

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tsawwassen First Nation v. Martinolich*,
2026 BCSC 793

Date: 20260501
Docket: S234103
Registry: Vancouver

Between:

Tsawwassen First Nation

Plaintiff

And

Wayne John Martinolich and Kathleen Mary Martinolich

Defendants

Before: The Honourable Justice Basran

Reasons for Judgment

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Place and Dates of Hearing:

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Introduction

[1] The defendants, Wayne John Martinolich and Kathleen Mary Martinolich, lease a residential property (the “Lease”) owned by the plaintiff, Tsawwassen First Nation (“TFN”).

[2] The leased residential property borders Stahaken bluff, also owned by TFN (the “Bluff”).

[3] A wooden retaining wall (the “Retaining Wall”) and stairs leading to a concrete seating area (the “Concrete Pad”) leased by the defendants purportedly encroach onto the Bluff. An amount of fill below the defendants’ lawn (the “Fill”) also allegedly encroaches onto the bluff.

[4] It is alleged that the defendants constructed an addition to the Retaining Wall without authorization from TFN. The remainder of the Retaining Wall and Concrete Pad pre-date the defendants’ acquisition of their leasehold interest.

[5] TFN notified the defendants that they are trespassing and demanded that they remove both the Retaining Wall and Concrete Pad. The defendants are prepared to remove the Concrete Pad but not the Retaining Wall because they believe that doing so will destabilize their leased property.

[6] TFN seeks orders requiring that the defendants remove both the Retaining Wall and the Concrete Pad and restore any land damaged by them.

[7] For the reasons that follow, I substantially agree with the plaintiff’s submissions that the defendants are liable in trespass and breached their lease. TFN is entitled to a mandatory injunction requiring the removal of the Retaining Wall, Fill, and Concrete Pad at the defendants’ cost, as well as solicitor-client costs pursuant to the terms of the Headlease (defined below).

Issues

[8] The issues to be decided are:

- a) Do the Retaining Wall, Fill, and Concrete Pad constitute trespass under the common law and/or the TFN's *Land Act*?
- b) Did TFN consent to the alleged encroachments?
- c) If the defendants are liable in trespass, what are the appropriate remedies?
- d) Did the defendants breach the Lease by constructing a new section of the Retaining Wall without obtaining a geotechnical opinion, building permit, or authorization from TFN? and
- e) If the defendants breached the Lease, what are the appropriate remedies?

Do the Retaining Wall, Fill, and Concrete Pad Constitute Trespass under the Common Law and/or the TFN's *Land Act*?

Relevant Facts

[9] The defendants reside at and hold a leasehold interest in a property located at 1263 Pacific Drive, Tsawwassen, BC, with the following legal description:

PID: 008-001-910
Legal Description: Lot 28 District Lot 169 Group 2
New Westminster District Plan 7476
(the "Property")

[10] The Property is situated between Pacific Drive at the front of the Property, and the Bluff at the rear of the Property.

[11] As noted, both the Property and the Bluff are owned by TFN. They form part of TFN's treaty lands and are subject to TFN's jurisdiction.

[12] The section of the Bluff immediately adjacent to the rear of the Property forms part of Lot 4, which is legally described as:

PID: 027-867-463
Legal Description: Lot 4 District Lot 169 Group 2

New Westminster District Plan BCP38104
("Lot 4")

[13] The Property's rear yard includes, among other things, the Retaining Wall and Concrete Pad. A volume of Fill behind and under the Retaining Wall extends as a wedge opening northward beneath the rear yard of the Property.

[14] Section 12 of the Lease provides in part:

[...] The Lessee hereby assumes the full and sole responsibility for the condition, operation, repair, replacement, maintenance and management of the Demised Lands and all improvements thereon and will, during the Term keep or cause to be kept the buildings and all other improvements in and upon the Demised Lands, both exterior and interior, structural and otherwise in a good and tenantable state of repair. Without limiting the generality of the foregoing the Lessee covenants to pay the costs of all connections to municipal services and of repairing, maintaining and continuing same.

[15] A new section of the Retaining Wall was constructed by the defendants in 2014. The rest of the Retaining Wall and Concrete Pad predate the defendants' acquisition of the leasehold interest.

[16] The Retaining Wall, including the new section constructed by the defendants, encroaches onto Lot 4 by 4.71 metres at its furthest point. The Concrete Pad encroaches onto Lot 4 by 6.79 metres at its furthest point.

[17] On November 30, 2021, TFN notified the defendants that they were trespassing on TFN land because of the encroachment of the Retaining Wall and Concrete Pad. TFN demanded that the defendants remove the Retaining Wall and Concrete Pad by May 30, 2022, with the removal to be overseen by a qualified professional (the "Notice of Trespass").

[18] The Notice of Trespass states that TFN's Executive Council has found the defendants to be in trespass under s. 35(1) of the TFN's *Land Act* and requires them to remove the Retaining Wall and Concrete Pad, and stabilize the land on which the trespass occurred by May 30, 2022.

[19] The defendants did not seek a review of the Executive Council's decision finding them in trespass and requiring them to remove the Retaining Wall and Concrete Pad.

