3090-20 / DV 3B 20
D. Thiessen

1SUSAN FIELD
106 GAGE ROAD
COMOX BC V9M 3W4

September 8, 2020

Attention: Dylan Thiessen
Planner

Comox Valley Regional District
770 Harmston Avenue
Courtenay BC V9N 0G8

Dear Sirs:

RE: Development Variance Permit Application - 107 Gage Road (Silcox)
Lot 2, District Lot 140, Comox District, Plan 41961, PID 001-037-978
Your file: 3909-20/DV 3B 20

I have received your letter of August 31, 2020 inviting me to comment on the captioned proposal. As the owner of the property located at 106 Gage Road, I am directly affected by this subdivision proposal.

Reducing the minimum road frontage subdivision requirement to accommodate this "lot line adjustment" will enhance the potential for the further development of the property (which it will, based on site coverage ratios). I believe that this is a bad idea. I can see no other concrete benefit to the proposed subdivision - other than as a way to potentially interfere with the use and enjoyment of my own property - without providing any tangible benefit to the applicant.

The history of the relationship between the applicant and myself is set out in some detail in the reported decision of the Supreme Court of British Columbia in *Silcox v Field* (2010 BCSC 1373). A copy is enclosed and the comments of the Judge at paragraphs 53 to 55 are particularly relevant. Approval of the variance, and the ultimate approval of the subdivision plan will substantially increase the length - and location- of the boundary between that of my property and that of the applicant. And the potential for future conflict between myself and the applicant is also increased. 78

The applicant is seeking a "variance". The granting of this application is discretionary. Without a substantive and substantial benefit to his own property, I see no reason to approve his request - and a very good reason to deny it. I ask that you consider this application in a broad context, and deny the request.

Your very truly,

Susan M Field

SUSAN FIELD
Enc.

00048980-00273733

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Silcox v. Field,*
2010 BCSC 1373

Date: 20100930
Docket: S07545
Registry: Courtenay

Between:

Robert Alexander Silcox and Kathryn Silcox

Plaintiffs

And

Susan Marjorie Field

Defendant

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Plaintiffs:	E.A. Holekamp
Counsel for the Defendant:	B.E. Hutcheson
Place and Date of Trial:	Nanaimo, B.C. May 11-14, 2010
Place and Date of Judgment:	Courtenay, B.C. September 30, 2010

[1] This action arises out of a dispute between adjacent landowners in a rural area outside of Comox, B.C. The dispute culminated in the defendant erecting a wall of earth topped by a row of large concrete blocks, along a southern portion of the boundary between their properties. The plaintiffs say that this contravened an agreement they had reached with the defendant in April 2006. Under that agreement, the plaintiffs had acquiesced in the defendant's purchase of a road allowance which abutted their properties at the north end. In return, they say, the defendant had agreed to do a number of things, including preserving their view – what they call their "viewscape" – over the southern end of the defendant's land, out over the Straits of Georgia. That view has been blocked by the wall.

[2] The plaintiffs therefore seek an injunction compelling the defendant to remove the concrete blocks, vegetation, and fill installed by her after April 29, 2006, and restraining the defendant permanently from interfering with the view as it existed on that date.

[3] A Reference Plan in evidence shows the layout of the most northern portion of the subject lands at the south end of Gage Road. The defendant's land, which is situated on the shore along a cliff top, is at the lower right, southeast corner of the Plan. The plaintiffs' land, labelled Lot 2, is at the lower left, and has a narrow panhandle leading north up to Gage Road. Separating the lots at Gage Road is a road allowance, Crown land, a horizontal plot divided more or less diagonally into Areas "A" and "B". (What I will refer to as the disputed area, where the plaintiffs' view has been impeded by the erection of the defendant's wall, is to the south of the area depicted in this Reference Plan.)

[4] The defendant and her now former husband built the house on her property in 1981. They obtained a closure of the Area A portion of the road allowance and purchased it from the Crown in 1991, leaving Area B intact. In 2002 they separated, with her husband moving to a house they had been building on a separate adjoining lot immediately to the southwest. The defendant now lives on her property with her mother.

[5] In 2004, more than a year before the plaintiffs purchased their lot, the defendant undertook improvements to the entrance to her property. This was the first substantial work on the property she had undertaken on her own since she and her husband had separated. She hired a surveyor to determine the location of her property line. Due to a misunderstanding or a miscommunication, what the surveyor ended up marking was not the line between the defendant's Area A and Area B, which was still owned by the Crown, but instead the line between Area B and what later became the plaintiffs' property, Lot 2. Relying on the survey, the defendant erected a deer fence and planted a tall hedge along what she thought was her property line, and created a gateway to her property spanning the width of the road allowance.

[6] The plaintiffs purchased Lot 2 in November 2005. It was completely undeveloped. They had been looking for a view property on which to build their retirement home, and they were enamoured of the view of the water across the defendant's property.

