver Water District*, 2013 BCSC 1892 [*Bilfinger*] at para. 24. I note that this paragraph of the reasons sets out the position of the parties with the judge agreeing that this argument was sound: *Bilfinger* at para. 42. However, *Bilfinger* did not involve a witness giving evidence at trial, but rather considered the scope of permissible questions in an examination for discovery: *Bilfinger* at para. 25.

[70] The plaintiffs also rely on *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2013 BCSC 1042 [*American Creek*], which was a mid-trial ruling on whether the president of the corporate defendant could give opinion evidence. The Court set out the limits of that evidence as follows:

[19] Circumstances may arise in this case where it becomes relevant to know that Mr. Cremonese formed an opinion, and what that opinion was. This is particularly so given that punitive damages are claimed. I analogise from the hearsay rule. In most circumstances, hearsay evidence is not admissible to prove the truth of the hearsay assertion. It is invariably admissible, however, to prove that the hearsay statement was made, to the extent that it is relevant. Similarly, if it becomes relevant to know whether Mr. Cremonese formed an opinion at a particular time, and if so, what that opinion was, then he can give that testimony. But such evidence is under no circumstances admissible to prove the correctness of his opinion, including whether, in his experience, it constituted industry standards. Once again, that can only be accomplished through an independent expert.

[71] Additionally, the plaintiffs reference para. 161 of *Giczi v. Kandola*, 2014 BCSC 508, which references the ability of a plaintiff in a personal injury action to give evidence on her own observations of her singing at a gig in 2009. The admissibility of that evidence is of no relevance to the situation here. Of more relevance, was the Court's finding on the admissibility of evidence from others on the plaintiff's singing ability:

[147] I find where the witness in question has sufficient personal experience, the witness is able to give his or her lay opinion as to the quality of the plaintiff's performance and singing, because that opinion is relevant and is a compendious way of giving evidence of certain facts that are too subtle or complicated to be narrated as effectively without resort to conclusions. Testimony which falls within this category is evidence of

witnesses as to the quality of the plaintiff's singing, performance and energy, as well as to the quality of her performances as Bette Midler.

[148] I also find that these witnesses, as they have the requisite experience, are capable of giving admissible lay opinion evidence comparing the plaintiff to other tribute performers generally, Bette Midler tribute singers, or Bette Midler.

[72] While opinion evidence is generally inadmissible unless given by an expert witness, lay opinion evidence may be admissible under certain circumstances. At para. 14 of *American Creek*, the Court discussed this principle and set out the criteria for the admissibility of lay opinion evidence, quoting the learned text, Sopinka, Lederman, & Bryant, *The Law of Evidence in Canada*, 3rd ed (Markham, Ont: LexisNexis Canada, 2009) at para. 12.14, which states:

Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with a reasonable facility describe the facts she or he is testifying about. But as such evidence approaches the central issues that the courts must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops.

[73] Recently, in *Underhill Estate (Re)*, 2025 BCSC 1722, the Court discussed this framework in the context of a challenge to a will based primarily on testamentary capacity, where certain lay witnesses gave opinion evidence vis-à-vis their impressions of a testator around the time the will was made. Justice Marzari restated the above criteria for the receipt of lay opinion evidence, and found that in weighing such evidence, the Court should consider the nature and specificity of the observations upon which the opinions were formed:

[28] In my view, the usefulness of such compendious observations expressed as lay opinion will depend on how connected they are to specific observations. A witness' lay opinion that a car was going very fast or speeding on a particular occasion, for example, is tied to a specific observation. An opinion that "someone always speeds" is less tied to any specific observation. When lay opinion evidence expands to encapsulate general observations over lengthy periods of time or many events, I find that I am unable to place the same weight upon it.

[29] Overall, I generally prefer lay opinion evidence with respect to observations made of Richard that are related to a particular time or event, over more general lay opinion regarding Richard's mental state untethered to specific times or events.

[74] Ms. Koch can testify as to her involvement in the preparation of the Koch RAR Report and her observations. She can testify to the methodology she used and that from her perspective she was in compliance with all required regulations. The weight to be given to the Koch RAR Report is dependent on the totality of the evidence provided.

[75] I note that the RDNO's major objection to Ms. Koch's evidence is that she departed from the proper RAR methodology in not assessing for potential vegetation on the Property. Ms. Koch testified that her characterization of the Property was done in accordance with the RAR methodology protocol and her methodology was acceptable to provincial officer of FLNRO. The evidence supports that FLNRO did accept the methodology used since Mr. Emmanuel Abrecia, riparian areas regulation biologist who reviewed the Koch RAR Report, in his comments dated June 21, 2016 states:

The QEP has applied the RAR methodology correctly to arrive at a SPEA for Kalamalka Lake but presents a variance to the SPEA that is outside the ability of the ministry to approve. The QEP, however, has followed current best available guidance by the ministry and DFO in the application of the draft variance protocol to present a situation of undue hardship and presents a development footprint in keeping with the intent of the RAR.

[76] Beside the box labelled, "Applied Methodology Correctly?" Mr. Abecia made a notation that read, "No". Ms. Koch sought clarification from Mr. Abecia regarding how she had applied the methodology incorrectly. Mr. Abecia stated in his June 23, 2016 email:

The draft variance protocol that you followed is still in draft form and is currently not legislated. It was developed by DFO and MOE to deal with hardship situations so that an authorization as contemplated by section 4.3 of the Regulation would not be required. The ministry still offers this tool as guidance since it helps in situations such as yours. A variance to the SPEA is not in the Regulation itself therefore does not meet the methodology. Recent legal proceedings have found that neither the province nor the local government has the ability to approve a SPEA variance, therefore the liability

is solely on the QEP who certifies the report. By following ministry guidance the QEP is performing their due diligence should any of the findings be challenged. Just like the old DFO operational standards, the variance protocol serves as best practices in the absence of it being official legislation which we hope to roll out in the near future.