[20] TFN granted the defendants several extensions of time to comply with the Notice of Trespass, with the last extension ending on June 1, 2023, one year after the initial deadline and a total of 18 months after the Notice of Trespass was issued. Despite these extensions, the defendants did not provide a plan to TFN for removal of the Retaining Wall or Concrete Pad.

Legal Principles

Common Law Trespass

[21] The tort of trespass consists of the following elements:

- a) direct intrusion onto the land;
- b) negligent or intentional interference with the land; and
- c) physical interference with the land.

Peter Ballantyne Cree Nation v. Canada (Attorney General), 2016 SKCA 124 [*Peter Ballantyne*] at para. 131, cited in *Ward v. Cariboo Regional District*, 2021 BCSC 1495 at para. 51.

[22] Motive or purpose for trespassing is not relevant to determining liability as a person in possession of land is not required to accommodate others: *Manak v. Hanelt*, 2022 BCSC 1446 at para. 39; *Ward* at para. 49.

[23] Both the initial intrusion and the failure to remove an encroaching structure or object constitute an actionable wrong. As long as the offending object remains, there is a continuing trespass and the purchaser of an offending chattel may be liable for it. The doctrine of "continuing trespass" applies to the failure to remove something wrongfully brought onto the land: *Peter Ballantyne* at para. 122.

[24] The mischief that trespass is directed at remedying is unjustifiable interference with possession. It is the act of entering upon land, in the possession of another, or placing or throwing or erecting some material object thereon without the legal right to do so: *Peter Ballantyne* at para. 128.

[25] “[...] [T]he tort of trespass to land allows the possessor to assert his proprietary rights and prevent the establishment of a prescriptive easement [...] trespass is actionable without proof of damage and also by the fact that mistake is no defence.”: *Peter Ballantyne* at para. 130.

[26] In respect of the second requirement of trespass, that the interference be intentional or negligent, “[t]respass will occur, regardless of consciousness of wrongdoing, if the defendant intends to conduct itself in a certain manner and exercises its volition to do so [...] ‘[t]respass does not depend upon intention.’”: *Peter Ballantyne* at para. 132.

Trespass Under the TFN’s Land Act

[27] TFN’s *Land Act* was enacted on April 3, 2009, the date that the Tsawwassen Final Agreement (the “TFN Final Agreement”) came into force. It applies to all TFN owned land, including the Property.

[28] Section 39 of the *Land Act* sets out a list of “trespass offences” in relation to Tsawwassen Public Lands:

Trespass offences

39 A person who without lawful authority

(a) occupies or possesses Tsawwassen Public Lands,

[...]

(e) constructs a building, structure, enclosure or other works on Tsawwassen Public Lands,

[...]

(g) throws, deposits or in any way causes to be placed on Tsawwassen Public Lands any glass, metal, garbage, soil or other material,

or

- (k) fails to comply with a requirement set out in any of paragraphs (a) to (e) of section 35 (1)

commits an offence and is liable on conviction to a fine not exceeding \$10,000, or to imprisonment for not more than 6 months, or to both.

[29] Lot 4 is owned in fee simple by TFN. It is Tsawwassen Public Land as defined in the *Land Act* because it is owned by the Tsawwassen Government for the benefit of TFN: *Land Act*, s. 2.

[30] Section 35 of the *Land Act* sets out certain remedies available to TFN in the event that a person trespasses on TFN lands:

Trespass – certain actions by Executive Council

35 (1) If a person trespasses on Tsawwassen Public Land, the Executive Council on written notice to the person may do one or more of the following:

- (a) require the person to cease the trespass;
- (b) if the land on which the trespass occurred has been affected as a consequence of the trespass, require the person to restore the land to a condition satisfactory to the director;
- (c) require the person to pay to Tsawwassen First Nation a sum of money considered by the Executive Council as being reasonable compensation for one or more of any
 - (i) possession of the land,
 - (ii) occupation of the land, or
 - (iii) use of the land

that was comprised in or associated with the trespass;

- (d) require the person to pay to Tsawwassen First Nation a sum of money considered by the Executive Council as being the reasonable costs or estimated costs incurred or to be incurred by Tsawwassen First Nation to restore the land to a condition satisfactory to the director;
- (e) require the person to remove, to the satisfaction of the director and within a period specified by the director, any improvements made by or on behalf of the person on the Tsawwassen Public Lands;
- (f) instruct and authorize the director to seize, on behalf of Tsawwassen First Nation, any goods or other materials left by the person on the Tsawwassen Public Lands;
- (g) if the person fails or neglects to comply with the requirement under paragraph (e) within the specified period under that paragraph,

instruct and authorize the director to remove the improvements at the person's cost.

(2) Money required to be paid to Tsawwassen First Nation by a person under this section is recoverable by Tsawwassen First Nation as a debt due to it.

[31] Section 38 of the *Land Act* provides people adversely affected by decisions made under s. 35 with a right of review:

Review of actions taken by Executive Council under section 35

38 (1) A person who is adversely affected by an action taken by the Executive Council under section 35 may apply to the Judicial Council for a review of the order.

(2) As soon as practicable after receipt of the application, the Judicial Council must conduct the review applied for, and by order may

- (a) reverse or modify the action taken, with or without conditions, or
- (b) confirm the action taken.

