COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hill v. Herd,*
2025 BCCA 173

Date: 20250528
Docket: CA49932

Between:

Tammy Arlene Hill, James Robert Hill and James Daniel Hill,
by his guardian, Tammy Arlene Hill

Appellants
(Plaintiffs)

And

William L.W. Herd, Herd & Smith Holdings Ltd.
DBA Warfield Petro-Canada, Regional District of Kootenay Boundary
and The Corporation of the Village of Warfield

Respondents
(Defendants)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Iyer
The Honourable Justice Riley

On appeal from: An order of the Supreme Court of British Columbia, dated May 10, 2024 (*Hill v. Herd*, 2024 BCSC 797, Nelson Docket 21119).

Counsel for the Appellants:	T.W. Pearkes
Counsel for the Respondents, William L.W. Herd, Herd & Smith Holdings Ltd. DBA Warfield Petro-Canada:	D.G. Cowper, K.C. S.P.W. Geisterfer
No one appearing for the Respondents, Regional District of Kootenay Boundary and The Corporation of the Village of Warfield	
Place and Date of Hearing:	Vancouver, British Columbia March 24, 2025
Place and Date of Judgment:	Vancouver, British Columbia May 28, 2025

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Justice Iyer
The Honourable Justice Riley

Summary:

The trial judge found that the activities of the respondent gas station operator constituted a nuisance on the neighbouring appellants' property. The appellants challenge the trial judge's ordering of damages in lieu of a permanent injunction and the refusal to grant declaratory relief stating that the respondent breached local bylaws and building permits. Held: Appeal dismissed. A permanent injunction is the presumptive remedy when a party has established a continuing nuisance. A judge enjoys broad discretion in considering whether to order damages in lieu of an injunction which must be exercised judicially but is otherwise unfettered. The trial judge erred in principle by engaging in a "balance of convenience" analysis and failing to recognize the presumptive entitlement of the appellants to a permanent injunction. Nonetheless, the judge's decision to order damages is supported by her evidentiary findings, including: there was a real question of whether the respondents impugned activities constituted a nuisance; the respondent had taken steps to lessen the impact of the light, noise, and odours complained of; some of the impugned activities were necessary for safety reasons and to avoid the closing down of the gas station; and the continued operation of the gas station benefitted the broader community. There was no error in the trial judge's refusal to grant declaratory relief; the declarations sought would not have impacted the trial judge's conclusions.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] The principal question on this appeal is whether the trial judge, having concluded that an activity constituted a nuisance, properly refused to grant a permanent injunction restraining its continuance.

[2] There is a secondary issue, whether the judge erred in law in dismissing the appellants' claim for a declaration that aspects of construction undertaken by the respondents were in breach of the conditions of a building permit.

[3] This case arises out of a dispute between neighbours in the Village of Warfield in the West Kootenays. The trial judge found the respondent, the owner and operator of a gas station on Schofield Highway, had caused noise pollution and light pollution and had permitted gasoline fumes to emanate from the gas station, and thereby created a nuisance affecting the appellants' home on Forest Drive, across the alley from the gas station.

[4] The noise, light and fumes complained of were all a result of changes made to the gas station and its operations in 2018. At that time, an above-ground gas storage tank nest, including an 80,000-litre fuel tank, was built at the rear of the gas station property, close to the alley. At the same time additional light standards and overhead lights were installed on the gas station property. From that point onward, fuel deliveries to the gas station were made by tanker trucks with pup trailers parked in the alley. Because the tanks were located above the elevation of the alley, it was necessary to pump fuel from the truck tanks up into the storage tanks. Formerly gas had been delivered to the front of the property and was unloaded by gravity feed.

[5] During the course of a twenty-day trial the judge heard from a wide range of witnesses with respect to the operation of the gas station, the nature and extent of the alleged nuisance and the character of the neighbourhood. She heard from a number of experts on, among other topics, acoustics and containment of gas vapours. Applying the criteria described in *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13, the judge held the appellants had established the existence of a substantial, non-trivial interference with their use and enjoyment of their property and that the interference was unreasonable in all of the circumstances.

[6] She did so despite her finding that the appellants' allegations of non-compliance with applicable regulations, including the *British Columbia Fire Code 2012* [*Fire Code*], in relation to the placement of the tanks and parking on the lane, were misplaced. In that regard, relying on *Grant v. Warman*, 2009 BCSC 886 at paras. 39–41, she held "compliance or noncompliance has no bearing on whether the structure in question actually creates a nuisance": at para. 366.

[7] The trial judge found the following nuisances had been ongoing since November 2018, a period of approximately five and a half years.

Lights

[8] The lights in three locations were at issue: a light over the above ground gas storage tank nest; a light over the gas station forecourt; and a light on the side of the convenience store. The light over the tank nest was installed for safety reasons.

Initially it was illuminated at all times. When the appellants complained of light pollution, a shield was installed on the tank nest light. That reduced the intensity of the light but did not solve the problems experienced by the appellants. A timer was then installed which turned the tank nest light on at 5:00 a.m. and turned it off at 9:00 p.m. Since at least the summer of 2021, the tank nest light has been turned off and is illuminated infrequently and manually, when light is required for a fuel delivery in the dark in the winter.

[9] The forecourt and convenience store lights are manual, and are generally turned on between roughly 5:00 a.m. and 9:00 p.m. everyday, during the gas station's hours of operation. The trial judge accepted that illumination of the forecourt and retail areas is necessary during the station's hours of operation. These lights are not related to the delivery of fuel from the alley. The cumulative impact of the lights on the appellants was considered to be "substantial": at para. 374. The lights limit their ability to enjoy their yard and deck in the evening. Their sleep had been adversely affected.

