

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Olson v. Cranbrook (City)*,
2025 BCSC 2171

Date: 20251103
Docket: S30772
Registry: Cranbrook

Between:

**Ronald Arthur Robert Olson and #0973275 BC Ltd. (also known as
RJO Developments)**

Plaintiffs

And:

The Corporation of the City of Cranbrook

Defendant

Before: The Honourable Justice Lawn

Reasons for Judgment

Counsel for the Plaintiffs:

J.M. Lalonde

Counsel for the Defendant:

A.D. Price

Place and Dates of Trial:

Cranbrook, B.C.
May 27-30 and June 2-6, 2025

Place and Date of Judgment:

Cranbrook, B.C.
November 3, 2025

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Introduction

[1] In 2012, the plaintiff, Ronald Olson, found himself the owner of a development property near Slater Avenue in Cranbrook, British Columbia. Five years earlier, as a favour, he had loaned \$100,000 to his friend, Wade Wurzer, drawn from a line of credit on his house. Mr. Wurzer used the funds to purchase four lots in Cranbrook, with the intention of building a subdivision. Mr. Wurzer ran into financial difficulty, taxes went unpaid, and in 2012, Mr. Olson ended up foreclosing on his loan and taking possession of the property, known in this litigation as Pagurut Avenue, or the Pagurut Avenue subdivision.

[2] The course of development did not run smoothly for Mr. Olson, who was a first-time developer and who also worked through his corporate entity, the plaintiff #0973275 BC Ltd. (also known as RJO Developments). Mr. Olson was periodically assisted by Mr. Wurzer, two different engineering firms, Community Futures British Columbia, various realtors, and others. He also had countless meetings with City officials. Despite all of this it took until 2020 for the plaintiffs to hold their “kickoff meeting” and begin construction of the roadway and the associated water and sewer service connections needed to develop lots which would eventually accommodate ten modular homes.

[3] During early meetings with City officials, the subject of the cost of the roadway arose. In April 2013, Jamie Hodge, the Director of Engineering Service/City Engineer for the City of Cranbrook at the time, sent a letter to Messrs. Olson and Wurzer (the “April 2013 letter”), stating that “the City will pay for the remaining 50% of roadway base and asphalt construction costs...”.

[4] In June of the same year, Wayne Staudt, who was then Chief Administrative Officer (CAO) of Cranbrook, wrote another letter, this time to RJO Developments (the “June 2013 letter”). The June 2013 letter confirmed the previous commitment set out in Mr. Hodge’s letter, to pay 50 percent of the road costs for Pagurut Avenue.

[5] Both letters were written on City letterhead.

[6] The plaintiffs say first that a binding contract arises from these letters, which City staff entered into on behalf of Council. The plaintiffs argue that the City breached its obligations arising from this contract on December 9, 2019, when Council voted “no” to a resolution that would have provided the funding for 50 percent of the road costs for Pagurut Avenue. Alternatively, the plaintiffs argue the contract was breached in May of 2021 when Curtis Penson, then Manager of Engineering/City Engineer, and Mark Fercho, then the City’s CAO, abandoned attempts they had been making to have the City fund the roadway construction notwithstanding the December 2019 decision.

[7] The plaintiffs also advance alternative bases for relief: first, that the City’s actions amounted to misfeasance in public office, and second, that the City has been unjustly enriched by the acquisition of the roadway which, under the parties’ contract dated November 4, 2021, reverted to the City upon issuance of the Certificate of completion by the City Engineer.

[8] The City does not dispute that the letters were written but argues that no binding contract arose from them. Furthermore, the City argues the officials who wrote the letters had no authority to bind the town, and the matter was never budgeted or approved by Council. In response to the plaintiffs’ alternative bases for relief, the City’s position is that misfeasance is not made out on these facts, and in particular, that the plaintiffs cannot prove causation. The City also says it has not been unjustly enriched, since a road is a net liability and not a gain; and in any event, there was no deprivation. In addition, the City says that the plaintiffs have not addressed the fact that there is a clear juristic reason for the road’s construction: Mr. Olson wished to develop his subdivision and a roadway was required for this under the *Land Title Act*, R.S.B.C. 1996, c. 250, the *Local Government Act*, R.S.B.C. 2015, c. 1, and the City of Cranbrook Subdivision and Development Servicing Bylaw, No. 3633, 2008 (“Bylaw 3633”).

Background

[9] This case did not turn on issues of credibility or reliability. Primarily, it turned on documentary evidence and the applicable legal principles. In any event, while some of the witnesses had frailties of memory in some areas, everyone who testified did so in a forthright manner and to the best of their ability.

The acquisition of the lands and initial conditions

[10] Mr. Olson testified that in 2007, his old friends, the Wurzers, came to him because they were interested in purchasing lands and developing a subdivision in the Slaterville neighbourhood in Cranbrook. They intended to subdivide lands located on Pagurut Avenue West, next to an auto wrecker, to create low-income housing. Mr. Olson agreed to participate and the Wurzers' corporate entity, 0788500 B.C. Ltd., granted him a mortgage over the lands in return for his investment of \$100,000.

[11] After three or four years, no significant steps had occurred. In 2012, while Mr. Olson was working full time as a millwright at Elkview Mines, Mr. Wurzer ran into financial difficulty. Mr. Olson received a letter which informed him that the lands were up for sale for tax reasons. After seeking legal advice, Mr. Olson concluded that his best hope to recoup any of his investment was to foreclose on his mortgage and acquire the lands himself. He filed a petition and, in due course, became the owner of the lands. Mr. Olson testified that he had to pay the back taxes and secure the agreement of Mr. Wurzer's now ex-wife. Mr. Wurzer, apologetic, agreed to help Mr. Olson in moving forward with the subdivision, and did so for a time.

[12] Mr. Olson testified that he was required by the credit union to take title in his name personally, in order to obtain a line of credit necessary for preliminary clearing work. The records indicate that the corporate plaintiff owned the lands from July 3, 2013, to April 8, 2015, when they were transferred to Mr. Olson personally. Mr. Olson remained the owner until the lands were subdivided on December 7, 2021.

[13] On July 9, 2012, the City issued the first Preliminary Layout Approval (“PLA”). It set out various conditions to be met by July 8, 2013, at which time if subdivision approval had not been granted, the PLA would expire and the parties would have to re-apply. As noted above, Mr. Wurzer agreed to help in the early stages, as Mr. Olson had a full-time job. Mr. Olson did his best to learn what was needed to meet the conditions in the PLA. With funds drawn from Mr. Olson’s line of credit, Mr. Wurzer and Mr. Olson cleared garbage and engaged McElhanney Consulting Services Ltd. to prepare engineering drawings. All of this took some time.