(3) As soon as practicable after completion of the review, the director must notify the affected person of

- (a) the outcome of the review, and
- (b) the person's right under the Judicial Review Procedure Act (British Columbia) to apply to the Supreme Court of British Columbia for judicial review of the cancellation order.

Positions of the Parties

[32] TFN submits that the encroachment of the Retaining Wall, Fill, and Concrete Pad amount to trespass under the common law and the TFN's *Land Act*.

[33] The defendants acknowledge that a portion of the Retaining Wall and the entirety of the Concrete Pad encroach onto Lot 4. However, they argue that this is not trespass because:

- a) of the terms of the Consent to the Assignment of the Lease, dated October 25, 2010 (addressed in the next section);
- b) the encroachments were in place when the defendants purchased the leasehold interest;

- c) the new Retaining Wall was built in 2014 to maintain the integrity of the property, consistent with their obligations as tenants;
- d) the encroachments were known to TFN for over a decade before the Notice of Trespass was delivered on November 30, 2021; and
- e) removal of the retaining wall is contrary to the right of Lot 28 for lateral support.

Discussion

[34] TFN may have known of the existence of a retaining wall and/or concrete pad on Lot 28 but there is no evidence that TFN knew that the Retaining Wall, Fill, and Concrete Pad encroached onto Lot 4 until April 26, 2021.

[35] The Retaining Wall, Fill, and Concrete Pad directly encroach onto Lot 4. Accordingly, the first and third requirements of the test for trespass are satisfied.

[36] The defendants allowed these encroachments to remain in place after it was brought to their attention that the Retaining Wall and Concrete Pad were over the property line. In 2014, the defendants constructed a new section of the Retaining Wall, partially on Lot 4. Their assertion that they did so based on their understanding of their obligations as tenants does not explain their failure to obtain the necessary permits and authorization from TFN.

[37] The defendants' conduct in refusing to remove the encroachments after TFN issued the Notice of Trespass constitutes an intentional trespass of a continuing nature. This is because the legal element of intention is satisfied where the conduct of the defendants is voluntary or intentional in nature. The defendants chose to maintain the Retaining Wall, Fill, and Concrete Pad after being notified that they encroached onto TFN's Lot 4.

[38] The three requirements for common law trespass are satisfied. The defendants' failure to remove the encroaching structures means that the trespass is a continuing trespass which gives rise to a new cause of action every day.

[39] The encroachment of the Retaining Wall, Fill, and Concrete Pad also amount to trespass under the TFN's *Land Act* because the defendants:

- a) permitted the Retaining Wall, Fill, and Concrete Pad to occupy part of Lot 4;
- b) constructed a section of the Retaining Wall, which included the addition of an unknown amount of Fill, on Lot 4; and
- c) failed to comply with TFN's written demand that they cease the trespass.

[40] If the defendants believed that the issuance of the Notice of Trespass was unreasonable, they could have applied to TFN's Judicial Council for a review of the decision. They failed to do so.

[41] Pursuant to the *Land Act*, TFN could have removed the Retaining Wall and Concrete Pad at the defendants' cost.

Did TFN Consent to the Encroachments and, if so, was Consent Revoked?

Relevant Facts

[42] The building plans for the Property do not show the Retaining Wall or Concrete Pad, and the Retaining Wall and Concrete Pad are not referred to in any permits on record with the Municipality of Delta.

[43] There is no evidence as to the exact age of the original Retaining Wall and Concrete Pad. It is common ground that both existed when the defendants purchased their leasehold interest in the Property on October 25, 2010.

[44] Golder Associates Ltd. conducted site reconnaissance at the Bluff in December 2009 and January 2010 and identified the existence of a retaining wall and concrete pad at the Property. Accordingly, TFN knew of the existence of the Retaining Wall and Concrete Pad but there is no evidence that it knew that they encroached on Lot 4 until April 26, 2021.

[45] As noted, on April 3, 2009, the TFN Final Agreement came into force. It provided TFN with jurisdiction over its lands, including lawmaking authority. Prior to this date, TFN did not have the authority to issue permits.

[46] The Property is subject to a headlease between His Majesty the King in Right of Canada (“Canada”) and Stahaken Developments Ltd. (“SDL”) dated June 19, 1987 (the “Headlease”).

[47] Pursuant to Schedule “A” of the Headlease, before constructing any improvements on the Property, a lessee is required to submit for approval plans and specifications to an environmental committee appointed by TFN’s development company, SDL.

[48] Section 5 of the Headlease requires a lessee to obtain an improvement permit from the Minister of Indian and Northern Affairs (the “Minister”) before constructing any improvement on the Property.

[49] Schedule “B” of the Headlease requires a lessee to ensure that any works, buildings or structures to be constructed, erected, or placed within the Demised Lands (as defined in the Headlease) conform with the standards contained in the City of Delta’s (“Delta”) Building Bylaw.

[50] In 1987, the Minister and Delta issued permits with respect to the construction of a residence and improvement of the Property.