[77] In closing submissions, the RDNO submitted that Ms. Koch did not comply with s. 1 of the *Regulation* because she only assessed the existing vegetation on the Property and not potential riparian vegetation. I have reviewed the cross-examination of Ms. Koch and at no time was she specifically asked about the *Regulation* nor about the need to assess for potential riparian vegetation. As a result of the lack of cross-examination on this issue, the Court was deprived of hearing her evidence on how she addressed s. 1 of the *Regulation*. Considering this failure, along with Ms. Koch's positive evidence that she complied with the RAR methodology, as was confirmed by Mr. Abecia in his email dated June 21, 2016, I am not persuaded that Ms. Koch's report should be given little weight on the basis of the non-compliance alleged by the RDNO.

[78] In *Wilson*, the Court of Appeal noted that it was common ground that the impugned opinion of Mr. Rublee departed from the prescribed methodology: *Wilson* at para. 6. The issues with that opinion were identified by FLNRO:

[47] On March 12, 2019, FLNRO advised that Mr. Rublee did not correctly apply the methodology set out in the Schedule to the RAR. His report did not meet the assessment and reporting criteria of the *RAR* because: (1) he should not have subtracted existing structures on the Property (the garage) from the developable area calculation; and (2) a varied SPEA of 15 metres was incorrect and outside the authority of the Ministry to support. Having identified these deficiencies in the assessment report, FLNRO asked that an amended assessment report be resubmitted that followed the methodology prescribed in the Schedule.

[48] On behalf of the Wilsons, Mr. Rublee advised by letter dated March 20, 2019, that the proponents of the development would not be amending the QEP report.

[79] The Court concluded that the Rublee report was "significantly" flawed and could not be considered an assessment report within the meaning of the *Regulation*, since it was not prepared in accordance with the required assessment methodology: *Wilson* at para. 12. The RDNO argues that the Koch RAR Report suffers from the

same deficiencies as those identified in the Rublee report. I disagree. Unlike in *Wilson*, the FLNRO specifically stated that Mr. Rublee did not apply the methodology correctly, whereas FLNRO specifically advised Ms. Koch she had applied the correct RAR methodology, but that the Ministry lacked the ability to approve a variance of the SPEA for the reasons set out in Mr. Abecia's June 23, 2016 email.

[80] Mr. Abecia specifically found that the RAR Assessment with a five metre SPEA for the low cover area was correct.

What reliance should be placed on the PLG Report?

[81] The RDNO argues that Mr. Verbenkov's opinions were marred by evident bias and by advocacy on behalf of the plaintiffs. One specific example raised was Mr. Verbenkov's evidence during a line of questioning regarding whether he conducted any research to see if other development variance permits were denied around the same time, and the effect any such denials would have had on his conclusions. On this point, Mr. Verbenkov testified, in part, "you usually use [comparables] that are supportive of what you're trying to achieve"; he also confirmed that he "did not" look for examples that would go the other way. The RDNO argues that this approach is contrary to the requirements that an expert witness be neutral and unbiased and not view his task as helping his clients achieve a certain result. The RDNO further submits that Mr. Verbenkov made "unusual or highly speculative assumptions or conclusions", primarily regarding the continuation of railway use, obtaining of a perpetual access easement for the driveway, setback interpretation, and the granting of a variance allowing construction of a large home on the Property.

[82] The RDNO submits that due to Mr. Verbenkov's bias, advocacy, and speculative or baseless assertions, his opinions are entitled to no weight, or alternatively, very little weight.

[83] The plaintiffs submit that although Mr. Verbenkov commented on the potential variance that could be obtained and ultimately concluded that varying the SPEA may

be an available option, his opinion on highest and best use was based on property setback variances that did not require SPEA variances.

[84] The plaintiffs point out that the RDNO did not call its own planning expert, notwithstanding that it had the PLG Report, which set out Mr. Verbenkov's assumptions, for one year and seven months. They argue there is no support for the assertion that Mr. Verbenkov was not credible or was biased.

[85] I agree with the RDNO that Mr. Verbenkov's statement about not looking for evidence that goes against his clients' goal raises a concern. However, when considering the totality of Mr. Verbenkov's evidence, on both direct and cross-examination, I am unable to conclude that he was biased or acting as an advocate for the plaintiffs. A finding that not all of an expert's assumptions are supported in the evidence does not result in a conclusion that they are biased. An expert is entitled to make assumptions which should be clearly set out in the report, which Mr. Verbenkov did, and whether those assumptions are ultimately supported by the evidence at trial is for the trial judge to decide.

[86] As such, I found that weight should be given to the PLG Report, with the caveat that certain of the assumptions Mr. Verbenkov made, including that the railway use was continuing and that the plaintiffs would have somehow obtained a perpetual access easement, were not proven. I have not relied upon any assumption that Coldstream would have provided a variance to allow for the construction of a larger home on the Property. In my view, that assumption was not proven on the evidence at trial.