[14] Mr. Olson originally testified as to a meeting with Mr. Hodge of the City some time before the April 2013 letter was obtained, although he could not remember the date. In his direct examination, when asked how the letter corresponded to the earlier conversation with Mr. Hodge, he stated that “It’s pretty clear... it was exactly what we talked about and what was agreed upon. This is what he gave us.” On cross-examination, he was taken to his discovery evidence, wherein he stated that prior to April 2, 2013, he had not had conversations with City staff about road construction costs: it had been Mr. Wurzer who had the discussion that led to the April 2013 letter.

[15] In any event, it was clear that at that time, Mr. Hodge did not indicate a certain requirement for the width of the road. Mr. Olson and Mr. Wurzer investigated road widths on their own. It was their understanding that where only one side of a street in a residential area was being developed, a narrower road width was required. In the case of Pagurut Avenue, because of the auto wreckers on the west side, only the east side of the roadway was being developed; Mr. Olson and Mr. Wurzer therefore inferred that a narrower road width would be sufficient.

[16] Eventually, the width of the road was clarified, but at the time of these preliminary steps in 2012–2013, I find that there was no understanding on the part of the City and Mr. Olson as to the required width of the road, other than conformance to City standards, as provided in Bylaw 3633 and referred to in the PLA. In the end,

although a great deal of evidence was led about the width of the roadway, nothing turns on it.

The 2013 letters

[17] As noted above, Mr. Olson’s recollection as to the events leading up to the letter in April 2013 was uncertain. At trial, he testified that before receiving the April 2013 letter, the “most important thing” was to obtain clarification as to what the City was willing to pay for in terms of the Pagurut Avenue road costs.

[18] In any event, it is clear that in April 2013, Mr. Olson and Mr. Wurzer received the April 2013 letter from Mr. Hodge, which stated:

Dear Sirs,

I understand that Mr. Dwayne Harvie indicated to you during subdivision design discussions that the City would pay for 50% of the Pagurut roadway reconstruction along the frontage or [sic: of] your proposed subdivision. I confirm that this is usual City practice.

As developer, you would be responsible for all deep servicing costs associated with construction of the subdivision (water and sewer lines, both storm and sanitary, including appurtenances and service laterals to the benefiting property lines), shallow services (telephone, cable, gas, electrical distribution), and 50% of the construction of road structure (base and asphalt as well as curb and gutter, street lighting and sidewalk all to City standards as outlined in the City Subdivision and Development Servicing Manual (Bylaw 3633). The City will pay for the remaining 50% of roadway base and asphalt construction costs along with curb and gutter and roadway catch basins as required including lateral connections to storm sewer. We typically require the subdivider/developer construct the entire roadway then submit detailed contract unit pricing and material quantities for review and City cost share of roadwork and these costs are then refunded to the developer/owner.

I trust this information clarifies the City’s policy with regards to cost sharing roadwork along subdivision lands fronting an existing City street. In reviewing this file I note that you were issued a PLA on July 9, 2012. Please remember that this PLA will expire on July 8, 2013.

[19] As noted above, on June 19, 2013, Mr. Staudt wrote the June 2013 letter to RJO Developments, confirming the previous commitment in these terms:

You have asked me to confirm the City’s commitment to pay 50% of the road costs along Pagarut [sic: Pagurut] Avenue W. as part of your planned subdivision.

This will confirm City Engineer L. James Hodge's previous commitment as per his letter to you dated April 2, 2013 (copy attached) that the City will pay 50% of the Pagarut [sic: Pagurut] Avenue West road costs.

To ensure there is no misunderstanding as to the City's commitment, the road will have to be constructed in accordance with City of Cranbrook bylaws and standards, and the City will pay 50% of the actual road costs as outlined in L. James Hodge's letter of April 2, 2013.

This letter is provided at your request for the purpose of assisting you with bank financing of this subdivision and no other purpose.

[20] Mr. Olson testified that he sought the second letter because he wanted something that was "more clear" than the first letter, which showed the City's commitment as to what it was willing to pay for—in other words, that it was willing to fund 50 percent of the roadway. The June 2013 letter, in Mr. Olson's opinion, was clearer, in that it confirmed that the City was, in fact, "going to pay."

Continued attempts at subdivision and rezoning

[21] Mr. Olson and Mr. Wurzer continued their attempts to move forward with the development. Eventually, Mr. Wurzer moved to Vancouver in May of 2014, for reasons that were not clear to Mr. Olson, and he was left on his own.

[22] The first PLA, having been extended for six months, expired on March 30, 2014. The City wrote to the plaintiffs to inform them that in order to market the property, they were required to have a valid PLA in place. Also in or around 2014, Mr. Olson had reached out to Jeannie Argatoff, a realtor with ReMax, to investigate whether the four lots in existence at the time could be sold without development, but including the work done so far as a part of the sale. It would appear that some marketing may have been done after March 30, 2014, but eventually another PLA was obtained, dated May 28, 2015.

[23] Mr. Olson described his difficulties with finances in the period of 2015–2019. He approached traditional lenders to no avail. At the suggestion of Mayor Lee Pratt, an approach was made to the Ministry of Housing to seek funding through the provincial government, with no success.

[24] Also in 2019, Mr. Olson was working on rezoning with a realtor named Brad McInnes. A new PLA dated July 29, 2019, was obtained. That PLA stated at item #7:

7) As per our meeting with the City's CAO in 2018, the City will fund half of the sidewalk costs on Pagurut [sic: Pagurut] Ave. Please provide engineering costs estimates to be agreed upon prior to construction.

[25] Mr. Olson and Mr. McInnes proposed a change in zoning from R1 to R7 and a width variation application, so that they could sell ten properties instead of just seven and so that they could put mobile homes on the lots, as permitted by R7 zoning, rather than modular homes as R1 exclusively allowed. They corresponded with Rob Price, the City's Community Planner in 2019. There was a public hearing on October 7, 2019, and the zoning change was adopted by Council, as was the development variance later that same month, eventually allowing Mr. Olson to build ten homes.

[26] Then, on December 9, 2019, the matter of the road cost reimbursement went to Council. The minutes of the meeting contain the following:

PAGURUT AVE PROPOSED ROAD

That Council receive the report from the Public Works Department titled "Pagurut Avenue West Proposed Subdivision Road"; and further, approve the payment for the west half of construction of Pagurut Avenue West and half of the sidewalk providing the construction be completed by December 31, 2020; funding \$150,000 from the Capital Roads Program and \$20,000 from Road Major Repairs Parts / Supplies / Equipment-Subdivision Upgrades.

Defeated.