[51] By an Assignment of a Lease-Hold Interest dated October 25, 2010 (the “Assignment Agreement”), Patricia Kloschinsky assigned all of her interests in the Property and the Headlease to the defendants. TFN consented to the assignment.

[52] Recital “I” in the Assignment Agreement to the defendants provides:

As at the effective date of this agreement first set out above, the Tsawwassen First Nation is the sole owner of the fee simple estate in the Demised Lands and Premises. The Tsawwassen First Nation has given its unconditional consent and approval of the assignment of the Headlease in relation to the Demised Land and Premises in accordance with the Tsawwassen First Nation Land Act 2009.

[53] The Assignment Agreement does not refer to any rights of encroachment on the neighbouring Lot 4.

[54] At the time that TFN consented to the Assignment Agreement, and at all material times up until April 26, 2021, there is no evidence that TFN was aware that the Retaining Wall and Concrete Pad were encroaching onto Lot 4.

[55] The defendants have never been advised that TFN consented to the encroachments.

[56] At the request of TFN, Andrew Jenkins of Watson & Barnard Land Surveying & Engineering prepared a topographic survey dated April 26, 2021, which identified that the Property's leasehold improvements such as decks, fences, and retaining walls were encroaching onto Lot 4. This included both the Retaining Wall, which encroaches by 4.71 metres at its furthest point onto Lot 4, and the Concrete Pad, which encroaches by 6.79 metres at its furthest point onto Lot 4. This is how TFN became aware that the Retaining Wall and Concrete Pad encroached onto Lot 4.

Legal Principles

[57] "In order for consent to be implied from acquiescence, it is essential that the party alleged to have acquiesced, had full knowledge of its legal rights.": *Montreal Trust Co. v. Herc Oil Corp.*, 2004 SKCA 116 at para. 23; *Johnson v. British Columbia Hydro and Power Authority*, 1981 CanLII 641 (B.C.S.C.), 27 B.C.L.R. 50 at para. 9.

[58] The court in *Montreal Trust Co.* summarized the necessary indicia of the defence of leave and licence at para. 36:

[36] [...]

- i) tacit consent, implied from conduct [...];
- ii) an agreement or understanding, or the anticipation of an agreement, for the defendant to be on the land [...];
- iii) trespass over a long period of time, years before litigation commenced [...];
- iv) the plaintiff had knowledge of the trespass [...];

- v) the plaintiff had knowledge of its own legal rights and did not make a mistake as to its legal rights [...];
- vi) the plaintiff had no reason to believe the trespasser thought he had a legal right to be on the land [...];
- vii) the defendant did not ignore the plaintiff [...]; and
- viii) lack of defiance or contempt in defendant's conduct [...].

[Citations omitted.]

[59] The burden of proving consent and/or the defence of “leave and licence” lies with the defendants: *Montreal Trust Co.* at para. 23.

Positions of the Parties

[60] The defendants submit that they are not trespassing because the encroachment of the Retaining Wall and Concrete Pad was authorized. This is based on the terms of the Assignment Agreement to which TFN provided an “unconditional consent and approval”.

[61] TFN denies that the encroachments were authorized either expressly or by implication and states that even if consent could be implied, this consent was revoked when TFN issued the Notice of Trespass.

Discussion

[62] There is no evidence that TFN, SDL, or Canada expressly authorized the encroachments onto Lot 4.

[63] The defendants' submission that the original Retaining Wall and Concrete Pad must have been approved is contradicted by the fact that they constructed the addition to the Retaining Wall in 2014 without obtaining any approvals.

[64] Given the absence of any express consent, the defendants assert that TFN acquiesced to the encroachments. However, TFN only became aware that the Retaining Wall and Concrete Pad were encroaching in 2021, so it did not have the required knowledge of its legal rights at the time that it consented to the Assignment Agreement.

[65] The defence of acquiescence fails because TFN did not have knowledge of its rights until April 26, 2021, at the earliest. TFN was therefore within its rights when, by the Notice of Trespass dated November 30, 2021, demanded that the defendants remove the Retaining Wall and Concrete Pad.

Did the Defendants Breach the Lease

Relevant Facts

[66] Under the Headlease, Canada, as represented by the Minister, leased to SDL certain lands previously forming part of the Tsawwassen Indian Reserve No. 0 (the “Demised Lands”). The Demised Lands include the Property.

[67] By virtue of the TFN Final Agreement and the ensuing transfer of the Demised Lands from Canada, TFN became the lessor of the Property so any references to the Minister in the Headlease in substance refer to TFN.