[7] Access to the property from Gage Road was a concern given the narrowness of the panhandle. From conversations with neighbours, advice they received from a consultant and communications with the Ministry of Transportation, the plaintiffs learned something of the history of the road allowance. They also discovered that the defendant's fence, hedge, and gate went beyond her property line.

[8] Dr. Silcox believed or understood that since the defendant had been allowed to purchase Area A, he and his wife could be entitled to purchase Area B. They also learned that as an alternative to purchasing it, they could apply to the Ministry for an access permit entitling them to build a driveway across Area B, and they did so in December 2005. The sketch plan attached to their application shows that they intended the driveway to take up to approximately two-thirds of the total area of Area B, with the width of the proposed driveway extending over the property line by up to six metres, i.e., directly into the portion which the defendant had fenced off and had been using.

[9] That permit was granted on January 12, 2006. The plaintiffs, in making their application, did not disclose to the Ministry the defendant's prior and ongoing use of the Area B. Neither, at that time, did they advise the defendant of her encroachment into Area B, nor of their having obtained an access permit.

[10] Around the same time, the plaintiffs began discussions with the defendant about means of enhancing and preserving their view across her property. They intended to build their house, and a carriage house, at the southwest corner of their property, and they hoped to preserve the view of the mainland, to the east across the straits. At an early stage of these discussions, they suggested to the defendant the possibility of obtaining from her a view covenant. The defendant dismissed this suggestion out of hand, as she did not want to burden the property; however, as a good neighbour, she was, at least initially, open to considering taking a number of other steps for the plaintiffs' benefit.

[11] One of the first items discussed was the movement of a hydro pole, and burying of power lines. The plaintiffs asked if the defendant would consent to having this done, at their expense, and she agreed. This work was done in early 2006. It turned out to be more expensive than the plaintiffs anticipated, and they asked the defendant if she would consider contributing towards the additional cost, as they believed that removal of the pole had enhanced her lot as well. The defendant declined this request.

[12] Also around this time, Dr. Silcox asked the defendant if he could remove a large dead branch from a tree situated toward the extreme north end of the view area. The defendant's evidence is that Dr. Silcox said that this would give him "viewscape" in an area which the defendant perceived to be about 14 feet wide. She could not remember if Dr. Silcox specifically referred to the 14-foot figure in making his request, but she was quite clear that she associated the term "viewscape" with that area of her land.

[13] Dr. Silcox denies using the word "viewscape" with the defendant at that time. He says that that word was first used with the defendant, in a letter that was sent to

her on April 22, 2006; during a meeting at the defendant's house which followed that letter, he recalls the defendant saying that she didn't know what that word meant, she had never heard it before.

[14] Having heard all of the parties, and with regard to the totality of the evidence, I am persuaded that what Dr. Silcox intended in this discussion about removing the tree branch, was simply to widen his view at that point. However, I am also persuaded that the term "viewscape" probably was used during that earlier conversation, and that from that moment on the defendant associated that word with the limited additional view. This misunderstanding, I have concluded, is at the root of the parties' dispute.

[15] The defendant agreed that she would keep that area clear. She regarded this as a promise on her part, and though there has been growth allowed in that area as this litigation has been pursued, she has continued to keep that area marked off.

[16] At about the same time, Dr. Silcox asked the defendant whether he could clear a growth of broom at the cliff top. The defendant understood him to mean only to clear the broom in the 14-foot area under the dead branch, and said "take all you want." Dr. Silcox testified that he thought this was strange, but rather than clarifying the remark he proceeded on the basis that he was free to clear out all the broom along that strip of land, and sometime later he did so, clearing off a long strip of the cliff top situated to the south of the pine tree with the dead branch, all the way down to a maple tree. This considerably opened up the plaintiffs' view outwards from the cliff top.

[17] The defendant says, and I accept, that she was shocked by the extent of the clearing undertaken by the plaintiffs. This had been a private, tranquil area of her land; she described it – I think, without exaggeration – as "a pretty little corner, a little treasure." She and her family had done a lot over the years to build up the vegetation in this area, to minimize the threat of erosion. She telephoned Dr. Silcox to get his explanation. It became apparent to both parties that there had been a misunderstanding.

[18] At this point, the defendant might have realized that Dr. Silcox had no particular interest in limiting his enhancements to the view, to the 14-foot area. The plaintiffs, for their part, might have realized that the defendant had no particular desire to alter a large portion of her land. They also could have realized the need for clarity in their communications with the defendant. Unfortunately, none of the parties, it seems, drew any useful lessons from this initial misunderstanding.

[19] Shortly after this incident, the plaintiffs asked the defendant if she would mind if they came onto her property occasionally to sit near the top of the cliff. The defendant said she would think this over; she called them back within a day or two and said she was not comfortable with this suggestion. As she explained in her testimony, why would she agree to such a thing with people she hardly knew?

[20] In the late winter or early spring, the defendant decided to make some improvements to the area where B.C. Hydro had buried the power cables. She erected a new fence along the property line, and planted cypresses along it. Dr. Silcox then approached her, asking her why he hadn't been consulted, and whether she would consider a different style of fence. She found him aggressive. She testified that it seemed to her that every time she had contact with Dr. Silcox, he wanted something from her.