Fumes

[10] Fumes emanate from fuel delivery trucks two to three times per week. Each delivery takes approximately 60 to 90 minutes. The deliveries occur without notice to the appellants. An e-mail advance notice system intended to provide such notice had proven to be ineffective. The initial, more disturbing delivery schedule was modified as an accommodation. By the fall of 2020 onward the majority of deliveries were in the morning and almost all occurred during regular business hours. A vapour recovery system was installed in February and April 2021. The judge concluded it had mitigated the noxious smells produced when fuel is delivered, but had not eliminated them. The judge observed:

> [378] … It was and remains impossible for the Hills to remain outside when the truck is delivering fuel. They keep their doors and windows closed.

Noise

[11] The noise that constituted a nuisance was associated with the fuel deliveries, a consequence of the idling of the truck and the operation of the pump. It was described as a very loud noise, likely to cause disturbance or annoyance:

> [380] … If the Hills are outside in their yard or on the deck of their home they go inside. It is impossible to maintain a normal conversation outside while the truck is delivering fuel. You would have to yell at a person three feet away to be heard.

[12] The judge described the unpredictability of the deliveries and the associated noise and fumes as an aggravating element of the interferences with the appellants' enjoyment of their property.

Utility of the activity

[13] The judge found there to be social utility in the presence of an operating gas station and convenience store in Warfield. She found there were good reasons to move fuel delivery to the alley. She held:

> [383] The Warfield gas station has significant social utility. It contributes to the local economy, provides employment for approximately 15 people, and is the only gas station and retail establishment selling groceries in the Village of Warfield.
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> [384] I accept the Herds' evidence that the decision to move fuel deliveries to the alley was motivated, at least in part, by safety concerns related to the previous practice of unloading fuel in the forecourt. Delivering fuel in the forecourt posed obvious dangers due to the presence of other vehicles and pedestrians in an uncontrolled environment. The decision to move fuel deliveries to the alley was also economically beneficial to the Herds as it enabled them to have more fuel delivered at lower cost than was possible from the forecourt.

Character of the neighbourhood

[14] The judge considered the alley at the centre of the dispute to be "figuratively and literally" the border between the commercial district and the residential district of Warfield: at para. 390. She found that when the appellants moved to their Forest Drive home, fuel was being delivered to the forecourt of the gas station and they were not adversely affected by lights, smells and noise. They did not come to the

nuisance. Balancing the gravity of the harm suffered by the appellants against the utility of the respondent's conduct, the trial judge concluded the interference was, in all of the circumstances, unreasonable.

Orders

[15] After finding the respondents had created a nuisance, the trial judge turned her attention to the remedy, noting that the appellants sought a permanent injunction to prohibit fuel deliveries from the alley in addition to an award of damages.

Injunction denied

[16] The judge was directed to and considered: *Suzuki v. Munroe*, 2009 BCSC 1403; *Kenny v. Schuster Real Estate Co. Ltd.*, [1990] B.C.J. No. 1420 (Q.L.), 1990 CanLII 1092 (S.C.), aff'd *Schuster Real Estate Co. v. Kenny*, [1992] B.C.J. No. 220 (Q.L.), 1992 CanLII 1941 (C.A.); *Innes v. Kotylak*, 2018 SKQB 325; and *Zhang v. Davies*, 2017 BCSC 1180, aff'd 2018 BCCA 99, cases cited by one or the other party as comparable for the purposes of determining what remedy is appropriate where a nuisance is established.

[17] She then considered the factors that should be weighed when considering whether to grant a permanent injunction described in *Suzuki*, including the inadequacy of damages, the nature of the plaintiff's injury and the balance of convenience between the parties.

[18] The trial judge was not persuaded a permanent injunction was appropriate. She noted that some effective measures had been taken to reduce the magnitude of the light and smell nuisances and the nuisance was not continuous; the noise and continuing smell issues only arising during deliveries, for about four and a half hours a week and the remaining lights were only on from 5:00 a.m. to 9:00 p.m. She then noted "[t]he balance of convenience between the parties strongly favours an injunction not being granted" (at para. 423) before making the following findings and weighing their significance:

a) Delivery of fuel from the alley is safer than delivery of fuel from the forecourt;

b) The risk of fire inherent in the delivery, storage and distribution of fuel would be greater if fuel was delivered from the forecourt rather than from the alley;

c) Delivery of fuel from the alley is not contrary to the *Fire Code*;

d) Delivery of fuel from the alley is more efficient and cost-effective, reducing the total number of fuel deliveries required to keep the gas station supplied, and the cost per litre of fuel delivered;

e) If the respondents were required to try to use a smaller truck and deliver fuel from the forecourt, their shipping costs would increase by at least 45% and in that event the business would likely close and that would have very serious impacts on the respondents, their employees and the members of the community who rely on the gas station; and

f) It is of benefit to the community for the Warfield gas station to continue to operate.

[19] She held at para. 428: “Considering the circumstances as a whole, I conclude that it would not be equitable to order an injunction”.

Money damages

[20] Having done so, she assessed damages on the basis that the appellants would suffer from an ongoing nuisance. She held:

> [432] I am not granting an injunction. In my view, that is a significant factor to take into account in assessing the amount of damages to be ordered.

[21] She ordered the respondents to pay damages to the appellants as follows:

a) James Robert Hill: $20,000;

b) Tammy Arlene Hill: $30,000;

c) James Daniel Hill (in trust to the Public Guardian): $30,000.

[22] That award is not appealed.

Declaratory relief

[23] The appellants also sought declaratory orders, most of which related to allegations that the respondents had breached local bylaws, the *Fire Code* or building and business permits. The judge refused to consider granting declaratory relief that was not clearly identified in the pleadings and held that the balance of the declaratory relief sought, other than factual declarations addressed in relation to the nuisance claim (and subsumed by it), was relief in the nature of judicial review under the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241.

[24] She held the appellants did not have standing to seek to challenge business licenses, and that they had failed to comply with the notice and limitation period requirements set out in s. 623(4) and (5) of the *Local Government Act*, R.S.B.C. 2015, c. 1, precluding review of certain bylaws.