[Emphasis in original]

[27] In the wake of this decision, Mr. Penson (who by 2019 had become the City's Approving Officer) sent Mr. McInnes a letter dated December 11, 2019, copied to Mr. Olson, setting out Council's decision and amending the June 29, 2019 PLA in respect of the road width. The amendment replaced the previous para. 7 of the PLA with the following:

7) Pagurut Ave W must be constructed to a "half road" standard with a minimum 7.5m asphalt width, along with curb, gutter, street lights and 1.5m wide sidewalk on the east side and a minimum 1m gravel shoulder on the west side. In addition a 1.5m wide is required to be installed on

6th St. NW adjacent to the development. All works and standards to be to the satisfaction of the City Engineer.

[Emphasis in original]

[28] There was some uncertainty in Mr. Olson’s evidence, as to whether the width of 7.5 metres was initially discussed before or after the December 11, 2019 amendment to the PLA. In the end, nothing turns on this point.

[29] This did not end Mr. Olson’s pursuit of funding. He continued to deal with City officials, who were not unsympathetic. On June 5, 2020, Mr. Penson, by this time the Manager of Engineering and Field Services Division, wrote to Ron Fraser, who was Acting CAO at the time, apparently following up on Mr. Fraser’s request to speak to Mr. Olson. The email stated:

Hi Ron,

As you have requested, I have followed up with Ron Olson to clarify his request to Council for 50% funding of Pagurut Ave.

He would like the City to fund 50% of a 9.5m road (full width), curb & gutter both sides, sidewalk on one side, and street lights. The deep servicing and shallow utilities would be 100% funded by the developer.

This would be consistent with the 2013 letters and meet the Subdivision and Development Servicing Bylaw standards for the road cross section.

Please let me know if you have any further questions. Hope you have a great weekend.

[30] Mr. Olson attended a meeting of City Council on June 8, 2020. In his examination-in-chief, he described the ten or 15 minutes he had to speak as “a bit of a blur”; but it is clear that he presented his case once again, maintaining that the City had agreed in the April 2013 letter and the June 2013 letter to fund half of the cost of the roadway. The Minutes of the meeting indicate he provided a history of the project, including various options for development that had been reviewed over the years, and Council discussed the issue at length and requested that staff prepare a follow up report.

[31] Mr. Penson authored a report which went to Council on June 22, 2020. The report recommended that Council rescind their earlier decision and approve the City’s payment of 50 percent of the road costs for Pagurut Avenue. This

recommendation was not accepted at the June 22, 2020, Council Meeting. Council also approved a resolution directing staff to obtain a legal opinion regarding the City's obligation and commitment.

[32] The matter went back before Council, with yet another report from Mr. Penson, in July of 2020. Again, Council voted not to fund the roadway.

[33] Mr. Olson testified that the "final last thing" he tried to do in September of 2020 was to put together a request for funding with a specific dollar amount. Mr. Fraser, the City's Interim CAO at the time, replied by email on September 16, 2020 stating that he and the Mayor had discussed Mr. Olson's request and agreed that it should not be taken forward to Council, who had twice rejected it.

[34] The 2020 overtures were not quite the end. There was some evidence that in 2021, Mr. Olson had further meetings or conversations with both Mr. Penson and Mr. Fercho, the City's CAO at the time, about funding Pagurut Avenue. The plaintiffs characterized these meetings (and some resulting communications between Messrs. Fercho and Penson in May of 2021 to the effect that Mr. Olson was pursuing a legal remedy) as amounting to a further or alternative breach of contract.

Road construction and home sales

[35] Eventually, on October 6, 2020, a kickoff meeting was held and road construction began. Mr. Olson and the City signed a contract on November 4, 2021, pursuant to s. 509 of the *Local Government Act*, providing that Mr. Olson would at his own expense install the "Works", as these were set out in the "Approved Engineering Plans" which formed a schedule to the November 4, 2021 agreement. At the time of trial, the road was 95 percent complete, just awaiting a final layer of asphalt. Some of the ten homes had been sold.

Issues

- 1) Did the 2013 letters constitute a contract which bound the City?

- 2) In the alternative, is the defendant liable for misfeasance in public office on the basis that the officials who wrote the two 2013 letters were acting outside their authority as public officials?
- 3) In the further alternative, was the City unjustly enriched by Mr. Olson having to pay the full cost of the Pagurut Avenue roadway?
- 4) Finally, in the event that the City is liable under any of the above heads, what are the plaintiffs' damages?
- 5) Costs.

(1) Did the April and June 2013 letters constitute a contract which bound the City?

[36] I have already set out the entirety of the April 2013 and June 2013 letters which the plaintiffs say establish a contract between RJO Developments or Mr. Olson and the City, the terms of which required the City to pay half of the costs of the Pagurut Avenue roadway.

[37] While the City disputes that the April and June 2013 letters contain the requisite elements of a binding contract, the City says that even if City staff purported to enter into a contract, the contract was not authorized pursuant to the applicable legislation, and therefore would not have been enforceable against the City. I will address this argument first.

Contract not authorized

[38] The determination of this issue depends first on the applicable legislation. The *Community Charter*, S.B.C. 2003, c. 26 states:

Principles of municipal governance

1 (1) Municipalities and their councils are recognized as an order of government within their jurisdiction that

(a) is democratically elected, autonomous, responsible and accountable,

(b) is established and continued by the will of the residents of their communities, and

(c) provides for the municipal purposes of their communities.

[39] Sections 114(3), 122 and 123 of the same statute set out the authority and powers of council:

Council as governing body

114 (1) The members of a municipal council are the mayor and the councillors.

(2) Despite a change in its membership, the council of a municipality is a continuing body and may complete any proceedings started but not completed before the change.

(3) The powers, duties and functions of a municipality are to be exercised and performed by its council, except as otherwise provided under this or another Act, and a council, in exercising or performing its powers, duties and functions, is acting as the governing body of the municipality.

(4) A council has all necessary power to do anything incidental or conducive to the exercise or performance of any power, duty or function conferred on a council or municipality by this or any other enactment.

...

Exercise of powers by bylaw or resolution

122 (1) A council may only exercise its authority by resolution or bylaw.

(2) If an enactment provides that a council is required or empowered to exercise a power by bylaw, that power may only be exercised by bylaw.

(3) If a council may exercise a power by resolution, that power may also be exercised by bylaw.

(4) An act or proceeding of a council is not valid unless it is authorized or adopted by bylaw or resolution at a council meeting.

General voting rules

123 (1) Unless otherwise provided, a motion on a bylaw or resolution, or on any other question before council, is decided by a majority of the council members present at the meeting.

(2) Each council member has one vote on any question.

(3) Each council member present at the time of a vote must vote on the matter.

(4) If a council member does not indicate how the member votes, the member is deemed to have voted in the affirmative.

(5) If the votes of the members present at a council meeting at the time of the vote are equal for and against a motion, the motion is defeated.