[21] The next thing Dr. Silcox complained of was the height of the newly-planted cypresses. He did not want them to grow too tall and block the view. She decided that this request was not unreasonable. They negotiated, and she agreed to limit their growth to the fence height, about six feet. In her mind, she offered to do so as a courtesy to him. She testified that she distinguished that "courtesy" from the "promise" she had made to keep the 14-foot area clear, although there is no evidence that there was any explicit conversation between her and Dr. Silcox of that distinction. Ultimately, nothing turned on this distinction.

[22] A short time after that, the plaintiffs began adding fill at the southeast corner of their property, building up the height by approximately six feet. It is at this location, near the mutual property line, that they subsequently built their gazebo, and

immediately east of that location where the defendant later erected her "wall". Dr. Silcox testified that the fill raised their land up to approximately two or three feet above the top of the defendant's deer fence. The fill was added without any consultation with or notice to the defendant. The defendant testified that she felt that the plaintiffs had played a "dirty trick" on her by getting her to agree on limiting the height of the cypresses, and then building up the height of their property.

[23] By this point in time it was early spring, and the plaintiffs remained frustrated by the defendant's unwillingness to give a view covenant. Dr. Silcox felt that her resistance to the idea was unreasonable. He had it in mind that in order to secure their view he could trade off their entitlement to Area B. One day the parties were all out on their properties, near the top of the cliffs. Dr. Silcox asked – for what the defendant said was the second or third time – whether he and his wife could sit on her property. Her reply was, "I've told you before, no." The defendant says that Dr. Silcox retorted, "I don't understand that word." He turned and walked away, followed by the defendant and Ms. Silcox. Ms. Silcox, according to the defendant, said, "he really doesn't understand that word, but he has other good points."

[24] Dr. Silcox denied having said this, and Ms. Silcox denied having made that remark about her husband. I think it is more probable that they did say something of that nature to the defendant. But regardless of what words were used, I am satisfied that this was very much the impression Dr. Silcox had made on the defendant. His demeanour while on the witness stand, and his characterization of events and his choice of words, were very much those of a man who is acutely aware of and perhaps may have an exaggerated sense of his rights, and is used to getting his way. Dr. Silcox says that he found it very difficult through this period of time to pin the defendant down and get firm commitments from her. It did not seem, from his testimony, that in his pursuit of an enhanced view he had much understanding of the impression he was creating in trying to pin the defendant down, nor much if any empathy for her position.

[25] As they walked away from this encounter, Dr. Silcox turned to the defendant and said words to the effect of, "By the way, your fence and hedge at the entrance to your property are trespassing onto Crown land." He had brought with him papers to prove it, and showed them to the defendant.

[26] The defendant was very upset by this turn of events. As she had already made a number of concessions to the plaintiffs, she felt she had been "set up" by them.

[27] This led to further discussion between the parties. In late April, the plaintiffs visited the defendant at her home. The defendant indicated her willingness to bear the costs of construction of a driveway down the panhandle and of supplying power for a gate at the plaintiffs' entrance. The plaintiffs again asked for a covenant, and the defendant again declined. The plaintiffs followed up with a letter to the defendant dated April 22. It reads in part:

> In order for us to give up the potential for acquiring the area that was supposed to be transferred to our property, we do have a bottom line. As you are aware, we are referring to the preservation of existing viewscape while you are the owner of your property and also continued protection should your property change hands.

[28] The defendant was not interested in this proposal and did not respond. I accept her evidence that in her mind, the covenant the plaintiffs were seeking was in relation to the limited 14-foot "viewscape".

[29] At this point it bears mention that the plaintiffs may not have had as clear-cut an entitlement to Area B, or even to the large portion of it covered by their access permit, as implied by their letter. Their characterization of Area B as a lot "that was supposed to be transferred to our property" may reflect their actual understanding or it may have been an exaggeration for bargaining purposes. The point was not pursued on cross-examination. However, the evidence of Mr. Leet of the Ministry of Transportation was much more equivocal than that. Faced with competing claims to Area B, the Ministry's practice would have been to encourage the parties to work things out; failing that, the Ministry looks to the legitimacy of the competing interests,

and one alternative was that Area B might have been divided so that each could purchase one-half. He did not state that the plaintiffs would have had an unqualified right to the whole of Area B.