[87] A further objection to the PLG Report relates to its reliance on the Koch RAR Report to support the various development scenarios where the southern portion of the Property had a five metre SPEA. The RDNO relies on the principle set out in *West Moberly First Nations v. British Columbia*, 2018 BCSC 730 [*West Moberley*] at para. 184, which states:

In my opinion, the thrust of the case law supports the proposition that while an expert may rely on other experts' reports for limited purposes (for

example, to situate their own opinion within a body of specialized knowledge or to refer to commonly accepted treaties/practices), another expert's report cannot be tendered for the truth of its content. An expert's opinion must be the result of independent analysis. Another expert's opinion cannot simply be adopted. This practice does not allow the opposing party or the trier of fact to adequately assess the opinion.

[88] In my view, *West Moberly* is distinguishable. In that case, the defendants sought to strike an expert witness' affidavit adopting a report that was neither authored nor expanded upon by that expert. On those facts, the Court ruled the affidavit and report inadmissible for a number of reasons. First, given that the expert's opinions were identical to those expressed in the report, the authors of which having declined to be deposed, the Court would have been left with the "practically impossible" task of evaluating the opinions based solely on inadmissible hearsay: *West Moberly* at paras. 169, 172, 181. To allow the opinions to be admitted under the circumstances would have also limited the defendants' opportunity to adequately assess them: *West Moberly* at para. 184. Additionally, it was not clear which of the report's original authors were responsible for the individual opinions expressed therein, making any examination on those opinions inherently difficult: *West Moberly* at para. 186.

[89] In the case at bar, Ms. Koch was called to and did give evidence at trial, including being cross-examined regarding the Koch RAR Report. As I have already found, Ms. Koch's expert opinions are inadmissible, but the Court is able to consider evidence of her observations and involvement in the process of preparing the Koch RAR Report. Accordingly, the information relied upon in the PLG Report is not entirely unsupported in the evidence.

[90] In any event, an expert may rely upon hearsay, provided that the hearsay is set out in the report in a way that allows the Court to ascertain whether that hearsay has been proven by admissible evidence or otherwise established as reliable: *Somers v. MacLellan*, 2022 BCSC 2304 at para. 27; *Mazur v. Lucas*, 2010 BCCA 473 at para. 40. In this regard, the PLG Report clearly sets out the extent and nature of its reliance on the Koch RAR Report:

For simplicity, the development scenarios established in Section 6 of this report utilize the general findings of Trina Koch's Environmental Assessment but do not propose to vary the SPEA as she identified through the MoE Variance Protocol. While varying the SPEA may be an available option, this Highest and Best Land Use Assessment explores maximizing development through application of the applicable zoning requirements and where necessary, variances to the property setbacks that do not require SPEA variances.

[91] The proper approach to the admissibility of hearsay evidence in an expert opinion, absent some other factor causing prejudice to one party, is not to withdraw the evidence from the trier of fact, but rather to address the weight of the opinion and the reliability of the hearsay in an appropriate self-instruction: *Mazur* at para. 40. Accordingly, where Mr. Verbenkov's evidence is based on information set out in the Koch RAR Report, the matter is one of weight.

Should any reliance be placed on the CWPC Report?

[92] The Hughes Rebuttal Report identifies several deficiencies in the CWPC Report, including that it fails to comply with the Review Standard of the Canadian Uniform Standards of Professional Appraisal Practice ("CUSPAP"). In particular, it points to the use of the term, "Special Assumptions", which Mr. Hughes says is not a term recognized by CUSPAP. It also highlights certain failures to properly identify what are "Special Assumptions" and what are "Extraordinary Limiting Conditions" throughout the Report. Mr. Carmichael testified that the term "Special Assumptions" has the same meaning as "Extraordinary Assumptions", and that the main point is to draw the reader's attention to the existence of those assumptions, which he testified he did.

[93] Mr. Hughes specifically notes that the CWPC Report provides a valuation on market data from comparables that all had physical or legal access but does not provide any adjustment for constructing physical access to the Property. Mr. Carmichael explained that when he considered each comparable, he made an adjustment to account for those costs.

[94] Mr. Hughes notes that the assumed renewal of the Lease was “buried in the [CWPC] Report” and not properly addressed. I note that that assumption is located under the heading, “Street Improvements/Access”, and that Mr. Carmichael addresses an alternative to water access. The evidence at trial was that there was no likelihood that the Lease would be renewed. As such, I agree that any assumption by Mr. Carmichael that the Lease would be renewed after 2025 was not proven at trial.

[95] Mr. Carmichael agreed that his phrasing of “Access to the subject property is provided by a driveway” in his report was a poor choice of words, since he knew that a driveway had to be built. I accept that Mr. Carmichael was aware that there existed no driveway on the Property, as he had attended the site many times.

[96] I disagree with Mr. Hughes’ comment that due to the numerous CUSPAP compliance-related and substantive errors that the CWPC Report is unreliable. I do agree that the CWPC Report and Mr. Carmichael’s evidence were less clear on how the access costs and extending services were accounted for in the CWPC Report. The CWPC Report lacked statements quantifying those costs and as to the source of the cost estimates obtained by Mr. Carmichael. Mr. Carmichael’s method makes it impossible to determine how much of an adjustment he made to each of the comparables. I prefer the approach taken in the Hughes Report where a value per sq. ft. was determined and then the costs for providing access and extending services were discounted.

Are the Hughes Reports reliable?