[25] A challenge to the Village's granting of permission to tanker trucks to park in the lane was dismissed. The judge found that decision was not unreasonable and not *ultra vires* the Village. She considered the alley to be a highway within the meaning of the *Community Charter*, S.B.C. 2003, c. 26. The *Community Charter* provides the Village with the authority to regulate in relation to highways, including the authority to temporarily restrict or prohibit traffic on a highway.

[26] The appellants submitted that delivery of fuel from the alley is a breach of the *Fire Code.* That submission was rejected because the judge found that the alley is not a "street" as defined in the *Fire Code* and unloading from the alley was therefore not a breach.

[27] The appellants' allegation that the Village's *Zoning Bylaw* had been breached was dismissed on the basis that the appellants, as private citizens, did not have

standing to require it to enforce its bylaws, and the court cannot make an order forcing the Village to enforce its bylaws: *Spraggs v. Greater Vernon Services*, 2006 BCSC 1176 at paras. 18–19; *Drager v. Lojstrup*, 2016 BCSC 1447 at para. 37.

Was it an error to refuse to grant a permanent injunction?

Applicable law: standard of review

[28] The standard of review of the decision not to grant injunctive relief is helpfully canvassed in *Krieser v. Garber*, 2020 ONCA 699:

> [46] … [T]he grant of an injunction is a discretionary decision. The court will only interfere with the exercise of discretion if it was based on an error of law (determined on a correctness standard), a palpable and overriding error of fact, the consideration of irrelevant factors or the omission of factors that ought to have been considered, or if the decision was unreasonable in the sense that it is not compatible with the judicial exercise of discretion: *Aventis Pharma S.A. v. Novopharm Ltd.*, 2005 FCA 390, 44 C.P.R. (4th) 326, at para. 4; *Bellini Custom Cabinets v. Delight Textiles Limited*, 2007 ONCA 413, 225 O.A.C. 375, at para. 44.

[29] In *Teal Cedar Products Ltd. v. Rainforest Flying Squad*, 2022 BCCA 26, this Court held in an injunction case:

> [28] … An appellate court may only interfere if the judge erred in principle, gave no or insufficient weight to relevant considerations, considered irrelevant factors, or made a decision that is so clearly wrong as to amount to an injustice: *Barrie v. British Columbia (Forests, Lands and Natural Resources Operations)*, 2021 BCCA 322 at para. 87.

[30] I agree with the view expressed in *Liu v. Hamptons Golf Course Ltd.*, 2017 ABCA 303 that applying the test for an interlocutory injunction to an application for a permanent injunction is a reversible error.

Applicable law: damages in lieu of injunction

[31] The appellants say the trial judge erred in law in employing a “balance of convenience” analysis when considering whether to issue an injunction.

[32] Some attempt at clarification of the subtle and sometimes conflicting rules that have developed in this area is necessary in order to determine whether the judgment is affected by legal error.

[33] That analysis begins with the seminal case of *Shelfer v. City of London Electric Lighting Co.*, [1895] 1 Ch. 287 (C.A.). In that case, the Court of Appeal considered whether the longstanding rule in nuisance cases that when the plaintiff has established his right at law "he is entitled as of course to an injunction to prevent the recurrence of that violation" (at 311) had been altered by *Lord Cairns' Act*. That legislation (since repealed but replaced with comparable provisions) gave the Courts of Equity jurisdiction to award damages, which they did not previously enjoy. Its enactment led the Court to consider whether damages in some nuisance cases might serve as a sufficient remedy, even where the nuisance continues. Lord Halsbury held the statute was not intended to "revolutionize the principles upon which equitable jurisprudence had been administered up to that time", rather at 311:

> The language, of course, is general; the discretion given is necessarily wide enough in terms to authorize a Judge to award damages where formerly he would have given an injunction. But there is nothing in this case which to my mind can justify the Court in refusing to aid the legal rights established, by an injunction preventing the continuance of the nuisance. On the contrary, the effect of such a refusal in a case like the present would necessarily operate to enable a company who could afford it to drive a neighbouring proprietor to sell, whether he would or no, by continuing a nuisance, and simply paying damages for its continuance.
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> …
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> I see no trace of any such intended alteration of the principles upon which equity should interfere with an injunction as would be involved in a refusal of an injunction here.

[34] The principles to which a court might refer when considering whether equity stands as a bar to the granting of an injunction were described by Lord A.L. Smith as follows at 322–323:

> So … whether the case be for a mandatory injunction or to restrain a continuing nuisance, the appropriate remedy may be damages in lieu of an injunction, assuming a case for an injunction to be made out.
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> In my opinion, it may be stated as a good working rule that—
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> (1.) If the injury to the plaintiff's legal rights is small,
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> (2.) And is one which is capable of being estimated in money,
>
> (3.) And is one which can be adequately compensated by a small money payment,

> (4.) And the case is one in which it would be oppressive to the defendant to grant an injunction: —
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> then damages in substitution for an injunction may be given.

[35] In Sharpe's helpful and comprehensive review of the jurisprudence, *Injunctions and Specific Performance*, (Toronto: Thomson Reuters, 1992) (loose-leaf updated 2024), a marked difference in approach to the granting of injunctions in Canada and England is identified. The author notes at 4.2, 4–5:

> In nuisance cases, once the plaintiff has made out a substantive right, the ordinary remedy is an injunction. This is especially so in England where until recently, the courts refused to entertain any notion of balancing burden and benefit. Thus, even where the advantage an injunction would confer on the plaintiff is slight compared to the burden it would impose on the defendant, injunctions are still awarded and the English courts traditionally refused to consider the hardship an injunction would inflict upon third parties or the public at large.
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> [Footnotes omitted.]