[30] Certainly, it stands to reason that the whole of the old road allowance, Areas A and B together, might have been evenly divided between the adjacent landowners if they had been bidding for ownership at the same time; it is entirely conceivable that in that case, the owner of Lot 2 could have obtained the whole of Area B. But by the time the plaintiffs purchased that lot, the old Area A had been owned by the defendant for many years, and she was already using Area B. Further, the plaintiffs had purchased their property without any understanding that they were entitled to any more access to Gage Road. than that afforded through the panhandle. If the Ministry had known of the defendant's use of Area B, it is not by any means clear that the plaintiffs would have been granted a permit to use two-thirds of it. And if the Ministry had become involved in the dispute between the parties over their conflicting desires to use Area B, it has not been established on the evidence that the dispute would have been resolved wholly or even substantially in the plaintiffs' favour. The defendant testified, and I accept, that Mr. Leet's evidence of the Ministry's position was not at all what she had been led to believe by Dr. Silcox. And however the Ministry would have handled the matter, the tone of the April 22 letter is such that I have no doubt that the defendant perceived herself as being at a considerable disadvantage and perceived the plaintiffs as attempting to manipulate the situation to their own advantage.

[31] Within a few days the plaintiffs contacted the defendant again, and Dr. Silcox met with the defendant and her companion Mr. McKay at her home. The parties have rather different perceptions of the outcome of that meeting. Dr. Silcox thought he had reached a comprehensive agreement with the defendant, and the plaintiffs set out their understanding in a letter dated April 29, which was drafted by Ms. Silcox on the basis of what her husband told her had transpired. The letter reads:

> Dear Sue:

> It was a pleasure meeting with you and Jim the other evening and to get some resolution over the driveway and viewscape.
>
> To summarize our arrangement:
>
> 1. You have agreed to pay for the road upgrade to the entrance of our property and to remove the "hump" that is within our property line subject to a suitable estimate from JC & H excavating or other.
>
> 2. You have promised to protect our viewscape by not planting any potentially obstructing trees in the viewscape area, by not allowing the broom to re-grow, to try and establish some sea oats, and to keep the newly planted cypress trees at fence height.
>
> 3. You will supply power to an electric gate if installed.
>
> 4. In return, we agree not to pursue ownership of the road allowance adjacent to our property nor hinder your application for ownership of the complete road allowance thus allowing your existing fence line to remain where it is.
>
> If there is anything that you don't agree with in this letter, please let us know. Otherwise, we look forward to proceeding as discussed.

[32] Dr. Silcox says that whole point of the meeting was to secure the defendant's agreement to preserve their view over her property. He says that he was quite clear about this and quite clear that in return for the defendant's agreement on all these points he was willing to waive any claim over Area B, and that they reached an agreement on that basis.

[33] Dr. Silcox testified that once he had the defendant's agreement he made a statement along the lines of, "Now I'll be able to sit in my wheelchair [when he is older] down there and look out over the water." The defendant and Mr. McKay deny that he made such a remark. Dr. Silcox was not firmly committed to this testimony – he qualified this evidence with the remark, "if memory serves". He also gave evidence to having said much the same thing to the defendant a month or so later, when he invited her up onto their property to show her where the coach house and main house would be, and they both admired the view. I conclude Dr. Silcox was mistaken and I find he did not make that statement during the April meeting.

[34] The defendant's recollection of the meeting is that discussions about the view played little part. She says that Dr. Silcox did ask her, again, for a covenant in relation to the "viewscape," and she again refused. She said that she did not want anything in writing. There were no other discussions regarding the view – all of the

items in the April 29 letter regarding the view had been agreed to previously. She did not see the commitments she had made previously – her "promise" in respect of what she thought was the "viewscape," and her agreement, as a courtesy, to keep the cypresses trimmed so as not to block the view between the pine and the maple – as being in any way related to their discussions during this meeting about Area B. She acknowledges that she agreed that she would bear the cost of the improvements to the plaintiffs' access to their property. At the end of the meeting she understood that Dr. Silcox was going to provide her with a letter that she could take to the Ministry and use in support of her application to purchase Area B.

[35] Mr. McKay had little specific memory of the meeting. He does recall Dr. Silcox asking for a covenant, and the defendant refusing. He says there were no other discussions regarding the view.

[36] Dr. Silcox also testified that during this meeting Mr. McKay remarked that he and his wife had "done a smart thing" by raising their land, and that the defendant nodded in agreement. This statement was not put to Mr. McKay in cross-examination. The defendant says that, to the contrary, she said to Dr. Silcox that she felt he had played a dirty trick by raising his land after getting her to agree to limit the height of the cypresses, but she would nevertheless honour the commitment she had given him. I accept the defendant's testimony on this point – I do not think she would have regarded the elevation of the property over hers as something admirable – and I reject Dr. Silcox's. I believe he has embellished the details of the meeting, consciously or unconsciously, to suit his purposes. This embellishment casts doubt on the whole of his recollection of the meeting.

[37] Ms. Silcox says, and I accept, that the "viewscape" she was referring to in the April 29 letter was intended by the plaintiffs to encompass the whole view between the pine and the maple tree. Of course, she was not at the meeting, and is in no position to say what was discussed.