[97] The plaintiffs argue that the Hughes Reports were materially flawed and list seven reasons in support of that position. I am not persuaded by any of those reasons. Further, I specifically reject the assertion that Mr. Hughes failed to make obvious concessions during his cross-examination or that he was argumentative to the point of becoming an advocate. I have no hesitation in accepting the reliability of the Hughes Reports. I do accept that the Aplin Martin Report was not tendered as expert opinion, as I will address in greater detail below.

What is the site area?

[98] In the CWPC Report, the site area was described as plus or minus 0.54 acres, or being plus or minus 23,305 sq. ft.

[99] This differs slightly from the size set out in the Hughes Report, which has the site area at 0.539 acres, or being equal to 23,479 sq. ft.

[100] Mr. Carmichael concedes in his rebuttal report that given that a site plan was prepared by a surveyor, it is more reasonable to rely on a site area of 23,479 sq. ft.

[101] During the evidence of Mr. Carmichael, the parties advised that the square footage agreed upon was 23,522 sq. ft. I will use the 23,522 sq. ft. as the size of the Property.

What could be built on the Property?

[102] One of the key issues is what development of the Property was reasonably probable. The parties both rely on *Holdom v. British Columbia Transit*, 2006 BCCA 282, in which the Court held that “probability connotes something higher than a 50% probability”: *Holdom* at para. 38. The parties agree that “probability” indicates something higher than 50 percent.

[103] The evidence supports a finding that it would have been challenging for the Property to be developed into a conventional home for the following reasons:

1. there were zoning setback permits that had to be obtained;
2. there was uncertainty as to whether a favourable setback interpretation or setback relief via a variance would have been obtained;
3. the short-term land access to the Property would have expired in 2025 with no prospect for renewal;
4. there was uncertainty as to whether the five metre SPEA boundary would be formally accepted;

5. Coldstream retained discretion to refuse to issue a riparian area development permit;
6. the plaintiffs needed to obtain a development permit and a building permit; and
7. there were potential problems relating to the need for a fire truck turnabout for the driveway.

[104] Considering the totality of the evidence, I find that the highest and best use for the Property was as a holding property with an undetermined development potential that included the possibility of a conventional home, with the more likely scenario being a recreational type of home or cabin or an unconventional home.

Which comparables are the most reliable?

[105] A number of the comparables were relied on by both appraisers. The mutual comparables are:

- 7804 Graystone Drive (CWPC Comp. 1/Hughes Index 7) – an irregular lot of 33,970 sq. ft located in Coldstream with no water access but with a water view on a cul-de-sac sold in February 2019 for \$25.66 per sq. ft and in December 2019 for \$26.84 per sq. ft. The CWPC Report suggests a slightly lower price per sq. ft is warranted under Scenario Two. The Hughes Report notes that this property was sold again in January 2017 for \$26 per sq. ft., and after that sale, the lot was improved with a 5,179 sq. ft. single family residence.
- 8208 Kalavista Drive (CWPC Comp. 2/Hughes Index 8) – a rectangular 17,947 sq. ft. waterfront lot located on the east side of Kalamalka Lake and on the west side of Kalavista Drive. It sold in March 2019 for \$1,675,000, equating to \$99.33/per sq. ft. The property was developed in 2019 with a new two-storey family home and a private dock with water access. The CWPC Report suggests a downward adjustment to account for this property's

- superior access and development potential, resulting in a much lower value per sq. ft. under both Scenarios. Mr. Carmichael notes that “other market data” is preferred. Mr. Hughes notes that a 4,645 sq. ft home was later constructed on the property.
- 7911 Graystone Drive (CWPC Comp 3/Hughes Index 6) – a 13,563 sq. ft. rectangular lot located on Graystone Drive which sold in January 2019 for \$475,000 equating to \$35.02 per sq. ft. The CWPC Report suggests a lower price per sq. ft. is warranted for the Property under both Scenarios. Mr. Hughes notes that a 5,035 sq. ft. single family home was later constructed on this property.
 - 7923 Graystone Drive (CWPC Comp. 4/Hughes Index 5) – a 11,302 sq. ft. rectangular lot located on Graystone Drive which sold in May 2017 for \$535,000, equating to \$47.34 per sq. ft. The CWPC Report concludes that a lower price per sq. ft. is warranted for the Property under both Scenarios. Mr. Hughes notes that after the sale, this property was improved with a 5,090 sq. ft. single family house.
 - 5903 Cosens Bay Road (CWPC Comp. 5/Hughes Index 11] – a 7,837 sq. ft. rectangular waterfront parcel located on Kalamalka Lake on Cosens Bay Road which sold in July 2017 for \$425,000, equating to \$54.23 per sq. ft. It has a 614 sq. ft. recreational cabin and a private dock for water access. The CWPC Report concludes that a lower value per sq. ft. is warranted under both Scenarios. Mr. Hughes comments that the sale price in July 2017 should be discounted by \$35,000 to reflect the improvement value, resulting in an extracted land value of \$390,000, equating to \$49 per sq. ft. In August 2018, the property was relisted after improvements were renovated and sold for an extracted land value of \$593,000, equating to \$75 per sq. ft.
 - 5905 Cosens Bay Road (CWPC Comp. 6/Hughes Index 10) – a 7,725 sq. ft. rectangular shaped waterfront parcel located on Kalamalka Lake on Cosens Bay Road which sold in August 2015 for \$387,000, equating to \$50.10 per sq.

ft. It had an 813 sq. ft. cabin and a private dock for water access. The CWPC Report concludes that a lower value per sq. ft. is warranted under both Scenarios. Mr. Hughes comments that the sale price should be discounted by \$20,000, representing the improvement value resulting in an extracted land value of \$367,000, equating to \$48 per sq. ft.