[68] The Headlease contains the following relevant terms:

- a) the Lessee covenants and agrees that prior to commencing any improvements as hereinafter defined, it will obtain from the Minister or the Minister’s duly authorized representative an Improvement Permit and no residential improvement shall be occupied until such time as the Lessee has obtained from the Minister or the Minister’s duly authorized representative an Occupancy Permit (the “Improvement Permit Requirement”): Headlease, s. 5(1);
- b) the Lessee shall not, without the prior written consent of the Minister ... undertake, suffer or permit any improvement, construction, demolition, alteration, remodeling, change or replacement (hereinafter referred to as “improvements”) on the Demised Lands which is not effected in accordance with the provisions of this Lease and the Environmental Program attached hereto as Schedule “A” (the “Environmental Program Compliance Requirement”): Headlease, s. 5(2)(b);

- c) the Lessee covenants that it shall, during the Term, at its own expense, promptly observe, perform, execute, and comply with all laws, rules, requirements, orders, directions, ordinances, and regulations of every authority having such competence, civic, municipal, provincial, federal or otherwise, concerning the Demised Lands and buildings, or other improvements constructed therein and thereon not inconsistent with the Indian Act, and all amendments thereto from time to time enacted (the “Legal Compliance Requirement”): Headlease, s. 13; and
- d) Lessees shall not construct, alter, or maintain any improvements on the leased premises until the lessees have submitted to the Committee two (2) complete sets of preliminary plans and specifications therefore in a form satisfactory to the Committee (the “Committee Approval Requirement”): Headlease, Schedule “A”, s. 2.3(a); and
- e) No structures, such as swimming pools, tennis or sports courts, patios, barbeques, posts or towers or major landscaping requiring the addition or removal of fill or soil, or any part thereof, shall be constructed, reconstructed, moved, extended, or located within the said Bluff Management Zone unless an opinion prepared and sealed by a qualified geotechnical engineer, stating that the proposed works would not endanger the stability of the soil in the said Bluff Management Zone or cause such soil to become susceptible to erosion, slippage, landslide, slumping, or settling, has been submitted to the Minister, Department of Indian Affairs and Northern Development... and prior approval in writing by the Minister has been obtained (the “Geotechnical Opinion Requirement”): Headlease, Schedule “C”, s. (b)(i).

[69] Schedule “C” of the Headlease defines the Bluff Management Zone as “that portion of the Demised Lands shown boldly outlined on the Plan completed by R.P. Justice on the 10th day of March, 1986 and of record in the New Westminster Land Title Office under plan number 75030”.

[70] The Bluff Management Zone is an area that was established by engineers hired to review the Bluff during and prior to the development of the subdivision at the top of the Bluff. The reason for establishing a Bluff Management Zone is because the crest of the Bluff is somewhat unstable and building there could lead to landslides.

[71] On April 3, 2009, TFN enacted the *Land Act*, the *Land Use Planning and Development Act (2009)* [*Land Use Act*], and the Tsawwassen First Nation Building Regulation, 2009 (the “Building Regulation”) pursuant to the *Land Use Act*.

[72] The Building Regulation provides, in part, that a registered professional shall undertake and conduct field reviews of the construction of a retaining structure 1.22 metres or more in height and that sealed copies of the design plan and field review reports prepared by the registered professional for all retaining structures 1.22 metres in height shall be submitted to a building official prior to acceptance of the works (the “Professional Review Provision”).

[73] Accordingly, since April 3, 2009, the Demised Lands, including the Property, have been subject to TFN laws including the *Land Act*, the *Land Use Act*, and the Building Regulation.

[74] As noted, on October 25, 2010, the defendants entered into the Assignment Agreement whereby they acquired a leasehold interest in the Property. Pursuant to the terms of the Assignment Agreement, the defendants agreed to abide by the terms of the Headlease at all times.

[75] During Mr. Martinolich’s cross-examination, he admitted that the defendants had an opportunity to review the Headlease and/or have their solicitor or realtor explain the terms of the Headlease to them before entering into the Assignment Agreement. He also admitted that the defendants had an opportunity to review the Headlease in the years subsequent to the Assignment Agreement, but they did not do so.

[76] In 2014, the defendants hired a contractor to replace the main section of the Retaining Wall. The new Retaining Wall was built partially within the Bluff Management Zone, which is on the Property, while the rest of it is on Lot 4.

[77] The new Retaining Wall is 1.5 metres in height at its maximum. It is made of new material and involved the installation of an unknown number of 20-foot long timbers that run towards the house with four-footlong timbers running crossways, known as “deadmen”, anchoring the Retaining Wall toward the house. The new Retaining Wall also included a drainage system designed to discharge water through three pipes protruding onto the Bluff.

[78] The defendants did not seek approval from either TFN or Delta before constructing the new Retaining Wall, nor did they obtain a professional geotechnical opinion on the construction of the new Retaining Wall. They did not inform TFN that they had constructed an addition to the Retaining Wall until after the Debris Slide in 2021(described below).

[79] The defendants have been on notice that the Retaining Wall and the Concrete Pad encroach onto Lot 4 and need to be removed since the issuance of the Notice of Trespass on November 30, 2021. However, the defendants have failed or refused to remove them.

Legal Principles

[80] Contracts, including leases, are to be interpreted in a practical, common-sense manner, not dominated by technical rules of construction. The primary objective is to determine the intent of the parties and the scope of their understanding. The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] at para. 47.

[81] There are three different types of contractual breaches:

- a) a failure to perform a single obligation due at a specific time, sometimes called a “once-and-for-all” breach;
- b) a failure to perform an obligation scheduled to be performed periodically; and
- c) a breach of a continuing obligation under a contract.

Singh v. Minhas, 2023 BCCA 7 at para. 42, citing *Pickering Square Inc. v. Trillium College Inc.*, 2016 ONCA 179.