[36] He continues at 4–6, 4–7:

> Until a recent decision of the Supreme Court [*Lawrence v. Fen Tigers Ltd.* [2014] 2 W.L.R. 433, [2014] UKSC 13], the English courts refused to engage in balancing costs and benefits except in two areas, what are called "trifling injuries" and where mandatory injunctions were claimed.
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> [Footnotes omitted.]

[37] In *Lawrence v. Fen Tigers Ltd.*, [2014] UKSC 13, a case involving a private nuisance by noise, the Supreme Court moderated the prevailing approach in England. The Court reiterated the rule that the *prima facie* position is that an injunction should be granted and the defendant must discharge the burden of showing that it should not. Lord Neuberger wrote:

> 101. Where a claimant has established that the defendant's activities constitute a nuisance, *prima facie* the remedy to which she is entitled (in addition to damages for past nuisance) is an injunction to restrain the defendant from committing such nuisance in the future; of course, the precise form of any injunction will depend very much on the facts of the particular case. However, ever since Lord Cairns' Act (the Chancery Amendment Act 1858 (21 & 22 Vict c 27)), the court has had power to award damages instead of an injunction in any case, including a case of nuisance … Where the court decides to refuse the claimant an injunction to restrain a nuisance, and instead awards her damages, such damages are conventionally based on the

> reduction in the value of the claimant's property as a result of the continuation of the nuisance. Subject to what I say … below, this is clearly the appropriate basis for assessing damages, given that nuisance is a property-related tort and what constitutes a nuisance is judged by the standard of the ordinary reasonable person.
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> 102. The question which arises is what, if any, principles govern the exercise of the court's jurisdiction to award damages instead of an injunction.

[38] After reviewing *Shelfer* and subsequent authorities which considered the question when damages should be awarded in lieu of injunctive relief, Lord Neuberger described the state of the law as dissatisfactory and sought to provide clarification. At para. 119, he expressed the opinion that restricting damages to *very exceptional circumstances* was "simply wrong in principle, and give[s] rise to a serious risk of going wrong in practice". He added:

> 120. The court's power to award damages in lieu of an injunction involves a classic exercise of discretion, which should not, as a matter of principle, be fettered, particularly in the very constrained way in which the Court of Appeal has suggested in Regan and Watson. And, as a matter of practical fairness, each case is likely to be so fact-sensitive that any firm guidance is likely to do more harm than good. On this aspect, I would adopt the observation of Millett LJ in Jaggard [1995] 1 WLR 269, 288, where he said:
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> > "Reported cases are merely illustrations of circumstances in which particular judges have exercised their discretion, in some cases by granting an injunction, and in others by awarding damages instead. Since they are all cases on the exercise of a discretion, none of them is a binding authority on how the discretion should be exercised. The most that any of them can demonstrate is that in similar circumstances it would not be wrong to exercise the discretion in the same way. But it does not follow that it would be wrong to exercise it differently."

[39] He concluded that the four factors listed in *Shelfer* are not exhaustive, nor mandatory, and should not be applied mechanically. The fact that those tests are not all satisfied does not mean that an injunction should be granted. The approach to be adopted by a judge when being asked to award damages instead of an injunction should be flexible. Having said that, he offered certain guidance (at paras. 121–122):

a) The *prima facie* position is that an injunction should be granted, so the legal burden is on the defendant to show why it should not;

b) In some cases, an injunction is necessary — if, for instance, the injury cannot fairly be compensated by money — if the defendant has acted in a high-handed manner — if he has endeavoured to steal a march upon the plaintiff or to evade the jurisdiction of the Court; and

c) If there is really a question as to whether the obstruction is legal or not (that is, whether it constitutes a nuisance), and if the defendant has acted fairly, the Court may be more inclined to order damages rather than an injunction.

[40] Further, he added, the public interest may be considered, in particular:

> 124. … The fact that a defendant's business may have to shut down if an injunction is granted should, it seems to me, obviously be a relevant fact, and it is hard to see why relevance should not extend to the fact that a number of the defendant's employees would lose their livelihood, although in many cases that may well not be sufficient to justify the refusal of an injunction. Equally, I do not see why the court should not be entitled to have regard to the fact that many other neighbours in addition to the claimant are badly affected by the nuisance as a factor in favour of granting an injunction.

[41] Lord Sumption shared the view that the public interest may be considered when a party seeks an injunction to bring an end to a nuisance: He wrote:

> 157. … An injunction is a remedy with significant side-effects beyond the parties and the issues in the proceedings. Most uses of land said to be objectionable cannot be restrained by injunction simply as between the owner of that land and his neighbour. If the use of a site for (say) motocross is restrained by injunction, that prevents the activity as between the defendant and the whole world. Yet it may be a use which is in the interest of very many other people who derive enjoyment or economic benefits from it of precisely the kind with which the planning system is concerned. An injunction prohibiting the activity entirely will operate in practice in exactly the same way as a refusal of planning permission, but without regard to the factors which a planning authority would be bound to take into account. The obvious solution to this problem is to allow the activity to continue but to compensate the claimant financially for the loss of amenity and the diminished value of his property. In a case where planning permission has actually been granted for the use in question, there are particularly strong reasons for adopting this solution. It is what the law normally provides for when a public interest conflicts with a proprietary right.

[42] The appeal in *Lawrence* ultimately turned on other grounds and the injunction made by the trial judge was restored, with the question of whether damages should have been ordered instead of left open to the parties to pursue before the trial court.