[106] The Hughes Report provides some additional comparables not referenced in the CWPC Report, being three properties bisected by a road. The prices for these properties were \$4, (Hughes Index 2), \$42 (Hughes Index 3), and \$22 (Hughes Index 4) per sq. ft., respectively. In addition, Hughes Index 9 was a bare land strata with a subdivision consisting of 19 single family strata lots that shared lake frontage on Kalamalka Lake with an improved beach house and multi slip dock. It sold in April 2016 for \$37 per sq. ft. The final additional comparable was Index 12, which was another property on Cosens Bay Road, being part of Kalamalka Park Estates LTD (the “Estates”) with 24 lakeshore lots and six lakeview lots. Each lot owns 1/30 share in the Estates. Lot 9 sold in October 2018 for \$49 per sq. ft.

[107] As an alternative assessment scenario, the CWPC Report considered the value of recreational park property and opined that the value of the Property based on comparables would be \$580,000, using \$25 per sq. ft. A review of the comparables used for the valuation of parkland in the CWPC Report are:

- 9657 Eastside Road (CWPC Comp. 7/Hughes Comp. 1) – a 2.44 acre irregularly shaped property with approximately 1,000 feet of waterfront located on Okanagan Lake with a dock, a swimming platform, and a level, large-pebble beach that sold for \$2.3 million, equating to \$21.68 per sq. ft. As noted in the Hughes Rebuttal Report, this property was resold in January 2018 with a declared value of \$1,671,000, equating to \$15.75 per sq. ft.
- 3676 Lakeshore Road (CWPC Comp. 8) – a 0.4 acre lot with sandy beach frontage on Okanagan Lake adjacent to the Rotary Beach Park, and that was acquired for \$2.7 million, equating to \$155.74 per sq. ft. by the City of Kelowna for park purposes.

- Comparable 9 – a 0.89 acre lot with frontage on Okanagan Lake with a sandy beach that was acquired for \$2.7 million equating to \$114.72 per sq. ft. by the City of Kelowna for park purposes.
- Comparable 10 – a 4.05 acre property with frontage on Okanagan Lake that was purchased by the City of Kelowna for \$3,690,000, equating to \$20.90 per sq. ft, for park purposes. The CWPC Report made downward adjustments for location and access and a significant upward adjustment for site size, supporting a higher per sq. ft. value than the Property. The Hughes Rebuttal Report notes that the purchase price was based on the residential developability of the site, which significantly exceeded the inferior access and developability of the Property.
- Comparable 11 – a 0.06 acre property with frontage on Okanagan Lake purchased by the Regional District of Okanagan-Similkameen for \$1,700,000, equating to \$40.87 per sq. ft. to be used as parkland in 2021. The CWPC Report noted the need for a downward adjustment for access, as it was adjacent to a road, and due to market improvements from the 2021 sale date to 2019.
- Comparable 12 – a 4.81 acre property with frontage on Skaha Lake that was purchased by the Regional District of Okanagan-Similkameen for \$2,930,000, equating to \$13,98 per sq. ft. The CWPC Report notes that there should be a downward adjustment for market improvements from the sale date of 2021 to 2019, which would be offset by significant upward adjustments for site size and location, warranting a higher price per sq. ft. for the Property.
- Comparable 13 – a 0.91 acre property located on a road with frontage to Okanagan Lake that was purchased by the City of Kelowna for \$5,325,000, equating to \$134.63 per sq. ft. It was purchased with the intention of expanding Strathcona Beach to the north. It included a sandy beach and an existing home with services.

[108] I agree with the comments made in the Hughes Rebuttal Report that all of the park comparables used by Mr. Carmichael were significantly superior urban residential waterfront sites located in Kelowna, together with much larger suburban and rural waterfront estates. All of these sales concern multi-million dollar properties having little in common with the subject Property. I place little weight on any of the comparables as being supportive of a value \$580,000 based on \$25 per sq. ft. for the Property to be sold as potential park, as set out in the CWPC Report. However, I do accept that there remains a potential alternative that the Property could have been sold for recreational purposes and potentially for a park at a value much lower than \$25 per sq. ft.

What costs should be allocated for access and extending services?

[109] Both appraisers agree that since the Property was not serviced there would be costs associated with the provision of services. Mr. Hughes relies on the Aplin Martin Report for costs relating to building a driveway and service extensions at \$246,310 with a 25 percent contingency (\$61,578), resulting in a final cost rounded to \$310,000. The CWPC Report did not specifically allocate any amount for the costs for access or extending services but adjusted the various comparables. As I have indicated, my preference is to use Mr. Hughes' approach, since it is then clear what the costs associated with providing access and services to the Property would be.