(6) A requirement under an enactment for an affirmative vote of a specified portion of all members of a council means an affirmative vote of that portion

of the number of members of which the council consists under section 118 [size of council].

(7) The voting rules established by this section also apply to council committees.

[40] There are further provisions in the *Community Charter* which deal specifically with expenditures of money. Section 149 provides for a “financial officer” who must be assigned the responsibility of financial administration, which includes expending municipal money “in the manner authorized by the council.” Subsections (1) to (3) of s. 173 provide that a municipality can only make expenditures if they are included in its financial plan, unless the expenditure is “for an emergency that was not contemplated for that year in its financial plan.”

[41] Under City Bylaw No. 3485, *Officers and Employees Bylaw* (14 June 2004), Schedule A, s. 2, the CAO has the following delegated authority regarding contracts:

(r) authorize the use or budgeted purchase or sale of City facilities, equipment and services and authorize the awarding of contracts for budgeted items within the Chief Administrative Officer’s signing limit authorization;

(s) supervise the calling and awarding of tenders for the supply of materials, equipment, services or construction approved by Council;

[42] The City also has a purchasing policy, Policy No. 40-501 dated January 1, 2009, adopted by Council resolution (“Purchasing Policy”). This policy limits the authority of the CAO and the Director of Finance to sign off on expenditures. I will return to the Purchasing Policy below.

[43] The caselaw supports the defendant’s position that even if the April and June 2013 letters constituted a contract, it could not be enforced.

[44] In *Amalgamated Recreation Engineers and Network Associates Ltd v. Sidney (Town)* (1978), 7 M.P.L.R. 217 (B.C.S.C.), 1978 CarswellBC 357, Justice Rae cited the applicable principle, quoting from the 1971 edition of Rogers’ *The Law of Canadian Municipal Corporations*. Justice Rae stated:

[76] The case law dealing with statutory provisions relating to municipalities, and of similar import to the foregoing, is accurately summed up in the

following quotation from Rogers, *The Law of Canadian Municipal Corporations* (1971, 2d ed.), Vol. 2, pp. 1035–36:

One principle that is clear and runs throughout all of the cases involving municipal agreements: a person entering into contractual relations with local authorities cannot assume that all the proceedings respecting the authorizing of the contract have been properly taken... Parties dealing with a municipal corporation are bound at their peril to take notice of the limits within which and the manner in which, the council has power to contract and bind the corporation. It follows from this that persons entering into contractual relations with local authorities cannot rely on the indoor management rule which, in the matter of domestic preliminaries, gives some protection to those dealing with trading corporations at least where there has been a breach by the corporation of an imperative statutory provision in the nature of a condition precedent to its right to contract.

[45] The current edition of the text is to similar effect. In Ian Rogers, *The Law of Canadian Municipal Corporations* (Toronto: Thompson Reuters Canada, 2020) at 25.2, the author states:

Under the Interpretation Acts of some provinces, all corporations are endowed with a general capacity to contract but this provision does no more than to give every corporation including a municipality the power to contract and makes this power a general feature of its statutory equipment. It does not, however, enlarge the express power to contract given by the governing statute or enable the municipality to exercise the power otherwise than by the method prescribed by the statute.

[46] In *Associated Planning Consultants (Int.) Ltd. v. North Vancouver (Corp.)*, [1982] B.C.J. No. 517, 1982 CarswellBC 1791, Justice Proudfoot (as she then was) addressed whether an effective lease existed between the parties. The applicable provision was s. 477 of the *Municipal Act*, R.S.B.C. 1979, c. 290, as it then stood, which included these words:

(1) The Council may, by by-law, absolutely lease any real property held or owned by the Municipality...

[47] Justice Proudfoot held that even if a valid lease had been agreed upon, the plaintiff could not succeed because the lease in question would fall within the framework of this section, and no bylaw had been passed: see para. 34. She continued:

[36] ...The law is clear that where a condition is imposed with reference to the exercise of a statutory power, (the passage of a by-law by a municipality) that condition must be complied with if the power is to be effectively exercised. Reference is made to Rogers on *The Law of Canadian Municipal Corporations* (2nd Ed. Vol. 2) states at p. 1037:

"A Municipality, being a creature of statute, can only enter into binding and valid contracts by complying with the statutory provisions and a contract made in breach of such provisions is illegal and void".

The author goes on to state:

"The law places the burden of seeing that all mandatory provisions of the governing statute are substantially complied with upon the party dealing with the corporation".

Further, at p. 1035:

"Parties dealing with a municipal corporation are bound at their peril to take notice of the limits within which and the manner in which, the council has power to contract and bind the corporation".

[37] In the result, contracts entered into by a Municipality, must be authorized and approved in a manner prescribed by the statute, and the onus is on the person entering into the contract to ensure that these requirements have been met. In the case at bar the onus was on the plaintiff to see that the appropriate by-law had been passed. See *Amalgamated Recreation Engineers and Network Associates Ltd. v. Town of Sidney et al* (1979), 7 M.P.L.R. 217 at p.240–1.

[48] The same line of authority was relied upon by Justice Chamberlist in *Skea v. Sunshine Coast (Regional District)*, [1998] B.C.J. No. 799, 1998 CarswellBC 661 at paras. 17–25, although in *obiter*. The Court of Appeal agreed, finding that an appeal of Chamberlist J.'s decision would have no chance of success with specific reference to this line of authority: see 1999 BCCA 523, paras. 10–12. See also *Silver's Garage Ltd. v. Town of Bridgewater*, [1971] S.C.R. 577, 1970 CanLII 196 at paras. 16–18.

[49] This law is directly applicable in the case at bar. The City's powers are to be exercised by its Council: *Community Charter*, s. 114(3). Council may only exercise those powers by bylaw or resolution: s. 122(1). Expenditures must be included in a municipality's financial plan (budget): s. 173. Thus, there had to be a bylaw or resolution authorizing the City's expenditure in terms of the Pagurut Avenue road costs, which then had to be budgeted.

[50] Marnie Dueck, the City’s Corporate Officer and City Clerk, confirmed that she conducted 20 hours of searching through City records, and was not able to find any resolution of Council authorizing a contract between the City and Mr. Olson or his company to fund the Pagurut Avenue roadway. Charlotte Osborne, the City’s Director of Finance and Chief Financial Officer (CFO), confirmed that she had never signed any document authorizing such an expenditure. In short, Council never approved the funding.

[51] In written argument, the plaintiffs submitted that nevertheless, the authors of the April and June 2013 letters, both high-ranking City officials, had “authority to bind the city to enter into Contractual obligations.”