[82] In appropriate circumstances, the courts recognize continuing breaches of contract and allow the limitation period to be reset each day that the breach continues. Such a characterization is appropriate only where the defendant’s contractual obligations are of a continuing nature: *Singh* at para. 41.

[83] The courts may properly consider a contravention of a statute, bylaw, or rule to be so minor as to not warrant the court’s concern: *Abdoh v. The Owners of Strata Plan KAS2003*, 2014 BCCA 270 at para. 24. However, this principle is applied narrowly, and the courts have found that a property height modification of just 16 inches can overcome the application of this principle where there is evidence as to the value, in subjective and objective terms, of the consequence of the breach: *Wallster v. Erschbamer*, 2011 BCCA 27 at para. 19.

Positions of the Parties

[84] TFN submits that the defendants have breached the Lease by:

- a) reconstructing and adding to the Retaining Wall without obtaining the required permits or authorization; and
- b) failing to comply with the laws set out in the TFN’s *Land Act* and by breaching the common law of trespass.

[85] The defendants assert that their failure to obtain a permit is merely a technical breach and that the additional 28 centimetres of height of the new Retaining Wall is minor and, therefore, *de minimis*.

Discussion

[86] The defendants are clearly bound by the terms of the Headlease because they agreed to abide by its terms as confirmed by their signatures on the Assignment Agreement. As noted, on cross-examination, Mr. Martinolich confirmed that the defendants had an opportunity to review and understand the terms of the Headlease, or to have their realtor or lawyer explain the terms of the Headlease, before he signed the Assignment Agreement.

[87] The Headlease defines “improvements” as “any improvement, construction, demolition, alteration, remodeling, change or replacement”. A practical, common-sense interpretation of this definition clearly captures the work done by the defendants in constructing the new Retaining Wall. The new Retaining Wall is a different design than the old one and it altered, improved, and changed the original Retaining Wall.

[88] I am satisfied that the defendants breached the Headlease by constructing a substantial new Retaining Wall in 2014 because they did not seek or obtain the necessary permits and authorization from TFN. The Headlease required that they obtain the permits and authorizations from TFN according to the Improvement Permit Requirement, the Environmental Program Compliance Requirement, and the Committee Approval Requirement (collectively, the “Improvement Approval Requirements”).

[89] The defendants also breached the Geotechnical Opinion Requirement when they constructed the new Retaining Wall. The Geotechnical Opinion Requirement requires an opinion prepared and sealed by a qualified geotechnical engineer to be submitted to TFN before any structure, including “major landscaping requiring the addition or removal of fill or soil”, is constructed, reconstructed, moved, extended, or located within the Bluff Management Zone. It is common ground that a portion of the

Retaining Wall was constructed within the Bluff Management Zone, and that the defendants did not obtain a geotechnical report before constructing the new Retaining Wall.

[90] I recognize that s. 12 of the Headlease obligates the lessee to keep all improvements on the Demised Lands in a good and tenantable state of repair. However, this does not excuse the defendants' actions in constructing the new Retaining Wall without proper authorization because:

- a) the defendants did not "repair" the existing Retaining Wall, they built a substantial addition to the Retaining Wall with a new, heavier, design; and
- b) section 12 refers to improvements on the Demised Lands and the Retaining Wall is largely not on the Demised Lands.

[91] The defendants also breached the Headlease by failing to comply with the Building Regulation. The Professional Review Provision provides that a registered professional shall undertake and conduct field reviews of the construction of a retaining structure 1.22 metres or more in height. The Retaining Wall is 1.5 metres at its highest point, so the defendants should have had a registered professional conduct a field review before its construction.

[92] In my view, the breach of the Building Regulation is more than a minor, *de minimis* breach, as asserted by the defendants. The Retaining Wall is 28 centimetres higher than the permitted 1.22 metres under which a professional opinion would not be required. The Retaining Wall therefore exceeds the maximum permitted threshold by approximately 23%—clearly more than a trifling deviation.

[93] It is common ground that the defendants did not obtain a professional geotechnical opinion when they constructed the new Retaining Wall, therefore, the defendants breached the Building Regulation.

What are the Appropriate Remedies for Trespass and Breach of the Lease**Relevant Facts**

[94] Wayne Savigny is a registered professional geotechnical engineer and geoscientist. He provided an expert report in which he noted that slope instability is commonplace at the top of the Bluff and it is exacerbated by non-compliance with geotechnical guidelines. Specifically, he opined that:

- a) the addition of material to the top of a slope is destabilizing;
- b) the weight of the Property's fill material alone has the potential to cause instability; and
- c) the loose condition of the fill can also lead to piping, which is when water movement through loose material can dislodge and carry soil with it.

[95] As previously described, in 2014, the defendants constructed an addition to the Retaining Wall without applying for permits or obtaining a geotechnical design or opinion.

[96] In November 2021, during a period of heavy rainfall, there was a slope failure at the upper part of the Bluff below the Retaining Wall (the "Debris Slide"). This resulted in a loss of fill and drain rock from behind the Retaining Wall.

[97] According to Mr. Savigny, the Debris Slide occurred after fill beneath the yard and Retaining Wall became saturated. The saturated fill then detached as a debris slide. This resulted in an undermining of the Retaining Wall.