[110] Mr. Glasser prepared a cost estimate, absent any contingency, of \$152,079. He compared the opinions of Aplin Martin and EMA respecting probable costs:

ITEM	APLIN MARTIN	EMA
Sanitary Sewer	\$24,744	\$16,200
Waterworks	\$18,217	\$13,400
Roadworks	\$165,359	\$102,744

Hydro/Tel Civil Works	\$14,065	\$14,200
Hydro/Tel Materials	\$23,925	\$5,535
25% Contingency	\$61,578	\$38,020
TOTAL	\$307,888	\$190,099

[111] As to the major discrepancies, Mr. Glasser explained the lower costs in his report:

- sanitary sewer – approximately \$8,500 difference reflecting cost savings for installing sanitary and water service lines in a single trench;
- waterworks – approximately \$4,800 difference reflecting that since the Property is adjacent to a rail bed, it was reasonable to expect that the in-situ material consists of compacted granular fill, with this material being suitable for reuse as backfill;
- roadworks – approximately \$62,600 difference for driveway resurfacing and retaining wall design and costing, based on his opinion that there was no need to pave the driveway because a gravel driveway would be sufficient to provide access while maintaining a more natural appearance, and that the costs of supply and installation of lock blocks in 2019 was substantially lower than the figures in the Aplin Martin Report; and
- hydro/tel materials – approximately \$18,390 difference reflecting that the costs in the Aplin Martin Report for the installation of hydro, telephone, and cable conduit systems was inconsistent with historical pricing effective in 2019.

[112] I note that Mr. Glasser, unlike Aplin Martin, had been involved in looking at bringing services to the Property from Graystone Drive, and was aware that a four-

metre wide easement existed for this purpose. It was his view that this option would have been cheaper than via the driveway. Mr. Glasser testified that he had some engagement with the Property since 2005.

[113] There were no witnesses called from Aplin Martin at trial and the Aplin Martin Report was not tendered as an expert report. There was no information provided on the expertise of its authors, Brett Dionne and John Graff.

[114] I am persuaded that Mr. Glasser had the necessary expertise, with nearly 30 years experience providing costs estimates, and more importantly, hands-on experience with the Property, to provide the costing opinions he gave. I find the estimates provided by Mr. Glasser more reasonable and that they should be accepted over those contained in the Aplin Martin Report.

[115] On the issue of whether a contingency should be included, I note that in Schedule C to the EMA Report, there is a contingency amount included. In the EMA Report, Mr. Glasser estimates the probable costs as being \$190,099, which includes a 25 percent contingency based on the Class D estimate methodology. It is my understanding that a Class D estimate is one of the probable costs. Mr. Glasser testified that a contingency should not be listed as a cost because it is extra money available in case unforeseen work arises.

[116] I am not persuaded that no contingency should be accounted for, since it makes sense that there is a risk of unforeseen work that can arise in many projects. As Mr. Glasser testified, the Class D cost estimate is more of a preliminary type of cost estimate. Further support for including the contingency is in the EMA Report, where a 25 percent contingency was included in the costs estimate. I find that the 25 percent contingency should be included and that the costs for access and extending services should be rounded to \$190,000.

Conclusion on Value

[117] Having considered all of the evidence tendered, the opinions of both appraisers, and the unique layout of this Property, my best judgment is that a fair

value for this Property, before accounting for any costs associated with access and extending utilities, is in the range of \$30 sq. ft., having a market value of \$705,660, which I will round up to \$706,000. I note that this is at the high end of Mr. Hughes' assessment. It is at the low end of Mr. Carmichael's assessment for Scenario One, being a waterfront single family dwelling, and the high end for Scenario Three, being a potential park purpose. From that amount, the costs for access and extending services of \$190,000 must be deducted, resulting in a value of \$516,000.

[118] I find the value of the Property to be \$516,000. From that amount, the Advance Payment must also be deducted, resulting in a figure owed of \$346,000 owed to the plaintiffs for the unpaid land value.

Are the plaintiffs entitled to damages due to the “shadow” of the expropriation?

[119] The plaintiffs submit that they are entitled to compensation for losses suffered prior to the expropriation because the RDNO frustrated their attempts to move forward with the development of the Property. The RDNO agrees that as a matter of law, a landowner may be awarded damages where development approvals were rejected because of a pending expropriation, absent which there was a reasonable prospect that such approvals would have been obtained: *Devick v. British Columbia (Minister of Transportation and Highways)* (1998), 47 B.C.L.R. (3d) 14, 1998 CanLII 6136 (C.A.).

[120] The RDNO argues that the plaintiffs' reliance on this legal principle is misplaced, and that *Devick* is factually distinguishable. In *Devick*, an owner of ranch lands which were ultimately expropriated for highway expansion had made numerous rezoning applications that were refused because of the Minister of Transportation and Highways' position that there should be no rezoning of lands potentially needed for highway improvement. The Court of Appeal found that but for the “shadow” cast over the property for nearly twenty years by the looming expropriation, there was a reasonable prospect of favourable rezoning: *Devick* at paras. 26-29. The RDNO submits that the evidence relied on by the Court in *Devick*

is non-existent here. They point out that the plaintiffs made only one application to Coldstream for preliminary work, which was not rejected, but held in abeyance as the plaintiffs had not secured the necessary legal access, and that the plaintiffs never applied for any of the substantive permits required to redevelop the Property, such as a development permit, a development variance permit for setback relief, and a building permit.

[121] The ultimate analysis of whether the prospect of redevelopment was reasonably likely depends on an assessment of the individual facts and evidence in each case: *Nye-Islam v. West Vancouver (District)*, 2018 BCSC 868 at para. 37. I agree with the submissions of the RDNO that the evidence in this case does not support an award of damages concerning the period prior to the expropriation.

Issue 2: Should any disturbance damages be awarded?

Legal Principles

[122] As noted above, the basic formula to determine “market value” in s. 31(1) requires a determination of whether there were any “reasonable damages” to be calculated in accordance with s. 34. However, an award for such damages will only be made if the amount of damages, when added to the market value based on its use at the date of expropriation, exceeds the market value based on its highest and best use at the date of expropriation.