[52] Several witnesses were asked in cross examination to provide their opinions as to whether the letters contravened the City’s Purchasing Policy. The City argues that these opinions are inadmissible as questions of law, and I agree. These opinions are also irrelevant: whether or not certain witnesses were of the view that Mr. Hodge and Mr. Staudt had the authority to enter into contracts such as this on behalf of the City is not determinative of whether they indeed had such authority.

[53] Ms. Osborne has worked for the City since 2006. She is currently the Director of Finance and CFO, a position she assumed in April of 2013. She was previously the Financial Services Manager, and then briefly the Deputy Director of Finance before assuming her current role. Ms. Osborne and Mr. Penson both testified as to the City’s capital roads program.

[54] Ms. Osborne stated that she relied regularly on the City’s “Purchasing Policy”, being Policy No. 40-501 dated January 1, 2009, and in fact was involved in its preparation. Her evidence was that the Purchasing Policy applies to all expenditures for goods and services. The policy provides as follows:

F. Purchasing Authority:

- Council - Expenditures over budget; and Budget Transfers over \$20,000

- Chief Administrative Officer and Director Finance and Computer Services – To Council Approved Budget (by line item)
- Chief Administrative Officer - \$100,000 (Within Budget)
- Director Finance and Computer Services - \$100,000 (Within Budget)
- Directors - \$25,000 (Within Budget)
 - Directors can designate spending authority within their group, subject to CAO approval, but not greater than \$10,000.

[55] Ms. Osborne confirmed in her testimony both her present role and that she is the “Director Finance and Computer Services” referred to in Paragraph F “Purchasing Authority” of the Purchasing Policy. She explained that any expenditure over \$100,000 within the budget was signed off on by her, as the Director of Finance, and by the CAO. Similarly, Ms. Osborne and the CAO sign off on any budgeted expenditure under \$100,000. If an expenditure is not within the budget, it must go back to Council.

[56] Ms. Osborne also explained the City’s budgeting process. Every year, the expenditures are determined, non-tax revenue is reviewed, and the difference between the two numbers is the tax levy that needs to be collected. She also explained that the City never budgets for a surplus, as this is not permitted by the *Community Charter*.

[57] On cross examination, Ms. Osborne was clear that the CAO does not have broad discretion to enter into contracts: a contract requires an expenditure which must be approved by Council, over a threshold which she stated was \$20,000.

[58] Mr. Penson’s evidence was consistent with Ms. Osborne’s, as to the authorizations set out in the Purchasing Policy, and his understanding and application of those rules.

[59] Several witnesses testified that the capital roads program was for the replacement and rehabilitation of existing roads, not for the building of new roads. In his direct examination, Mr. Penson explained, with reference to the City’s five-year financial plan, that amounts were budgeted for the capital roads program, to

rehabilitate and replace existing infrastructure in relation to roads. Despite this, Mr. Penson's December 9, 2019, staff report recommended a transfer of \$150,000 from the City's capital roads program for the funding of Pagurut Avenue. As Mr. Fercho and Ms. Osborne both testified, although it would have been possible for Council to move or redirect at least some portion of the funds from the capital roads project in order to fund a project like Pagurut Avenue, Council chose not to do so. The December 9, 2019, motion was defeated.

[60] As noted above, the matter came before Council on two further occasions, and Mr. Penson was apparently sympathetic to Mr. Olson's continued lobbying. Council voted each time against funding the roadway. In the absence of Council's approval to fund the construction of the roadway, even if a contract had been entered into, it could not be enforced against the City.

Existence of contract

[61] The conclusion above is sufficient to dispose of the plaintiffs' argument that a contract resulted from the April and June 2013 letters. Given the amount of trial time dedicated to the issue, however, and in case I am in error in my application of the *Amalgamated Recreation Engineers* line of authority, I will briefly summarize the reasons why Mr. Olson's breach of contract claim must ultimately fail on contractual principles as well.

[62] The plaintiffs argued that the April and June 2013 letters, written on City letterhead and signed by high-ranking officials, formed an "obvious contract" on an objective standard.

[63] In support of that position, the plaintiffs cited *Remington Energy Ltd. v. British Columbia Hydro & Power Authority*, 2005 BCCA 191 at para. 31 on offer and acceptance; and *Qi v. Qin*, 2024 BCSC 1830 on the law of contract formation. In *Qi*, Justice Hughes wrote:

94 As set out in *Oswald v. Start Up SRL*, 2021 BCCA 352 [*Oswald BCCA*] at para. 34, the requirements of a binding contract are: (a) an intention to contract; (b) the essential terms must be agreed to by the parties; and (c) essential terms must be sufficiently certain. This determination is contextual,

and must consider all material facts, including the communications between the parties and the conduct of the parties both before and after the agreement is made.

95 The test for a binding contract is objective, namely whether parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract: *Oswald BCCA* at para. 38, citing *Berthin v. Berthin*, 2016 BCCA 104 [*Berthin*] at para. 47. Ultimately, the question is whether an objective, reasonable bystander would conclude the parties intended to contract: *Oswald v. Start Up SRL*, 2020 BCSC 1730 at para. 123 [*Oswald BCSC*].

[64] These principles are, of course, well-settled.

[65] The City highlights the following aspects of the law of contract formation:

- a) For parties to be bound, there must be a manifest meeting of the minds or *consensus ad idem*: *Shannon v. Gill*, 2018 BCSC 135 at para. 35;
- b) When a dispute arises, the first question is whether the parties have agreed on all essential terms, and the court must analyse the evidence to determine whether, in all the circumstances, it is clear to the objective reasonable bystander that the parties intended to contract: *Kuo v. Kuo*, 2017 BCCA 245 at para. 38;
- c) Offer and acceptance are necessary to show a meeting of the minds: *Khosah v. Canada Life Assurance Company*, 2013 BCCA 25 at para. 35;
- d) For a contract to exist, the terms must be reasonably certain, and they must be enforceable—that is, with a definite as opposed to an uncertain meaning: *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 at para. 47; and
- e) Consideration is required for a contract to be concluded. This can be something other than money, such as a right, interest, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other: *Terrafund Financial Inc. v. 569244 B.C. Ltd.*, 2000 BCSC 1719 at para. 25. In order to create an enforceable bargain,

a promise must be supported by new consideration: *Balfour v. Tarasenko*, 2016 BCCA 438 at para. 44.

[66] The plaintiffs, who bear the burden of proving the existence of this contract, point to the percentage and category of expenses in the letters as providing sufficient certainty. They say the intention to contract was confirmed by numerous employees and Council members.

[67] The defendant argues that key terms of the contract were uncertain; that the objective evidence does not establish an intention to be bound; that there was no meeting of the minds; and that the plaintiffs have failed to show that there was consideration.