[38] I make the following observations regarding the April 29 letter. First, the word "viewscape" has no commonly accepted definitions that I have been able to find. The

word appears to be of relatively recent derivation, possibly from compounding "view" and "landscape." The glossary to an on-line Parks Canada guide defines it as "a line-of-sight from a specific location to a landscape or portion of it"; that would seem to be not inconsistent with the defendant's understanding of what the plaintiffs meant, but I do not think the plaintiffs intended that technical a meaning. Dr. Silcox testified that he did not have a particular location from his property in mind. It seems that they intended "viewscape" simply as a synonym of "view" or "panorama".

[39] Second, the letter itself does not define or describe the "viewscape". In particular, it does not state either how wide an area it is to encompass or where on the plaintiffs' property the view in question is to be from.

[40] Third, paragraph 2 of the letter states that the defendant has promised to refrain from doing two specific things to protect the "viewscape" – not to plant any potentially obstructing trees, and not to allow the broom to re-grow. Even if one accepts the plaintiffs' understanding of what the viewscape consisted of, the letter does not state that the defendant had agreed absolutely to keep the viewscape clear. On their face, the terms of the agreement summarized by the letter would still permit the defendant to erect structures which could impede the view – a hydro pole; a windmill; a garden shed; or, potentially, a wall.

[41] Fourth, as a matter of construction, the clause in paragraph 2 concerning the newly-planted cypress trees – which potentially blocked the view between the pine and the maple – does not appear to relate to the "viewscape.". As with the clause concerning the sea oats, it appears to be a promise made independent of the promises concerning the "viewscape area". Thus, there is nothing in the reader's mind to connect the "viewscape area" with the area affected by the cypresses; if anything, they would appear to be separate, or at most overlapping areas of the property. This wording would have done nothing to alert the defendant that the plaintiffs did not share her understanding that the "viewscape" and the area between the pine and the maple were two separate things.

[42] The plaintiffs bear the burden of proof. I am not persuaded on the evidence that there was likely any explicit discussion at the April meeting of the scope of the "viewscape" the plaintiffs were bargaining to obtain. Nor am I persuaded that there was ever, prior to that meeting, any clear, unambiguous statement made by the plaintiffs as to what defined the "viewscape", at least none sufficient to displace the erroneous impression received by the defendant during their discussions about the dead tree branch and the hydro pole.

[43] The defendant says that she was surprised to receive the April 29 letter. It was not what she was expecting. She had already said to Dr. Silcox that she did not want her various commitments to be in writing. She did not consider the commitments concerning the view at the south end of the property to be connected to those concerning the entrance at the north end, and she had only wanted a letter from the plaintiffs stating that they had no objection to her purchase of Area B. Nevertheless, as she agreed under cross-examination, this letter served the same purposes as the one she had expected, and so she submitted it to the Ministry with her application for a road closure. In due course she had an appraisal done, and purchased Area B at a price of $16,000 plus GST.

[44] I pause to note that the defendant's use of the letter was not without legal significance. If the letter's summary of the "arrangement" had in any material way expanded the defendant's obligations beyond those the defendant understood she had undertaken, the defendant, having used the letter to further her own ends, would have been bound to conform to the letter's terms. But I do not find there was any material difference between what the letter clearly said, and what she had understood was expected of her.

[45] In May, the defendant paid an excavating company approximately $3,400 to take out the hump on the plaintiffs' property and build up their gravel driveway. Dr. Silcox complained that the gravel did not match.

[46] It seems that the next year was a period of relative peace between the parties. But in the spring and summer of 2007, there were several incidents of conflict.

[47] The defendant found that because of the fill added by the plaintiffs, deer were able to get over the fence into her property. She decided to raise the fence height by fixing extensions onto the thin wooden fence posts, and stepped onto the plaintiffs' property at the Gage Road entrance to nail them from that side. Ms. Silcox confronted her, complaining that the extensions were unsightly. Ms. Silcox was very agitated. Harsh words were used. Dr. Silcox later said to the defendant that he had never seen his wife so angry.

[48] Photographs of the fence and the extensions are in evidence. There is nothing unusual about the fencing materials; they are of a type commonly seen, and appear to me to be entirely appropriate to the rural area where the parties live. The defendant's trespass onto the plaintiffs' land was trivial. Regardless of whether the extensions were more unattractive when fixed from the plaintiff's side of the fence, it is apparent that Ms. Silcox grossly overreacted. Her behaviour during this incident seems to be an illustration of the plaintiffs' exaggerated sense of entitlement.

[49] Once the height of the fence was extended, the defendant let the cypresses planted along the fence line grow. Dr. Silcox admitted that at one point, he trimmed the tops of some of the cypresses. There are photos in evidence of those trees, with flagging tape showing cuts below the newly-extended fence height. Dr. Silcox denied having cut the cypresses as low as shown in the photographs. I do not believe him.

[50] Next, the defendant did some landscaping to the disputed area, adding large rocks and plants. She taped off a corridor which she understood was the limit of the plaintiffs' "viewscape" so that it could be preserved. At first the plaintiffs simply felt some concern or apprehension about these landscaping changes. But then the defendant added, or they became aware that the defendant had added some saplings – two small pine trees – and some pampas grass, all of which had the potential eventually to grow and block their view. The plaintiffs regarded this as a

provocation and a breach of their agreement with the defendant. Dr. Silcox confronted the defendant on several occasions. He called her a liar and a cheat. On one occasion he swore at her; he apologized in writing, though he maintained that his anger was justified.