[123] S. 34 of the *Act* provides, in part:

Disturbance damages generally

34 (1) An owner whose land is expropriated is entitled to disturbance damages consisting of the following:

- (a) reasonable costs, expenses and financial losses that are directly attributable to the disturbance caused to the owner by the expropriation;
- (b) reasonable costs of relocating on other land, including reasonable moving, legal and survey costs that are necessarily incurred in acquiring a similar interest or estate in the other land.

(2) If a cost, expense or loss is claimed as a disturbance damage and that cost, expense or loss has not yet been incurred, either the claimant or the expropriating authority may, with the consent of the court, elect to have the

cost, expense or loss determined at the time, not more than 6 months after the date of expropriation, that the cost, expense or loss is incurred.

[124] The applicable principle was stated in *Sequoia Springs West Development Corp. v. British Columbia (Minister Of Transportation Highways)*, 2003 BCCA 8:

[52] The claim for expenses thrown away, in this case, is a claim for expenses that have no benefit to the land owner because of the taking ... In other words, monies proved to have been spent to improve the property under development for its highest and best use, to the extent they are thrown away by the expropriation, represent recoverable loss.

[125] The purpose of s. 31(1) is to prevent double recovery, as was discussed in *Kliman v. Phoenix Estates Ltd.*, [1997] 5 W.W.R. 116; 30 B.C.L.R. (3d) 112 (C.A.):

[17] The difficulty with the appellants' argument is that it calls for an interpretation of the *Act* which the words will not reasonably bear. Although there is some force in the contention that the cases on expropriation fashioned a rule in language similar to s. 30 in order to prevent double recovery (see *Horn v. Sunderland (Borough)*, [1941] 1 All E.R. 480 (C.A.)), the legislature has seen fit to employ language that embraces all forms of damage whether resulting in double recovery or not. The facts in *Horn* provide an example of double recovery. If compensation for the taking of farmland was based on its use as a building site and the owners also received as disturbance damages the cost of buying another farm, double recovery would result because the owner would have had to give up the farm operation in order to sell the land on the open market at its highest and best use.

[18] The damages alleged to be suffered by the appellants on frustration of the interim agreement cannot escape falling under s.33 and, indeed, no other kind of damages are contemplated by s.30. Section 30 denies recovery of damages when the compensation for highest and best use, different from present use, is greater than present use plus disturbance damages.

[19] Counsel for the appellants questioned whether the Board was in a position to make the comparison between highest and best use and present use plus disturbance damages because it did not arrive at a value on present use. I cannot take this submission seriously in light of the fact that everyone appearing before the Board treated present value as in a lower order of magnitude than the highest and best use as a residential subdivision.

Position of the Parties

[126] The plaintiffs claim that they expended \$116,920.35, squarely relating to the costs to develop the Property, all of which were reasonably incurred, rendered useless as a result of the expropriation.

[127] The RDNO submits that none of the property expenses claimed by the plaintiff were truly “thrown away” or “of no benefit” to the plaintiffs, because the plaintiffs used the work product resulting from those expenses to persuade the Court that the Property could be developed. It argues that to award any additional costs would result in double recovery because the disturbance items would have increased the valuation and have also been the subject of disturbance damages.

[128] The RDNO submits that s. 31(1) of the *Act* means that the plaintiffs can only recover damages if the Court values the Property: based on its use as of the Expropriation Date, being vacant land; or, based on the highest and best use other than the Expropriation Date use, and the disturbance damages exceed the difference between the value based on the Expropriation Date use and the value based on highest and best use.

[129] As pointed out by the RDNO, there is no expert evidence on the value of the Property as vacant land.

Analysis

[130] In *Heringa v. City of Nanaimo*, 2010 BCSC 1571, the Court considered a claim for disturbance damages arising from a partial taking of Mr. Heringa’s land. The parties each called expert evidence regarding the market value of the interest taken. Both appraisers valued the property not on the basis of its current use, but on its “highest and best use”, which was to allow for some type of residential subdivision. The appraisers’ valuations were based on the direct comparison approach. There was no evidence provided on the value of the property as at the date of the expropriation. Justice Fitzpatrick found that:

[38] The only proven value of the Property is based on highest and best use, not use as of the date of the expropriation where disturbance damage can also be added. Accordingly, I find that there is no basis for compensation in respect of disturbance damages pursuant to s. 34.

[131] The purpose of the PLG Report tendered by the plaintiffs was to determine the highest and best use for the Property. The plaintiffs instructed CWPC to value the Property under its highest and best use as of February 21, 2019, being the

vesting date. The Hughes Report was also carried out using the highest and best use, being recreational residential use. Neither valuation addressed the value of the Property as of the Expropriation Date, being a vacant lot. There is no evidentiary record for me to determine if the value of the Property as a vacant lot plus the alleged disturbance damages would amount to a greater amount than the market value of the Property based on its highest and best use.

[132] The Court in *Heringa* also cited *Maple Ridge-Pitt Meadows* (1999), 68 L.C.R. 167 (B.C.E.C.B.), in which the Expropriation Compensation Board denied a claim for disturbance damages, stating at para. 93, “in British Columbia, if the market value is based on a highest and best use other than the existing use, all disturbance damages are excluded whether there is double recovery involved or not.” The Board further concluded:

[96] ... [W]e think that, in applying section 31, the board must consider whether the market value is based on its use as a development property which is more valuable than the use to which the property is currently being put. Development normally involves some holding period until the property is rezoned and other land regulation requirements are met and development is underway. Development, by definition, is a different use than the present use of land that lacks the zoning and other land regulation requirements for development.