[43] In contrast to the English approach, as it stood before *Lawrence*, and as it is still occasionally applied, Sharpe notes (at 4–10): “In Canada,… *Shelfer* is inevitably cited as setting out the guiding principle but there is a distinct line of Canadian cases which holds that it is appropriate, in deciding whether to afford injunctive relief, to weigh the hardship an order will cause the defendant and the economic and social impact it might have upon the community”. In support of that view, Sharpe cites, among other cases, a number of early pollution cases: *Canada Paper Co. v. Brown* (1922), 63 S.C.R. 243, 1922 CanLII 585; *Huston v. Lloyd Refineries*, [1937] O.J. No. 107, [1937] O.W.N. 53 (H.C.J.); *Morris v. Dominion Foundries & Steel*, [1947] 2 D.L.R. 840, 1947 CanLII 328 (Ont. H.C.J.); *Chadwick v. City of Toronto,* [1914] O.J. No. 117, 32 O.L.R. 111 (S.C. App. Div.); *Black v. Canadian Copper Co.*, [1917] O.J. No. 511, 12 O.W.N. 243 (H.C.); and *Bottom v. Ontario Leaf Tobacco Co.*, [1935] 2 D.L.R. 699, 1935 CanLII 62 (O.N.C.A.).

[44] Some judges have gone so far as to consider the balance of convenience when considering whether to grant a permanent injunction to a party who has established the existence of a nuisance. In *Boggs v. Harrison*, 2009 BCSC 789, after considering whether damages would be an appropriate remedy (a question encompassing all of the factors described in *Shelfer*) the Court asked further questions, including not only whether the injunction is necessary to enjoin a continuing nuisance and whether the injunction will be capable of enforcement, but also the balance of convenience:

> [141] An injunction is an equitable remedy and is in the discretion of the court. A number of factors may be relevant in any particular case. A plaintiff must always prove that damages would not be an adequate remedy, and that the balance of convenience favours the plaintiff over the defendant. I think it is also necessary to establish that an injunction is necessary to prevent continuation of the wrongful conduct, and that the order sought could be enforced.
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> [Emphasis added.]

[45] *Boggs* was referred to by the trial judge in the case at bar as authority for the statement that when deciding whether to grant a permanent injunction the balance of convenience between the parties may be considered.

[46] Perhaps as a result of the frequent reference by judges to the balance of convenience in cases where a permanent injunction is being sought, this Court, in *Cambie Surgeries Corp. v. British Columbia (Medical Services Commission)*, 2010 BCCA 396, has clearly stated that the balancing of interests is inappropriate when determining whether to grant a permanent injunction to a plaintiff whose legal rights have been infringed:

> [27] Neither the usual nor the modified test discussed in *RJR-MacDonald* has application when a court is making a final (as opposed to interlocutory) determination as to whether an injunction should be granted. The issues of irreparable harm and balance of convenience are relevant to interlocutory injunctions precisely because the court does not, on such applications, have the ability to finally determine the matter in issue. A court considering an application for a final injunction, on the other hand, will fully evaluate the legal rights of the parties.
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> [28] In order to obtain final injunctive relief, a party is required to establish its legal rights. The court must then determine whether an injunction is an appropriate remedy. Irreparable harm and balance of convenience are not, *per se*, relevant to the granting of a final injunction, though some of the evidence that a court would use to evaluate those issues on an interlocutory injunction application might also be considered in evaluating whether the court ought to exercise its discretion to grant final injunctive relief.
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> [Emphasis added.]

[47] In *NunatuKavut Community Council Inc. v. Nalcor Energy*, 2014 NLCA 46 [*Nalcor*], the Newfoundland Court of Appeal emphasised the importance of recognizing the successful applicant's *prima facie* right to an injunction to restrain a continuing nuisance and cautioned against any balancing of the respondent's rights against those of the successful applicant. Chief Justice Green adopted the pre-*Lawrence* English approach to the exercise of the discretion to award damages in lieu of an injunction. He wrote:

> [64] … [W]hile balancing of competing interests (proportionality) is vital when considering the appropriateness of an interlocutory injunction, this sort of analysis is generally foreign to the awarding of an injunction as a final remedy. Once a claimant establishes that he or she has suffered a

> recognized civil wrong, he or she is entitled to remedial relief (subject to the limited considerations of *de minimis*) regardless of the impact on the wrongdoer and regardless of whether the wrongdoer will suffer a greater inconvenience as a result of having to provide a remedy than the claimant will suffer from leaving the wrong unremedied … At law, where the primary remedy is damages, the remedy follows as of course. In equity, where all equitable relief, including an injunction, is discretionary, the court may deny such relief but must do so according to well-recognized equitable principles that have been developed as guidelines for the exercise of that discretion. Whether at law or in equity, the impact on the defendant of granting a remedy generally only becomes relevant again at the point where a temporary stay of judgment may be granted.
>
> [Emphasis added.]

[48] He noted:

> [65] Chief among the discretionary considerations that must be addressed is whether there is an effective alternative remedy available. This is because equitable remedies are generally regarded as supplementary to other available remedies. It is only where such supplementation is needed that the appropriateness of an injunction enters the picture. In most cases, this will involve a consideration of whether the claim can be properly remedied by an award of damages. Usually, damages will not be adequate where what is at issue is threatened future harm that is not an extension of existing harm. …

[49] The very limited scope of discretion recognized in *Nalcor* is reflected in the following passage:

> [68] Hardship to the parties may also be a consideration. This is not to say that there should be a balancing of convenience to the respective parties as there would be when deciding whether an interlocutory injunction should be granted. At the "final" stage it has already been determined that the plaintiff's rights have been breached and that there is sufficient reason to believe that apprehended acts will occur in the future. The plaintiff is therefore *prima facie* entitled to a remedy. As noted, considerations of hardship on the part of the defendant are therefore ordinarily of little or no consequence. There may be an exception in a case of extreme hardship suffered by the defendant with relatively no hardship to the plaintiff and where the plaintiff is seeking merely to vindicate his rights in a declaratory sense. But where, as will be the situation in most cases, the plaintiff is threatened with substantial detriment or inconvenience, hardship to the defendant will be irrelevant. However, hardship to the plaintiff if an injunction is not granted may be relevant to questions of whether alternative remedies are adequate. Further, hardship to third parties if the injunction were to be granted to enjoin other persons having notice of the order may in some cases be a relevant consideration.
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> [Emphasis added.]