[98] TFN granted the defendants multiple extensions of time to comply with the Notice of Trespass, with the last extension ending on June 1, 2023, one full year after the initial deadline and a total of 18 months after the Notice of Trespass was issued. Despite these extensions, the defendants never provided a plan to TFN for removal of the Retaining Wall or Concrete Pad, and the Retaining Wall and Concrete Pad continue to encroach onto Lot 4.

[99] The terms of the Headlease and TFN's Building Regulation provide a process by which the defendants could apply to TFN for a permit to install a new engineered retaining wall on the Property. If the defendants were to apply, TFN would review the application.

Legal Principles

[100] Injunctive relief is strongly favoured when there is interference with property rights because it is the essence of the concept of property that an owner should not be deprived of his rights without consent: *Ward v. Cariboo Regional District*, 2021 BCSC 1495 at paras. 302–303.

[101] The rule favouring injunctive relief is even stronger in trespass cases as compared to nuisance cases, especially where the trespass is deliberate and continuing: *Ward* at para. 305

Positions of the Parties

[102] TFN says that the defendants' trespass warrants a mandatory injunction requiring them to remove the encroaching portions of the Retaining Wall and Concrete Pad and restore any area of the Property or Lot 4 damaged by the Retaining Wall and Concrete Pad. Pursuant to a satisfactory geotechnical plan, TFN wants the defendants to remove the Retaining Wall because it plans to undertake slope stabilization work where the Retaining Wall is currently located.

[103] TFN seeks the following relief:

- a) The defendants shall retain a geotechnical engineering firm (the "Engineer") with slope stability experience, and the choice of firm shall be subject to prior consultation with, and approval by, TFN;
- b) The Engineer shall prepare a plan (the "Removal Plan") for the removal of the Retaining Wall, Fill, and Concrete Pad and the restoration of that part of the slope affected by the Retaining Wall, Fill, and Concrete Pad;

- c) The Removal Plan shall be finalized by no later than three months following judgment, unless otherwise agreed between the parties, and shall be subject to TFN's approval before it is adopted and implemented;
- d) If the parties are unable to agree upon the Removal Plan, they shall have leave to return to court to have any specific issues in dispute resolved;
- e) The Removal Plan shall be implemented and all work pursuant to the Removal Plan shall be completed no later than six months following judgment unless the parties agree otherwise; and
- f) All costs and expenses arising from and associated with the foregoing orders shall be borne by the defendants.

[104] The defendants are prepared to remove the Concrete Pad but they assert that the reconstructed Retaining Wall ensures lateral support between Lot 28 and Lot 4. Mr. Savigny's report disputes this assertion, noting that the sloughing of Fill under the new Retaining Wall has caused instability.

[105] The defendants submit that even if the encroachment of the Retaining Wall amounts to trespass, the Court should exercise its equitable jurisdiction in declining to grant a mandatory injunction. They further submit that they are at most liable for 50% of the expenses incurred to preserve the slope because it involves both their Property and the adjacent property located at 1261 Pacific Drive.

[106] During closing submissions, the defendants agree that the encroachment of the new Retaining Wall is not *de minimis*, but they suggested that it ought to be left in place in consideration of their willingness to remove the Concrete Pad.

Discussion

[107] The defendants' trespass is not trivial. The Retaining Wall and Concrete Pad encroach by over 4.71 metres and 6.79 metres respectively at their furthest points onto Lot 4. Based on Mr. Savigny's expert report, these encroachments are in an area that is prone to instability, as demonstrated by the Debris Slide which has left

the Retaining Wall structurally undermined. The Fill also has the potential to cause slope instability.

[108] In my view, a mandatory injunction requiring the removal of the Retaining Wall, Fill, and Concrete Pad, along with restoration of the slope where the Retaining Wall, Fill, and Concrete Pad were located, will adequately address the interference caused by the encroachments. The alternative, permitting the encroachments to remain, would effectively result in an expropriation of TFN land without legislative sanction.

[109] I largely concur with TFN's proposed relief with a few minor adjustments:

- a) The defendants shall retain an Engineer with slope stability experience and the choice of firm shall be subject to prior consultation with and approval by TFN;
- b) The Engineer shall prepare the Removal Plan for the removal of the Retaining Wall, Fill, and Concrete Pad and the restoration of that part of the slope affected by the Retaining Wall, Fill, and Concrete Pad;
- c) The Removal Plan shall be finalized no later than six months following TFN's approval of the geotechnical engineering firm, unless otherwise agreed between the parties, and shall be subject to approval of TFN before it is adopted and implemented;
- d) If the parties are unable to agree upon the Removal Plan, they shall have leave to return to court to have any specific issues in dispute resolved;
- e) The Removal Plan shall be implemented and all work pursuant to the Removal Plan shall be completed no later than six months following the parties' approval of the Removal Plan, unless they agree otherwise;
- f) If the defendants fail to comply with these requirements, TFN is entitled to do the necessary work at the defendants' expense; and

- g) All costs and expenses arising from and associated with the foregoing orders shall be paid by the defendants.