[51] Following these confrontations, the defendant retained legal counsel. Counsel wrote to the plaintiffs, advising them that any further communications with the defendant were to be through him. The defendant delivered a copy of the letter to the plaintiffs with a handwritten note inviting them to contact her counsel when they were ready to have power hooked up to their gate.

[52] The plaintiffs, too, retained counsel, who wrote to the defendant's counsel in October 2007. That letter complained about the planting of the pine trees and the pampas grass, describing it as "malicious, self serving, and contrary to the agreement." It further complained that the defendant had left rolls of old fence wire right in their line of sight, and had operated a noisy sprinkler that shot water onto the plaintiffs' property right in front of their guests; these were described as "acts of random malice" which were "ridiculous, unnecessary and un-neighbourly".

[53] For the defendant, the final straw came in the summer of 2008. She and Mr. McKay returned to her home from a weekend in Victoria to find that some of the larger plants in the immediate vicinity of the fence appeared to have been sprayed with a deleterious substance. Their leaves bore brown spots, as if droplets had landed on them. Photographs of the damaged plants are in evidence. The plants eventually turned brown and died.

[54] The evidence of the defendant and Mr. McKay is that the damage was concentrated in an area at or close to the fence separating the defendant's land from the plaintiffs' in the area where the plaintiffs say they were entitled to a view. It appears they were predominantly, if not all, plants that obstructed or had the potential to grow and obstruct the plaintiffs' view. There is no evidence of plants on the plaintiffs' side of the fence having suffered any harm.

[55] I conclude from the pattern of the damage that it likely was the result of an airborne spray, that it was focused intentionally on the defendant's plants and that it was likely done for the purpose of either preserving the view or intimidating the defendant. The plaintiffs deny having had anything to do with this. I do not believe them. There is no reason to believe that this was a random act of malice by a stranger. The alternative is that the defendant damaged her own plants, seeking to cast blame on the plaintiffs in order to provide a justification for the wall being erected. Nothing in the defendant's presentation persuaded me that she would be likely to undertake that degree of deception. Further, in my judgment such a step would have been inconsistent with her strong sentimental attachment to the property. It is far more likely that this act was undertaken by the plaintiffs, perhaps as yet another expression of their sense of entitlement, but in any event wishing to cause harm.

[56] The defendant testified that she felt as if she had been assaulted. She wondered what would happen next. She felt robbed of her sense of peace and security. Her reaction was to build a wall, blocking off the plaintiffs' view of the disputed area. She had several truckloads of earth brought in, forming a berm perhaps three to four feet above the plaintiff's property, and then topped the berm with a row of concrete lock-blocks, approximately 2½ feet high. She has allowed the cypresses to grow quite high behind the lock-blocks on her side of the wall. The wall does not extend up into the corridor she believes to have been the agreed-upon "viewscape".

[57] One evening during the trial, the court, with counsel in attendance, took a view of the two properties. From the plaintiffs' gazebo, the dirt berm, concrete blocks and cypresses significantly impede – but do not entirely obscure – the view to the east, which would be of a good portion of open water and the coastline of the Sunshine Coast. (The gazebo itself has been positioned such that one of its walls blocks off the corridor which the defendant believed formed the "viewscape.") The blocks themselves are unsightly, and jarringly out of place in the rustic surroundings. I would not go so far as to describe them as brooding, or intrusive. A casual viewer

unfamiliar with the history of the parties could find them odd, and think it a shame that the view had been impaired. I should also note that the view of the property was conducted in May, at the height of spring. It is certainly possible that in fall and winter, the prospect offered by the blocks could be much more unattractive.

[58] In addition to the impairment of the view, I would be prepared to accept that the presence of the blocks is a constant reminder to the plaintiffs of how unpleasant their relationship with the defendant has become. Given their belief that the defendant has knowingly broken the agreement, it would only be natural for them to perceive the wall's design as having been calculated to offend.

[59] Having said that, it must also be said that the wall's impairment of the view across the defendant's property from higher up where the plaintiffs' house is located, is much less significant. Furthermore, the wall has done nothing to impede the view from the gazebo looking south across the property owned by the defendant's former husband, which is breathtaking.

[60] From the defendant's side of the property, the newly-placed fill forms a slope, which has now been heavily planted; that area is not as useful to her as it formerly would have been.

[61] From the defendant's perspective, as drastic a step as building the wall was, I have no doubt that she genuinely perceived it as necessary in order to restore her peace of mind and her enjoyment of the property.

[62] The plaintiffs frame their case in breach of contract, and alternatively plead promissory estoppel.