[68] Inconsistency in key terms is a significant problem for the plaintiffs. For example, the scope of work was not consistently defined. In the 2013 Hodge letter, the 50 percent City contribution applied to the sidewalk, while in 2015 discussions between Mr. Archibald (the engineer that Mr. Olson and Mr. Wurzer hired for the project) and Mr. Penson, sidewalk and streetlights were excluded, as Mr. Penson confirmed in his evidence. In Mr. Penson's July 29, 2019 PLA, the sidewalk was included again. However, in Mr. Penson's December 11, 2019 letter, it was confirmed that as per Council's direction, the City would no longer be funding half the sidewalk. These inconsistencies continued after 2019. The post-2019 period is relevant to the plaintiffs' alternative position that there was a breach or further breach of contract in May of 2021, when Mr. Fercho and Mr. Penson communicated with each other indicating that litigation was inevitable. During the 2020 overtures, Mr. Olson again sought payment for the sidewalk.

[69] A binding contract requires an expressed intention to be bound. The plaintiffs argue that the April and June 2013 letters set out such an intention. The language of the April 2013 letter, however, describes "usual City practice", "policy", and what is "typically" required. This letter does not set out an intention to be bound. Mr. Olson then sought another letter, which he testified was for increased clarity. The June 19, 2013, letter states, at the close:

This letter is provided at your request for the purpose of assisting you with bank financing of this subdivision and no other purpose.

[70] The plaintiffs do not point to any further contractual document in service of this promise to pay. For example, there was nothing signed or executed by Mr. Olson or the corporate plaintiff, setting out the terms agreed, as was done in the parties' November 4, 2021 agreement, where the plaintiff Mr. Olson agreed to pay for the roadway. In short, I find that the April and June 2013 letters did not contain any manifest intention to contract.

[71] Of equal concern to the plaintiffs' case is the issue of consideration. In *Terrafund Financial Inc.* at para. 25, the Court defined consideration as something of value received by a promisor from a promisee. It can take the form of a right, interest, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other. See also *Balfour v. Tarasenko*, 2016 BCCA 438 at paras. 44–45. The determination of consideration is based on an objective assessment of the actual communications between the parties: see *Aubrey* at para. 48.

[72] The plaintiffs led no evidence as to the consideration flowing from them to the City. The plaintiffs had to construct the road in order to build their subdivision, regardless of the April and June 2013 letters. As the defendant submits, they did in fact construct the road. Mr. Olson did not give evidence of any promise he made or benefit he provided in exchange for the 50 percent funding.

[73] In *Terrafund Financial Inc.*, the Court adopted the defendant's position that absent consideration, a promise contained in a letter did not create an enforceable contract: at paras. 27, 35.

[74] Since the plaintiffs did not provide any evidence of consideration, I find the promises contained in the April and June 2013 letters for the City to fund 50 percent of the Pagurut Avenue roadway did not constitute a binding and enforceable contract.

[75] Given the conclusions above, it is not necessary for me to address the City's alternative arguments that if a contract existed, it had expired or would have been terminable upon reasonable notice.

(2) Estoppel

[76] The plaintiffs rely on the doctrine of promissory estoppel for the enforcement of the City's obligation to pay for the road work. They submit that the principles of promissory estoppel are well-settled: the plaintiff must show that the defendant has, by words or conduct, made a promise or assurance intended to affect their legal relationship and to be acted on, and that the plaintiff, in reliance on the representation, in fact acted upon it or in some way changed its position: *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para. 1.

[77] The plaintiffs plead that estoppel is a flexible, equitable concept which seeks to avoid truly unconscionable results, citing *Desbiens v. Smith*, 2010 BCCA 394 at para. 40. At para. 38 of *Desbiens*, Groberman J.A. observed that the Court in *Litwin Construction (1973) v. Pan* (1988), 29 B.C.L.R. (2d) 88 (C.A.), 1989 CanLII 2682 did endorse a robust doctrine of estoppel, but added:

[40] Estoppel is, as an equitable concept, flexible. It must, however, be applied with some caution, so as to avoid legal uncertainty and arbitrariness. The object of its application is to avoid truly unconscionable results, and not simply to resolve disputes by reference to some abstract and vague concept of fairness.

[78] Often, but not always, the defendant's problematic conduct will be blameworthy, in the sense of being deliberate or reckless: *Desbiens*, at para. 39.

[79] The plaintiffs also submit that "the principle of estoppel binds the crown", citing *Canada (Attorney General) v. Adamoski*, 2004 BCCA 625 at para. 22.

[80] The plaintiffs' pleadings and argument fail to contend with the fact that the statements by Mr. Hodge and Mr. Staudt on which they rely to ground the estoppel were made without authorization. Where promissory estoppel has been applied

against public authorities in existing case law, the promises made were not unlawful, or inconsistent with a statutory discretion: see *Immeubles Jacques Robitaille inc. v. Québec (City)*, 2014 SCC 34 at paras. 20-21.

[81] The doctrine of estoppel cannot be raised in the face of legislation that renders the underlying acts unlawful. Even where the municipality has received all or some of the benefit of a contract, estoppel will not overcome a lack of proper authorization to contract: David G. Boghosian and J. Murray Davison, *The Law of Municipal Liability in Canada*, (Toronto: Lexis Nexis, 1999) 2.190. As stated by Justice Binnie in *Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services)*, 2001 SCC 41 at para. 47, public law estoppel clearly requires an appreciation of the legislative intent embodied in the power whose exercise is sought to be estopped. The legislation is paramount.

[82] As noted above, s. 149 of the *Community Charter* says that the municipal officer responsible for financial administration must expend municipal money in the manner authorized by Council, and s. 122(1) says that Council may only exercise its powers by bylaw or resolution. Further, the Purchasing Policy clearly states that expenditures over budget must be approved by Council. Council rejected the 50 percent contribution to the Pagurut Avenue development, which was not within the City's budget, on several occasions instead of supporting it via a bylaw or resolution. As there is no evidence of any bylaw or resolution that authorized the City's expenditure of funds for the Pagurut Avenue Road costs, the legislative requirements were not complied with and the doctrine of promissory estoppel does not assist the plaintiffs.

(3) Misfeasance in Public Office

[83] In their notice of civil claim, the plaintiffs plead that three unlawful acts by City officials amounted to misfeasance in public office:

- a) Mr. Hodge advising the plaintiffs in the April 2013 letter that the City agreed to pay for 50 percent of the road work;

- b) Mr. Staudt advising the plaintiffs in the June 2013 letter that the City agreed to pay for 50 percent of the road work; and
- c) Mr. Penson advising the plaintiffs on or about December 6, 2019, that the City agreed to pay for 50 percent of the road work.

[84] There was no evidence at trial that Mr. Penson gave the plaintiffs the advice set out at (c) above, and so only the first two acts are at issue.