[50] For that reason, the Court cautioned against the use of "balance of convenience" language:

> [95] ... This language should be avoided so as to avoid improperly applying the interlocutory injunction test. There has to be a greater emphasis on the interests of the defendant than that. The court has to be cautious that, in drawing the terms of the order, it does not unnecessarily interfere with the rights and interests of the defendant in circumstances that are not necessary to enjoin the defendant's wrongful behavior.
>
> [Emphasis added.]

[51] It should be borne in mind, however that Green C.J.N.L.'s comments on permanent injunctions in *Nalcor* were *obiter*. The injunction issued by the trial court was set aside because it was inappropriate to grant a permanent injunction before judgment on the merits in a case where there were real factual disputes. Chief Justice Green noted:

> [6] ... In the view I take of the matter, it is not technically necessary to address in detail many of the specific submissions made by the parties on the appeal. Nevertheless, because the issues engaged are of considerable importance, and because it appears that there were a number of misunderstandings throughout the process as to the applicable law and procedure, I have decided to comment on a number of these matters even though it may not be strictly necessary to do so.

[52] Because a trial had not been held and a cause of action had not been proven, it is not clear whether the court in *Nalcor* was addressing the appropriate test for the granting of a permanent injunction to restrain *a trespass* or *a nuisance*. As will be seen below, there is a stronger presumptive right to a permanent injunction in trespass than in nuisance.

[53] In *778938 Ontario Limited v. Annapolis Management Inc.*, 2020 NSCA 19, the Nova Scotia Court of Appeal considered a trial judge's refusal to grant a permanent injunction, despite finding the defendant liable in nuisance because the injunction sought would result in immediate and substantial losses disproportionate to the enjoined activity and "the cure would be worse than the disease": at para. 9.

[54] Justice Bryson dealt with the appellant's submission that observed the judge had assimilated trespass and nuisance in his analysis, and therefore applied the wrong law, as follows:

> [17] [The appellant] emphasizes that no damage need be proved to establish trespass. There is no reason to conclude that the judge was confused about the difference between nuisance and trespass because the risk of trespass had disappeared by the time of the hearing. The nuisance-trespass distinction had become academic at that point. But [the appellant] is right that the law is more generous in favouring an injunction for trespass, although it is the presumptive remedy for both: Sharpe, *Injunctions and Specific Performance*, 5th ed (Toronto: Thomson Reuters Canada Limited, 2017) §4.590; *Maxwell, [Maxwell Properties Ltd. v. Mosaik Property Management Ltd.*, 2017 NSCA 76] 34-35.
>
> [18] As *Maxwell* explains at para. 40, "equitable discretion to grant an injunction is usually—but not invariably—exercised to vindicate property rights". Sharpe elaborates at §4.10:
>
> > Where the plaintiff complains of an interference with property rights, injunctive relief is strongly favoured. This is especially so in the case of direct infringement in the nature of trespass. … The discretion in this area has crystalized to the point that, in practical terms, the conventional primacy of common law damages over equitable relief is reversed. Where property rights are concerned, it is almost that damages are presumed inadequate and an injunction to restrain continuation of the wrong is the usual remedy.
>
> [19] Later, Justice Sharpe adds at §4.590:
>
> > Where there is a direct interference with the plaintiff's property constituting a trespass, the rule favouring injunctive relief is even stronger than in the nuisance cases. Especially where the trespass is delivered and continuing, it is ordinarily difficult to justify the denial of a prohibitive injunction …

[55] The Court concluded the trial judge had not erred in refusing to grant a permanent injunction to restrain continuing or threatened trespass, as the trespass had come to an end. Turning to the claim to an injunction to restrain the continuance of the nuisance, Bryson J.A. noted that the Court had a discretion to withhold equitable relief from those "whose intransigence would extract an unreasonable price for reasonable forbearance": at para. 43. *Shelfer* and *Nalcor* were considered to provide "helpful guidance for the exercise of the court's discretion and the parties' conduct": at para. 43.

[56] Several points of note in this case arise from the jurisprudence. First, the decision to award damages in lieu of a permanent injunction as a remedy in a nuisance claim is discretionary and the exercise of that discretion should not be lightly interfered with. Second, once a nuisance is established an injunction is the presumptive remedy. Third, the broad discretion of a trial judge to award damages in lieu of an injunction should be exercised judicially and in light of the factors identified in *Shelfer*, but is not to be fettered. Fourth, the discretion should not be exercised by engaging in a balancing of convenience and language suggesting such a balancing of interests is to be avoided. Fifth, the evidence that may be considered in engaging in the balance of convenience analysis on an interlocutory injunction application (such as, for example, the nature and extent of the harm that may be suffered by the respondent if an injunction is granted or that which will be suffered by the applicant if one is refused) may be considered in exercising the discretion to refuse a permanent injunction. Finally, the effect of the nuisance on third parties and the effect of a permanent injunction on the community may be considered in the exercise of the discretion.

Analysis

[57] In my view, the trial judge should more clearly have stated that a permanent injunction is the presumptive remedy to which a party who has established a continuing nuisance is entitled. She ought to have placed the burden upon the respondents to establish that damages would be an adequate and appropriate remedy.

[58] The judge cited the following passage from the judgment in *Suzuki* as authority for some basic propositions:

> [109] An injunction is an equitable remedy, and therefore the granting of one is discretionary: R.J. Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora: Canada Law Book Inc., 2000) at para. 4.10, *Boggs v. Harrison*, 2009 BCSC 789 at para. 141.
>
> [110] A number of factors are relevant in determining whether or not to grant an injunction. The inadequacy of damages is frequently considered, along with the nature of the plaintiff's injury and the balance of convenience between the parties: Sharpe, *Injunctions and Specific Performance* at

> paras. 1.60-1.140, *Boggs* at para. 141, A.M. Linden & B. Feldthusen, *Canadian Tort Law*, 8th ed. (Markham: LexisNexis Canada Inc., 2006) at 594.
>
> [111] In situations where the nuisance is likely to continue without the granting of the injunction, as is the case here once the interlocutory order ends … the inadequacy of damages is easily satisfied: Linden & Feldthusen, *Canadian Tort Law* at 594.