[133] The Board’s comments are applicable here. However, and in any event, I have awarded to the plaintiffs the market value of the Property on its highest and best use based on the expert appraisal evidence tendered. I see no basis for additional disturbance damages based on the evidentiary record before me.

Issue 3: Can the plaintiffs recover for loss of opportunity?

[134] It is my understanding that the plaintiffs do not advance both their claims for disturbance damages and for the loss of opportunity to obtain a permit together, but as alternatives. The claim being the difference between Mr. Carmichael’s valuation (\$580,000), and his valuation had the Property obtained all necessary approvals for the development of a single-family residence (\$780,000).

[135] In my view, the appropriate claim to be advanced is the disturbance claim, although on the evidentiary record before me, I did not make any award for this claim. A loss of opportunity claim ought to have been pled so as to give the RDNO notice of the claim it had to defend.

[136] The core object of a notice of civil claim is described in Frederick M. Irvine et al., *British Columbia Practice*, 3rd ed., (Markham, Ont.: LexisNexis Canada Inc., 2006) (loose-leaf updated July 2025, release 106):

If a notice of civil claim is to serve the ultimate function of pleadings, namely, the clear definition of the issues of fact and law to be determined by the court, the material facts of each cause of action relied upon should be stated with certainty and precision, and in their natural order, so as to disclose the three elements essential to every cause of action, namely, the plaintiff's right or title; the defendant's wrongful act violating that right or title; and the consequent damage, whether nominal or substantial.... The material facts should be stated succinctly and the particulars should follow and should be identified as such...

[137] As noted by Justice Voith, as he then was, in *Sahyoun v. Ho*, 2013 BCSC 1143:

[17] These requirements serve two foundational purposes: efficiency and fairness. These purposes align with Rule 1-3 which confirms that "the object of [the] Supreme Court Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits."

[18] I emphasize efficiency because a proper notice of civil claim enables a defendant to identify the claim he or she must address and meet. The response filed by a defendant, together with the notice of civil claim and further particulars, if any, will confine the ambit of examinations for discovery and of the issues addressed at the trial itself. Proper pleadings limit the prospect of delay or adjournments. They allow parties to focus their resources on those matters that are of import and to ignore those that are not. They facilitate effective case management and the role of the trier of fact.

[19] A proper notice of civil claim also advances the fairness of pre-trial processes and of the trial. Defendants should not be required to divine the claim(s) being made against them. They should not have to guess what it is they are alleged to have done.

[138] The failure to plead any type of loss of opportunity claim is a significant barrier for the plaintiffs to advance such a claim. The arguments put forth by the RDNO in its closing submissions best capture the problems with this claim:

- a) This claim is unpleaded;
- b) The principal complaint appears to be that Coldstream delayed Ms. Koch's work with a view to passing new, more restrictive riparian area development permit conditions:
 - i. The evidence, including the cross-examination of Mr. Galloway and the direct examination of Mr. Verbenkov, suggest that any additional requirements imposed by the new OCP were minimal at best;
 - ii. The Coldstream witnesses testified that neither had any intention of delaying, and were never pressured to delay, the Plaintiffs for the purposes of having the new OCP enacted or for any other reason. Nothing contrary to this was suggested to either of them in cross-examination.
 - iii. The notice that Coldstream would choose to hinder the Plaintiffs by passage of a new OCP makes little sense, as Coldstream could have done so much more effectively by passage of a new zoning bylaw.
- c) To the extent that this claim is based on allegations that RDNO had done something to prevent development:
 - i. RDNO was not the approval authority and could not have done anything with its local government powers to prevent development;
 - ii. RDNO's refusal to permit the Plaintiff's to sue the Rail Trail to access the Property with heavy equipment in 2016, and its cease-and-desist letter in 2017, were exercises of RDNO's powers as owner of the Rail Trail.
- d) As a further, general response, the plain fact is that the Plaintiffs simply did not make either development applications to Coldstream or Lease-related requests to RDNO, and so the idea that such requests or applications would have been rejected for the purpose of blocking the development of the Property is highly speculative and cannot form the basis of recovery for this ill-defined claim.

[139] The governing body responsible for issuing a building permit is Coldstream. There is a great deal of merit in the RDNO's position that this is a claim involving Coldstream and not the RDNO. There are no allegations in the amended notice of civil claim against Coldstream, nor is Coldstream a named defendant.

[140] The loss of opportunity claim is dismissed.

Orders

[141] The following orders are made:

1. The value of the Property as of February 20, 2019, was \$516,000.
2. The amount owed by the defendant to the plaintiffs, after accounting for the advance payment of \$170,000, is \$346,000 plus interest and costs.
3. The plaintiffs' claims for disturbance damages and loss of opportunity are dismissed.

[142] The parties requested that the issues of interest and costs be put off to a later date. I request that the parties advise me through Scheduling whether an agreement has been reached respecting interest and costs within three months from the pronouncement of these reasons. If I am advised that the parties are unable to agree on these two issues, then arrangements can be made to have a case management conference to discuss how they will be addressed. If the parties do not contact me through Scheduling within those three months, I will assume the parties have reached an agreement on interests and costs and I will proceed to have all of the trial materials shredded.

[143] I would like to thank counsel for how efficiently this trial was conducted and for their excellent, articulate, and comprehensive closing submissions.

“Forth J.”