The Law

[85] The tort of misfeasance in public office found its modern footing in Canada in *Odhavji Estate v. Woodhouse*, 2003 SCC 69 where Justice Iacobucci summarized the requirements of the tort in these terms:

32 To summarize, I am of the opinion that the tort of misfeasance in a public office is an intentional tort whose distinguishing elements are twofold: (i) deliberate unlawful conduct in the exercise of public functions; and (ii) awareness that the conduct is unlawful and likely to injure the plaintiff. Alongside deliberate unlawful conduct and the requisite knowledge, a plaintiff must also prove the other requirements common to all torts. More specifically, the plaintiff must prove that the tortious conduct was the legal cause of his or her injuries, and that the injuries suffered are compensable in tort law.

[86] The Court of Appeal has often urged caution in the use of this tort. In *J.P. v. British Columbia (Children and Family Development)*, 2017 BCCA 308 at para. 323, D. Smith J.A. stated:

[323] For good reason, the ambit of the tort has always been narrow. As was observed by Madam Justice Newbury in *Powder Mountain Resorts Ltd. v. British Columbia*, 2001 BCCA 619, leave to appeal to SCC ref'd, 37817 (8 March 2018):

[2] But for reasons that are perhaps obvious, the tort must be used cautiously. Otherwise, the courts risk straying into the arena of political decision-making, bypassing the normal restraints associated with judicial review, and becoming the arbiters of the personal thought processes of public officials. One recent commentator (Phillip Allott, "EC Directives and Misfeasance in Public Office", [2000] 59 *Camb. L.J.* 4) has written that the court should not, by means of the tort, take on the role of "ombudsman, a parliamentary committee, or an organ of public opinion in reviewing even egregious acts of maladministration, official incompetence, or bad judgement." (at 6.) To avoid dangers of this kind, a balance must be sought between curbing unlawful

behaviour on the part of governmental officials on the one hand, and on the other, protecting officials who are charged with making decisions for the public good, from unmeritorious claims by persons adversely affected by such decisions. ...

[87] At para. 22 of *Odhavji*, Iacobucci J. differentiated between Category A (where the conduct of the public official is specifically intended to injure) and Category B (where the public official acts “with knowledge both that she or he has no power to do the act complained of and that the act is likely to injure the plaintiff.”). This knowledge can be established through actual knowledge, subjective recklessness, or wilful blindness: see *J.P.*, at para. 329, below.

[88] The above principles regarding the tort of misfeasance in public office were recently reviewed and discussed in some detail by the Court of Appeal in *British Columbia v. Greenglen Holdings Ltd.*, 2025 BCCA 115. I will return to this case below.

The parties’ positions

[89] The plaintiffs submit that Category B misfeasance applies to the April and June 2013 letters on the following bases:

- a) The defendant was a public official exercising public functions. The plaintiffs argue that Mr. Hodge, as Director of Engineering Service/City Engineer, and Mr. Staudt, as CAO, were public officials exercising public functions when they signed the letters.
- b) Writing the letters was not permitted City practice and therefore was an act “in excess” of the officials’ powers (*Odhavji*, para. 24). Moreover, the plaintiffs say that payment along the lines set out in the letters would be very unusual: the plaintiffs point to the testimony of Mr. Stetski in support of this submission. I acknowledge that other witnesses testified as to the unique nature of the April and June 2013 letters. Mr. Penson confirmed that the content of Mr. Hodge’s April 2013 letter did not reflect his current understanding of what the City usually pays for. Ms. Osborne confirmed that Mr. Staudt’s June 2013

letter was not typical in terms of promising to contribute to building a road and reimbursing costs.

- c) The officials were aware that this conduct was unlawful and likely to harm the plaintiff(s). Mr. Staudt helped to write the Purchasing Policy which had been in force since 2009, and which his June 2013 letter contradicted. Further, Mr. Hodge was “wilfully blind or had ‘conscious disregard’ for the lawfulness of the conduct and the consequences to the plaintiff”, because he was both an experienced engineer and the Approving Officer who was familiar with the Purchasing Policy. Mr. Fercho, the current CAO, confirmed that the person in the CAO role should be “very well aware” of the Purchasing Policy, testifying that he uses it often. In 2013, authorization for the payment of 50 percent—or any other amount—of the Pagurut Avenue road costs, was not in the City’s budget and therefore was not within Mr. Hodge’s nor Mr. Staudt’s authority to promise.
- d) The plaintiffs also advance a causation-based argument in that they relied on the April and June 2013 letters to commence work on the subdivision and submit that if those officials had not agreed to pay for 50 percent of the road work, they would not have commenced the work.
- e) Finally, as the injuries are financial, the plaintiffs submit they are compensable in tort law.

[90] The City submits that the claim in public misfeasance cannot succeed for three reasons:

- a) The April and June 2013 letters were not unlawful acts in the exercise of a public function;
- b) The plaintiffs have not established the requisite mental element on the part of the officials; and
- c) The April and June 2013 letters did not cause the alleged damages.

Discussion and decision on misfeasance

[91] The issue of causation is a difficult hurdle for the plaintiffs.

[92] The law is clear that causation is a required element of the tort of misfeasance in public office: *Greengem Holdings Ltd.* at para. 81. The plaintiffs must prove that the tortious conduct that has been established on the evidence caused their injury: *Greengem Holdings Ltd.* at para. 81.

[93] The City submits that the plaintiffs have not met their burden in this regard, and I agree. The alleged tortious conduct is the provision of the April and June 2013 letters. Between 2013 and 2019, when the Council unanimously resolved to oppose funding of the road for the proposed subdivision, the plaintiffs have not shown that the April and June 2013 letters caused the plaintiffs to sustain financial loss. In brief:

- a) Mr. Olson invested in the lands and the subdivision development without any expectation of cost-sharing with the City. He first invested \$100,000 in 2007 and commenced foreclosure proceedings to take possession of the lands in 2012. The lands were challenging and finding financing was tough, as Mr. Olson testified at some length, but this situation would not have been any different had the April and June 2013 letters not been written.
- b) Mr. Olson tried to sell the lands a number of times after the April and June 2013 letters were written, including as “raw land” and as subdivided lots. His repeated attempts to extricate himself from the situation after 2013 indicate that the April and June 2013 letters did not somehow convince him to stick with the project.
- c) The plaintiffs argued that, between 2013 and 2019, work was done on the lands in reliance on the April and June 2013 letters. However, the evidence equally points towards the sale of the lands as the rationale for performing the work. For example, in 2018 and 2019, Mr. Olson removed trees, stumps, and boulders from the site, and in 2018-2019, Mr. Olson testified that he did surveys on the water main to ensure it was up to standard. There was no

evidence as to the costs or extent of this work and Mr. Olson did not provide any evidence that he would not have done that work if the April and June 2013 letters had not been provided. Mr. Olson did refer to Geotech studies but, on cross examination, agreed that those studies were conducted in 2020.