[63] The contract is alleged to have been formed at the meeting which preceded and was then summarized in the April 29, 2006 letter. In British Columbia, the absence of a written agreement is not necessarily a bar to a claim for breach of a contract for the use or sale of land, because of subsection 59(3)(c) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253. It provides:

> A contract respecting land or a disposition of land is not enforceable unless
>
> . . .
>
> (c) the person alleging the contract or disposition has, in reasonable reliance on it, so changed the person's position that an inequitable result, having regard to both parties' interests, can be avoided only by enforcing the contract or disposition.

[64] I accept the plaintiffs' position that as a result of the assurances they thought they had received from the defendant, they did change their position, to their detriment, with respect to Area B. The defendant points to the concession made by Dr. Silcox, in cross-examination, that by April 2006 the plaintiffs had determined not to purchase Area B in any event. That, however, does not answer the point that the plaintiffs at least had the right to seek the consent of the Crown to use all or a portion of Area B. I do not understand Dr. Silcox to have implied that they would not have attempted to purchase at least some portion of Area B, if they had been unable to conclude an agreement with the defendant.

[65] Having said that, however, I cannot conclude that this is an appropriate case for the application of ss. 59(3)(c). I say this for two reasons.

[66] First, that remedy is only available when there has in fact been an agreement between the parties (see *Booth v. Finch*, [1996] B.C.J. No. 2082 (C.A.), at para. 13). In the present case, I am satisfied that there never was a firm mutual understanding of what the "viewscape" consisted of. The plaintiffs are seeking restoration of their entire view over the defendant's property, and I am certain that was something the defendant never intended to and, in fact, did not bargain for. If I could conclude, from a commonly accepted definition of the word "viewscape" and from the surrounding circumstances, that there was an objective basis for finding an agreement, then it could be open to me to hold the defendant to its terms, regardless of her subjective understanding. But the circumstances do not point to an agreement.

[67] If anything, the April 29 letter, while it only purports to be a summary of the parties' agreement, and not an agreement in itself, seems to imply, as I have observed above, a distinction between the area covering the "viewscape" and the area where the cypresses were planted, which affected the view the plaintiffs

desired to retain between the pine and the maple. The defendant does not rely on this interpretation of the letter; but nevertheless, since the letter is relied upon by the plaintiffs as summarizing the agreement, the lack of clarity in the letter would seem at least to be suggestive of a lack of clarity in the parties' verbal dealings. Taking the letter, and the parties' testimony as to their previous dealings into account, there is insufficient evidence of mutual certainty to the terms of what the parties believed they had agreed to, for plaintiffs to invoke ss. 59(3)(c).

[68] Second, ss. 59(3)(c) requires an examination of the position of both parties. Even if there had been an agreement, it would only be enforced when that would be the only means of avoiding an inequitable result, with regard being given to the interests of both the plaintiffs and the defendant.

[69] In considering whether it would be inequitable to leave the wall in place, I give some weight to the detriment suffered by the plaintiffs in waiving their right to claim any portion of Area B, and the corresponding benefit obtained by the defendant. An equally relevant consideration, on the other hand, is that the defendant did at least fulfill part of what the plaintiffs thought her end of the bargain was, by paying for the improvements to their entrance; some consideration was received, so it is not as if leaving the wall in place would leave the plaintiffs empty handed.

[70] Further, and most importantly in my view, removal of the wall would deprive the defendant of what measure of peace and security it has provided her. In my judgment, the plaintiffs' behaviour subsequent to April 2006, in particular the malicious and high-handed damage to the defendant's plants, which must be viewed in the context of their generally confrontational approach to defendant, and their numerous demands and objections, should entitle the defendant to leave to wall in place and relieve her of any obligations which could arise in law or in equity respecting preservation of the plaintiffs' view. In my judgment, leaving the wall as-is would lead to a more equitable result than forcing its removal.

[71] Alternatively, the plaintiffs rely upon the doctrine of promissory estoppel. As noted by the B.C. Court of Appeal in *Zelmer v. Victor Projects Ltd.* (1997), 34

B.C.L.R. (3d) 125,147 D.L.R. (4th) 216, at para. 44, proprietary estoppel is "a modern term used to describe estoppel by encouragement or by acquiescence." The kind of conduct which gives rise to the estoppel has also, in 19th century case law, been referred to as a form of fraud. As an illustration, the Court of Appeal cited the decision of Fry J. in *Wilmot v. Barber* (1880), 15 Ch. D. 96, at 105:

> What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.
>
> (emphasis added)

[72] More recently, Martland J. of the Supreme Court of Canada, speaking for the Court in *Canadian Superior Oil v. Hambly*, [1970] S.C.R. 932, 12 D.L.R. (3d) 247,accepted the appellant's adoption of the test set out in *Greenwood v. Martins Bank*, [1933] A.C. 51, at 57:

> The essential factors giving rise to an estoppel are, I think:
>
> (1) A representation or conduct amounting to a representation intended to induce a course of conduct on the part of the person to whom the representation is made;
>
> (2) An act or omission resulting from the representation, whether actual or by conduct, by the person to whom the representation is made;
>
> (3) Detriment to such person as a consequence of the act or omission.