[59] By referring to the injunction sought by the appellant as a discretionary, equitable remedy and in its description of the factors to be considered in exercising the discretion, this passage fails to recognize the successful plaintiff's *prima facie* right to an injunction. In referring to the inadequacy of damages as a factor "frequently considered", it fails to recognize that where a nuisance is established damages are presumed inadequate and an injunction to restrain continuation of the wrong is the usual remedy. The suggestion that in situations where the nuisance is likely to continue without the granting of the injunction "the inadequacy of damages is easily satisfied" also reflects a failure to recognize the presumption. It implies that the plaintiff must discharge the burden of establishing that damages are an inadequate remedy. The onus does not rest upon a party who has established a nuisance to establish entitlement to the presumptive remedy. In these respects, the approach described invites error.

[60] The reference to consideration of the balance of convenience is misleading. As we have seen, this terminology should be avoided when weighing the discretion to refuse a permanent injunction to one who suffers from a continuing nuisance. The question the trial judge should have addressed is whether the respondents could establish that damages, rather than the presumptive remedy of a permanent injunction, would be an adequate and appropriate remedy for the continuing nuisance.

[61] Having said that, in my opinion the judge's findings of fact support the exercise of the discretion to refuse to order a permanent injunction. Notwithstanding the errors in principle I have identified, for the following reasons I would not order an injunction and consequently, I would not set aside the damage award.

[62] While the judge found the respondents had created a nuisance and the appellants had not moved to it, there was, to use the words of Lord Neuberger, a question as to whether the acts of the respondents were legal or not. The judge found the gas station located in Warfield's relatively small commercial district had operated with an appropriate license since 1947. It emitted light and produced some odors when the appellants first moved to their home, directly across the alley from the gas station, and continued to do so even before the impugned changes to its operations. The lane upon which the activity found to be a nuisance occurred was on the boundary between industrial and residential neighbourhoods. The judge found the appellants moved to their home without considering that, in doing so, they would likely experience more noise, lights and smell than they did at their former home or the possibility that there could be developments at the gas station or elsewhere in the commercial district that might increase the noise, lights and smell to which they would be subjected. In short, before adjudication of the appellants' claim, there was some doubt with respect to whether, in light of the history and all the circumstances, the respondents' activity constituted a nuisance.

[63] The judge made findings supportive of the conclusion that the respondents had acted fairly. She found the respondents had taken many "ameliorative measures" (at para. 422) to minimize the nuisance, including installing light shields and severely limiting the hours during which certain lights were illuminated, installing a vapour recovery system and attempting to limit fuel deliveries to morning hours. A witness familiar with vapour recovery systems testified that the respondents' system is the only one he knows of in the province outside of the area in which they are mandatory, southwest of Hope.

[64] The judge noted that the impacts of the nuisance are not continuous. The nuisance occasioned by illumination, while significant, has been dramatically reduced and is now only periodic. The significant continuing nuisance arising from illumination was that caused by lights in the gas station forecourt, illuminated only during business hours (not after 9:00 pm) and considered necessary for operation of the gas station and convenience store. Since at least 2021, the most problematic

lights, those on the tank nest, directly across the lane from the appellants' home, are turned on manually and only when required for safety reasons during evening deliveries in the winter.

[65] The nuisance occasioned by noise and odors has also been moderated. It is intermittent. The judge found it to be experienced for an hour and a half, two or three times per week, usually in the morning, after the appellants' son has gone to school. Smells had been reduced (although not eliminated) by the vapour recovery system. Noise varied with the type of delivery.

[66] The judge found the decision to move fuel delivery to the alley to have been motivated in part by safety concerns related to the previous practice of unloading fuel in the forecourt and concluded that those safety concerns favoured continuing delivery from the alley. The respondents led evidence that trucks unloading in the forecourt protrude six feet into the road and pose a risk that fuel hoses on the ground will be driven over. The judge accepted that delivering fuel in the forecourt posed obvious dangers due to the presence of other vehicles and pedestrians in an uncontrolled environment.

[67] The judge found that the respondents' business was important to the community. It contributes to the local economy, provides employment for approximately 15 people, and is the only gas station and retail establishment selling groceries in Warfield. The judge concluded that it was "probable that an injunction would put the Herds out of business": at para. 427. The evidence of the respondents was that smaller trucks would have to be used to deliver fuel from the forecourt and that would increase the cost of delivery of fuel by about 45%, an intolerable increase. The appellants take issue with this finding, but have failed to show that it was tainted by palpable and overriding error. There was evidence in the record to support the judge's factual conclusion, and I would not accede to the appellants' effort to dislodge it by pointing to evidence in the record which might be interpreted to point in the opposite direction. Having found that an injunction would put the viability of the gas station at risk, the trial judge went on to reason that the loss of the

business “would be a very serious impact for the Herds, not to speak of their employees and the members of the community who rely on the gas station”: at para. 427.

[68] The judge held:

> [428] Considering the circumstances as a whole, I conclude that it would not be equitable to order an injunction.

[69] While the balance of convenience, *per se*, ought not to have been measured, all of the factors I have described above can be fairly considered in the exercise of the discretion not to grant a permanent injunction.

[70] Finally, the judge, having carefully weighed the impact of the nuisance upon the appellants, concluded that she was in a position to make an appropriate award of damages, which award was intended to compensate them for the continuing nuisance, as moderated by the ameliorative measures she described. That question, whether the claim could be properly remedied by an award of damages, was one the trial judge was in a privileged position to address.