- d) After the City denied funding in 2019, Mr. Olson carried on. He sought funding from Community Futures British Columbia with the understanding that he would be paying for the entire cost of the road, and subsequently commenced construction.

[94] It is clear from Mr. Olson's conduct before and after receiving the April and June 2013 letters that the work he did on Pagurut Avenue and the costs that he covered in relation to this work cannot be causally linked to the promises contained in those 2013 letters.

[95] Given the plaintiffs' failure to prove causation, their claim on misfeasance in public office cannot succeed. Therefore, I will not address the City's arguments that the April and June 2013 letters were not unlawful acts in the exercise of a public function, or that even if they were, there was no proof that Messrs. Staudt and Hodge knew or were subjectively reckless or wilfully blind as to the unlawfulness of the acts.

(4) Unjust enrichment

[96] At the start of the trial, I allowed the plaintiffs' application to amend the notice of civil claim to add a claim for unjust enrichment.

[97] The elements of a claim for unjust enrichment are well known. The plaintiff must prove an enrichment of the defendant, a corresponding deprivation of the plaintiff, and an absence of juristic reason for the enrichment: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30. All three elements must be proven.

[98] The plaintiffs submit that the City has been unjustly enriched because it now has a road that it did not have before. The City submits that the road is not an

“incontrovertible benefit” to it, but rather, a net liability, and thus not an enrichment at all. The City also argues that the plaintiffs have suffered no deprivation, and that in any event, even if the City was enriched, there was a juristic reason for it.

[99] I am not persuaded by the City’s assertion that the road is a liability. The issue is not whether the City has received a net enrichment, but whether it has received an enrichment—with any offsetting loss being addressed elsewhere: see Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, 2nd ed (Toronto: LexisNexis, 2022) at 2.01[3].

[100] However, it is not necessary for me to determine this issue, because of my conclusions on the remaining two elements of the test.

[101] The plaintiffs have failed to establish deprivation. While building the road did carry a cost, this road was essential for the plaintiffs in order to proceed with the subdivision. At the time of trial, this subdivision had sold five of its ten lots, after Mr. Olson’s previous unsuccessful attempts to sell the bare land or the lots at various pre-development stages over many years.

[102] In *Beaver Lake Industrial Park Inc. v. City of Kelowna et al*, 2006 BCSC 486, a developer was attempting to recover latecomer fees which it claimed it was entitled to because the City had told the original land owner that it would be eligible for latecomer protection, after it was required to build a water supply system. The developer made a number of claims, including that the City was unjustly enriched by the water supply system. Justice Silverman held that the claim in unjust enrichment was not made out. With respect to deprivation, Silverman J. stated:

[124] 2. With respect to the second branch of the test, the Plaintiff has not suffered a deprivation. It required the waterworks, including the PRV, to obtain water; it obtained water. It had to meet the requirements of the City's subdivision bylaw in any event to pursue its own project. This is to be contrasted by the expenditures in *PNI* where the developer had to spend funds for amenities it would not have otherwise required and had to give up land it otherwise could have developed. ...

[103] Similarly, the plaintiffs had to develop the road in order to pursue the Pagurut Avenue development. Mr. Olson's evidence was that after Council's rejection of the development in 2019, he had to "make a silk purse out of a pig's nose" and resolved to continue building the subdivision to address the heavy debt load associated with the project thus far.

[104] Finally, the plaintiffs have failed to satisfactorily address the defendant's argument that there was a juristic reason.

[105] The test for juristic reason was reformulated in two parts by Iacobucci J. at para. 44 of *Garland*. The first part is relevant to the inquiry here. Justice Iacobucci stated:

[44] ... Consequently, in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. The established categories that can constitute juristic reasons include a contract (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.

[106] The plaintiffs have failed to show that no juristic reason from an established category exists to deny recovery. The plaintiffs are not challenging the Approving Officer's decision to require the road work. It is the plaintiffs' burden to show that there is no statutory, contractual, or other basis in the established categories, in order to make out a *prima facie* case under the juristic reason component of the analysis. The plaintiffs made no submissions on this point.

[107] Further, Mr. Penson was authorized to require the road works as a condition of subdivision by the following:

- a) The *Land Title Act*, ss. 75(1), 85(3), 86, and 87;
- b) The *Local Government Act*, ss. 506(1), (8), (10) and 509;

- c) City Bylaw 3633, ss. 8.3 and 8.5; and
- d) The Agreement signed by the City of Cranbrook and Ronald Olson, dated November 4, 2021.

(5) Damages

[108] Given the conclusions I have come to above, it is not necessary for me to assess damages in this case.

[109] In case I am incorrect in these conclusions, however, I observe the following:

- a) The burden is on the plaintiffs to prove damages, whether under breach of contract or the alternative positions.
- b) The plaintiffs pointed to various estimates which were in evidence as to the cost to build the roadway.
- c) These estimates were inconsistent with each other, in that the included items varied.
- d) In written argument, the plaintiffs relied on the estimate set out in Mr. Penson's report to council dated June 22, 2020. That number was \$199,000. Mr. Penson explained this estimate in his evidence. The figure does not represent actual costs, and it included items which were never constructed. For example, the estimates in the June 22, 2020 report were for a 9.5 metre roadway, and a roadway of 7.5 metres was eventually constructed.
- e) The MacKay Contracting invoices in evidence cannot be relied on as proof of damage: they were general in nature apart from details surrounding certain items that were not subject to the 50 percent coverage proposed in the April and June 2013 letters: sewer, water, and lot grading.
- f) There was a great deal of evidence given about the width of the roadway. The width was not clarified in 2013, other than that it had to be in conformance

with the applicable bylaw. By 2019, Mr. Penson had allowed for a 7.5 metre width, in an apparent attempt to save Mr. Olson money by constructing a roadway of the minimum width required for two lanes, rather than the standard 9.5 metres. The roadway agreed to in the November 2021 contract and eventually built by the plaintiffs conformed to this specification. I do not understand the plaintiffs to take the position that the reduction in roadway width caused them any damage; nor did they object, in 2020 or 2021, to this specification. In any event, I find that the plaintiffs have not proven damages associated with the change in roadway width.

- g) With regard to public misfeasance and the costs between 2013 and 2019, the defendant submits that the plaintiffs have failed to adequately set out those damages, if any. I agree. The plaintiffs led no evidence as to the direct costs associated with the work done during this period.

Costs

[110] The defendant, having been substantially successful, is entitled to its costs. Subject to receiving written submissions within 14 days of the release of these reasons, the defendant will be entitled to its costs at Scale B.

“Lawn J.”