[73] A further description of the doctrine appears in the judgment of Lord Denning of the English Court of Appeal in *Crabb v. Arun District Council*, [1976] 1 Ch. 179, at 187-188:

> If I may expand what Lord Cairns L.C. said in *Hughes v. Metropolitan Railway Co.* (1877), 2 App.Cas. 439, 448: "it is the first principle upon which all courts of equity proceed," that it will prevent a person from insisting on his strict legal rights – whether arising under a contract, or on his title deeds, or by statute – when it would be inequitable for him to do so having regard to the dealings which have taken place between the parties.
>
> What then are the dealings which will preclude him from insisting on his strict legal rights? If he makes a binding contract that he will not insist on the strict legal position, a court of equity will hold him to his contract. Short of a binding contract, if he makes a promise that he will not insist upon his strict legal rights – then, even though that promise may be unenforceable in point of law for want of consideration or want of writing – then, if he makes the promise knowing or intending that the other will act upon it, and he does act upon it, then again a court of equity will not allow him to go back on that promise: see *Central London Property Trust Ltd. v. High Trees House Ltd.* [1947] K.B. 130 and *Charles Rickards Ltd. v. Oppenhaim* [1950] 1 K.B. 616, 623. Short of an actual promise, if he, by his words or conduct, so behaves as to lead another to believe that he will not insist on his strict legal rights – knowing or intending that the other will act on that belief – and he does so act, that again will raise an equity in favour of the other; and it is for a court of equity to say in what way the equity may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct. In *Ramsden v. Dyson* (1866) L.R. 1 H.L. 129, 170 Lord Kingsdown spoke of a verbal agreement "or what amounts to the same thing, an expectation, created or encouraged" . . . .
>
> (emphasis added)

[74] What Fry J. referred to in *Wilmot* as the necessity of the defendant having knowledge of the plaintiff's mistaken belief, was described by Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1981] 3 All E.R. 577 (Eng. C.A.), at 584, in the following terms:

> When the parties to a transaction proceed on the basis of an underlying assumption (either of fact or of law, and whether due to misrepresentation or mistake, makes no difference), on which they have conducted the dealings between them, neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

[75] Thus, in order for the doctrine of promissory estoppel to apply to the present case, the defendant must have known that the plaintiffs understood the "viewscape" to be the view between the pine and the maple; and the defendant, through her words or conduct, must have indicated that she knew the plaintiffs would be acting on that assumption, and must thereby have created an expectation in the plaintiffs'

minds or encouraged them think that they would enjoy a broad view over her property. Neither of these is true. As stated above, I have concluded that the parties were not acting from a shared underlying assumption. And nothing said or done by the defendant was inconsistent with her more limited understanding of their agreement. The plaintiffs were not induced to acquiesce in the defendant's purchase of Area B by the defendant's conduct; their expectation, instead, was induced by their mistaken belief that a mutually understood agreement had been concluded. The defendant was unaware of this mistake, and she bears no legal responsibility.

[76] Moreover, both promissory estoppel and the mandatory injunctive relief sought by the plaintiffs are founded in equity: the jurisdiction the court has to arrive at a result based on fundamental notions of fairness and justice, without regard to technicalities or deficiencies in the common law. But it is a fundamental principle of equity that the party seeking to invoke the court's equitable jurisdiction must, in relation to the subject matter of the dispute, come before the court with "clean hands."

[77] In *Mayer v. Osborne Contracting Ltd.*, 2010 BCSC 1249, at para. 243, Walker J. stated:

> The clean hands doctrine serves to deny equitable relief where the misdeeds or misconduct has "an immediate and necessary relation to the equity sued for": *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167; *DeJesus v. Shariff*, 2010 BCCA 121at paras. 84 to 86; and John A. McGhee, ed., *Snell's Equity*, 30th ed. (London: Sweet & Maxwell, 2000) at 32. In *The Principles of Equitable Remedies*, 6th ed. (UK: Sweet & Maxwell, 2001) I.C.F. Spry wrote at pp. 169-170:
>
> > . . . it must be shown, in order to justify a refusal of relief, that there is such an "immediate and necessary relation" between the relief sought and the delinquent behaviour in question that it would be unjust to grant that particular relief.

[78] As stated above, I have found the plaintiffs responsible for the damage to the defendant's plants, and I have characterized their act as malicious and high-handed. They have not come before the court with clean hands. It was that act that led finally to the defendant perceiving the necessity of building a wall to restore her privacy and her peace of mind. There is a sufficient connection between the plaintiffs' conduct,

and the equity they now seek, that one negates the other, and they are not entitled to equitable relief.

[79] The plaintiffs' claim is dismissed, with costs at Scale B. Any submissions on costs may be made in writing, by the defendant within seven days of the date of these reasons, with the plaintiffs' reply seven days thereafter.

"The Honourable Mr. Justice A. Saunders"