[71] In light of the findings of fact of the trial judge, in particular her conclusion that an injunction would cause the respondents to adopt a more dangerous method of fuel delivery and would likely cause the business to close with attendant loss to the community, I would also conclude that an order for a permanent injunction should not be granted in the particular circumstances of this case.

Was it an error to refuse to grant declaratory relief?

[72] The appellants contend the judge erred:

a) in construing provisions of the *Fire Code* and the *British Columbia Building Code 2012* [*Building Code*]; and

b) in declining to make findings of fact in response to the appellants’ allegation that the respondent, William Herd, breached the building permit

> issued October 18, 2018, when he undertook the renovations necessary to permit fuel to be delivered from the lane.

[73] The appellants suggest that misinterpretation of the *Fire Code* played a role in the trial judge's conclusion that delivery of fuel from the lane was safer than delivery from the forecourt. They suggest she might have granted the permanent injunction they sought if she had appreciated that the *Fire Code* would not permit deliveries to occur from the lane. They assert the trial judge did not take into account "the objectives and the functional statements of the *Fire Code* in relation to the minimum standards of safety prescribed by the *Fire Code* or that the authority having jurisdiction had not accepted alternative measures to address technical non-compliant matters".

[74] The trial judge dealt with the argument that parking trucks or permitting them to park for extended periods in the alley was a breach of the *Fire Code* as follows:

> [474] The primary basis upon which the Hills submit that delivery of fuel from the alley is a breach of the *Fire Code* is that the alley is a street and that unloading from the alley is therefore a breach. I have already considered and rejected this interpretation of Division A, Part 1, sentence 1.4.1.2(1) of the *Fire Code*. The alley is not a street. The Hills submit in the alternative that if the alley is not a street it is firefighting access within the meaning of *Fire Code* sentence 4.3.2.4(2). Chief Derby's evidence was that if the tanks being on or near a fire [sic], he would not instruct firefighters to insert themselves between the two fuel tanks as it would be unsafe. Further, he testified that in the event of a fire, the fire department would be directed to go to the front of the building. The Hills have not established that unloading fuel from the alley constitutes a breach of this or any other provision of the *Fire Code*. The Village Council's jurisdiction to grant the temporary parking permission was not limited by reference to the *Fire Code*.

[75] The interpretation to which the judge referred was at paras. 326–332 of the reasons for judgment. There she interpreted *Fire Code* Division A, Part 1, sentence 1.4.1.2(1), which states:

> Street means any highway, road, boulevard, square or other improved thoroughfare 9m or more in width, that has been dedicated or deeded for public use and is accessible to fire department vehicles and equipment.

The definition of "Street" in the *Building Code* is identical.

[76] The appellants had asserted that the alley between their house and the respondents' gas station is a street, despite the fact it was acknowledged to be less than nine metres in width. They contended that the "9m or more qualifier" only modifies "other improved thoroughfare". The respondents took the position that the language of the *Fire Code* is clear: the width of the highway, road, boulevard, square or other improved thoroughfare needs to be at least 9m wide to be considered a street for the purposes of the *Code*. This view was shared by the local assistant to the fire commissioner and the engineer of record in the renovations. The judge was of the opinion that these witnesses were the two most qualified and proximate individuals to answer this question and their interpretation should be given substantial weight. She accepted the view that the plain meaning of the definition of "street" in the *Fire Code* contemplates a highway, road, boulevard, square or other improved thoroughfare that is at least nine metres wide.

[77] The respondents say the trial judge's interpretation of the *Fire Code* and *Building Code* are not an issue on this appeal. I agree. The judge determined that there was a nuisance created by the respondents and "even if those allegations [of a breach of the *Fire Code*] are true, it is not the non-compliance that would be the cause of the nuisances alleged": at para. 367. She extensively considered and carefully weighed evidence with respect to the extent to which fuel delivery trucks obstructed the alley, the time it would take to move them in an emergency and means of access to the raised storage tanks for firefighting purposes from the forecourt. Having considered that evidence, she was of the view that it was safer to deliver fuel to the gas station from the alley.

[78] I agree with the respondents' submission that it is not necessary for us to revisit whether the alley is a "street" within the meaning of the *Fire Code* for the purposes of this appeal.

[79] The appellants' assertion that the 2018 construction was carried out in breach of the building permit was considered when the trial judge considered the appellants' claim in negligence. That claim was founded in part upon the appellants' assertion

that the respondents owed them a duty of care to ensure they did not suffer foreseeable damages as a result of the failure to comply with relevant bylaws, including the zoning and the building bylaws and other enactments respecting safety, such as the *Fire Code.* The judge accepted the respondents' argument that the bylaws were relevant to, but not co-extensive with the standard of care. She held (at para. 514) that the standard of care in negligence was that proposed by the respondents: "would a reasonable person have completed the 2018 renovations in the same manner as the Herds, and operated the gas station such that fuel deliveries would take place from the alley?" Having similarly held that compliance or non-compliance with permits was of limited weight in addressing the nuisance claims, it was unnecessary for the judge to determine whether the respondents had complied with the terms of the building permit.

[80] The failure to address compliance with the building permit was not a failure to make material findings of fact. I can see no basis upon which we might conclude that the judge erred in law in failing to make a factual finding that was not essential to the exercise of her judgment. I largely agree with the respondents' submission that there is no practical utility in making findings related to compliance with applicable building requirements and this Court should reject the appellants' invitation to make any findings regarding compliance with regulatory requirements.

[81] The appellants sought leave to adduce evidence on the appeal of fuel unloading activity and the consequences of that activity as new or fresh evidence. In my view, that evidence does not meet the last part of the test for admission of such evidence enunciated in *Palmer v. The Queen*, [1980] 1 S.C.R. 759, 1979 CanLII 8: the evidence is such that it could have affected the result at trial.

[82] I would dismiss the appeal.

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Iyer"

I AGREE:

"The Honourable Justice Riley"