Is TFN Entitled to Solicitor-Client Costs for the Defendants Breach of the Headlease

Relevant Facts

[110] Section 19 of the Headlease provides, in part, that:

- a) Where, in the opinion of the Minister, the Lessee has failed to perform any of the covenants or obligations of the Lessee under or in respect of this Lease, the Minister, in addition to and not in substitution for any other rights and remedies [...] may order the Lessee in writing to rectify the failure, and failing compliance within 90 days of such order, Her Majesty may perform or cause to be performed any such covenant or obligation or any parts thereof [...] and She will be reimbursed therefore from the Lessee forthwith and any sum incurred or spent by Her Majesty [...]

The obtaining of a judgment or judgments on any covenant herein contained will not operate as a merger of such covenant. In the event of any default hereunder, the Lessee will pay full costs arising therefrom, and whether before action or otherwise, and at the option of the Minister, upon a solicitor and client basis (the “Remedies Provision”).

[111] Since January 2022, the defendants have agreed to remove the Concrete Pad. To date, they have not taken any specific steps to do so.

Legal Principles

[112] The determination of whether an indemnity provision provides for a party to recover the actual legal fees it incurred in an action is a matter of contractual interpretation. The court must assume that the words in a contract are there for a purpose and may reject an interpretation that would render one of the contract’s terms ineffective. There are no strict requirements or “magical words or phrases” in order to be entitled to a specific order of costs: *Wanson (Bristol) Development Ltd. v Sahba*, 2017 BCSC 2140 at paras. 9–13.

[113] The court generally favours the enforcement of contractual cost indemnity provisions subject to the court’s discretion: *Peace River Partnership v. Cardero Coal Ltd.*, 2023 BCCA 351 at para. 146.

[114] “[...] [W]here a contractual indemnity provision meets the threshold test of ‘clearly and unequivocally’ establishing the right to indemnification [internal cites omitted], that provision will, in our view, be presumptively enforceable. The burden then shifts to the party opposing indemnification to establish why the court should exercise its discretion to depart from the terms of the contract”: *Peace River Partnership* at para. 148.

Positions of the Parties

[115] TFN submits that if the defendants are found liable for breach of contract, the appropriate remedies are:

- a) injunctive relief requiring the defendants to remedy their breach of the Headlease; and
- b) costs on a solicitor-client basis.

[116] The defendants assert that their failure to obtain a permit was merely a technical breach because they assert that TFN knew about the construction of the new Retaining Wall. The defendants further assert that as retired pensioners, they proceeded with this litigation because they believed they had an arguable case. They submit that ordinary costs should apply.

Discussion

[117] TFN was forced into this litigation because, despite several extensions granted to the defendants, they refused to comply with the terms of the Notice of Trespass and breached the Headlease. The claim for solicitor-client costs was explicitly identified in the notice of civil claim so the defendants knew that paying these costs was a risk of continuing with this litigation.

[118] The starting point in assessing costs for this matter is not ordinary costs because the Headlease explicitly contemplated solicitor-client costs at the discretion of the lessee, TFN.

[119] I accept that the defendants offered to remove the Concrete Pad in 2022 but to date, they still have not removed this obvious encroachment onto Lot 4. More importantly, the defendants have not taken any substantive steps to comply with the Notice of Trespass, despite repeated time extensions. They have not hired a geotechnical engineer to develop a plan to cure the trespass. Instead, the defendants chose the course of litigation. In these circumstances, I decline to exercise the court's discretion to depart from the contractually agreed upon term that TFN is entitled to solicitor-client costs.

[120] The plain and explicit wording of the Remedies Provision at s. 19(a) of the Headlease makes it clear that the consequences of default include TFN's right to recover costs on a solicitor and client basis. This meets the threshold described in *Peace River Partnership* of clearly and unequivocally establishing the right to indemnification. To hold otherwise would negate this term.

[121] With the burden resting on the defendants, I find that they have failed to establish why the Court should exercise its discretion to depart from the contract.

[122] TFN is therefore entitled to its costs of this action on a solicitor-client basis for the steps required to remedy the defendants' breach of the Headlease.

Conclusion

[123] The defendants' encroachments onto Lot 4 and their failure to remove those encroachments constitute a continuing trespass under the common law and TFN's *Land Act*.

[124] The defendants' construction of a new Retaining Wall in 2014 and their ongoing trespass on Lot 4 also constitute a breach of the Headlease.

[125] I do not accept the defendants' argument that the encroachments were authorized. There is no evidence that any such authorization was provided by TFN or any other entity. Furthermore, TFN was not aware of its legal rights until at least

April 26, 2021 so there is no basis to argue that it should be deemed to have consented by acquiescence.

[126] In my view, TFN acted reasonably by notifying the defendants that the Retaining Wall and Concrete Pad were encroaching onto Lot 4 and providing them with a reasonable deadline to remove them. TFN's actions have not been arbitrary but have been consistent with its rights of possession and its desire to protect the Bluff.

[127] TFN's possessory rights have been significantly affected. Accordingly, TFN is entitled to a mandatory injunction requiring the removal of the Retaining Wall, Fill, and Concrete Pad at the defendants' cost, as well as solicitor-client costs pursuant to the terms of the Headlease.

"Basran J."