

Damages for Digging

The facts of the case

In *Heyes v. Vancouver, TransLink, Canada Rapid Line Transit Inc. and Transit B.C. Limited Partnership* the defendants, TransLink, Canada Rapid Line Transit Inc. and Transit B.C. Limited Partnership were found liable in nuisance for the damages to the business operated by the plaintiff caused by the massive disruption of switching from the bore hole approach to the “cut and cover” approach in building the Skytrain (Canada Line) to the Vancouver Airport.

The plaintiff also sued the City of Vancouver, but the court found that the City, whose streets were used, was not liable because at the time the City granted a license for use of its streets for the project, the decision to use cut and cover had not actually been made public. The City was unaware that the defendants had chosen an option that was going to create an actionable nuisance.

The court dismissed additional claims based on negligence and a claim for negligent misrepresentation.

The court’s reason

What seems to have really bothered the court in this case was the decision to forgo boring or tunneling beneath the streets in favour of the “cut and cover” method of construction, which was made to lessen the costs that would be incurred by the contractor. However, while the defendants spared the contractor some financial outlay, they passed high financial burdens onto individual business owners that were disproportionate to the public benefit of a less expensive method of construction.

There were two methods that could be used to build the project: one method did not create a nuisance, another cost less but created a costly nuisance to adjoining businesses. In the circumstances, where the chosen method created a nuisance, the court ruled that the parties making the decision that caused the nuisance could not escape liability for the business losses resulting from the nuisance they caused.

The law has changed

The important thing for local governments to note is that this case represents a significant departure from the law as it has stood until this case. In previous cases, the law had protected the public authority against claims for damages, if there was no evidence of bad faith or actual carelessness on the part of the builders of a public project. Now it is clear that public authorities cannot take this outcome for granted.

In the past, as long as the defendants made sure that access to the commercial enterprises was available, a claim for damages could not succeed. In this case, actual access was always available to the store, however customers failed to continue to frequent the business because of the excessive inconvenience and disruption.

Significance for local governments

There are obvious implications for local governments undertaking projects that result in long term disruption to streets, particularly where businesses are concerned. In addition to ensuring that actual physical access remains available to businesses, local

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government should make every effort to ensure that it considers and adopts choices that are the least disruptive to the businesses, if possible, even if it means that there may be some additional cost involved.

The longer the estimated period of disruption, the more critical it becomes to factor in the economic cost to business. If the disruption to the business in this case had been of short duration, the court ruling might have been different.

Colin Stewart

Tips for Preparing and Registering Section 219 Covenants

Section 219 Covenants are without a doubt a very useful part of the local government toolbox in British Columbia. The history and purpose of the Section 219 Covenant is too vast a subject for a brief article such as this one. It is enough to say that a Section 219 Covenant is an agreement between a local government and the owner of land, in which the owner's rights to use, build on or subdivide the land are limited in furtherance of some public purpose. However, it's not just the "big picture stuff" that is important. With Section 219 Covenants, as with anything, the devil has an alarming propensity to appear in the details. This article presents a handful of practical tips to help avoid unwanted snags.

Geotechnical reports – Just stick to the script!

Where lands are subject to geotechnical hazards such as flooding, erosion, subsidence, and others, section 56 of the Community Charter permits a building inspector to issue a building permit if a qualified professional certifies that the land may be used safely for the use intended, subject to any conditions the qualified professional may include. It is also a requirement under section 56 that the owner of the land covenant to use the land in accordance with the qualified professional's report, that the owner covenant to indemnify the local government against liability arising out of the use of the land, and that these covenants be registered against title to the land under section 219 of the Land Title Act.

Most often, the qualified professional's report is attached to the Section 219 Covenant as a schedule. In order to comply with the requirements of section 56 and, more to the point, in order to ensure that the local government is entitled to protection from liability, it is essential that the report tracks the language of section 56. The report must first of all state clearly what the intended use of the land is, and it must then state that "the land may be used safely for the use intended" if the land is used in accordance with the conditions specified in the report. This is exactly the thing that the qualified professional is required to certify. Accept no substitutes! The same thing goes when an approving officer is requiring a geotechnical report under section 86(1)(d) of the Land Title Act.

To avoid headaches for you and to assist landowners – especially those who may not be familiar with the requirements of the Community Charter or with the nature of geotechnical reports – you might consider offering to review draft reports on an informal basis to ensure they contain the necessary certification language and meet the requirements of section 56, so that any of those deficiencies are identified before the landowner has accepted the report and paid the bill. Of course, you cannot and should not "second guess" the engineer's opinion as to the safety of the site for the use intended in the context of the perceived hazard.

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Avoid scheduling nightmares

Although geotechnical reports under section 56 of the Community Charter are specifically intended to be attached as schedules to Section 219 Covenants, the Land Title Office has made it clear in recent years that it will not accept just anything as a schedule to a Section 219 Covenant. The Land Title Office will reject a Section 219 Covenant if it contains a schedule that is vague, unclear, or illegible. To make things more challenging, the Land Title Office also has reservations about accepting Section 219 Covenants that refer to external documents that are not attached as schedules. At times this can present something of a “catch 22” for local governments, but these guidelines will help you avoid some of the pitfalls.

First, ask yourself whether a schedule is really necessary. Can the salient points of a document be incorporated into the text of the Section 219 Covenant? Except in the case of geotechnical reports, the Land Title Office will reject a Section 219 Covenant that relies on a report attached as a schedule.

Plans, sketches, diagrams and the like can be attached as schedules, but the cardinal rule is that they must be clear and legible. In cases where the plan is simply too large to be reduced to a form that will fit into the document, the plan may be kept on file in a local government office, to be available upon request. The Land Title Office has indicated that in such cases it will accept references to externally stored plans, so long as the reference is to specific filing information.

Bylaws may also be referenced without attaching them as schedules, since they are public documents.

Take charge and maintain control

Section 219 Covenants are often required as pre-conditions of some form of local government approval, notably subdivision approval. It is important that the Section 219 Covenant in such cases be registered against the relevant property before the approval is granted. If registration is overlooked until after approval has been granted, it may be too late. Even if approval can be withdrawn on the basis that it was granted on condition that a Section 219 Covenant be registered, it will be an uphill battle to do so.

It is far better for local governments to maintain control of the process. If approval is the incentive, then approval should not be granted until the Section 219 Covenant is registered. To avoid mistakes, the local government should receive the signed Section 219 Covenant and have its lawyers register it in the Land Title Office. This avoids the possibility that a developer might pressure a local government official into granting approval while the developer delays registration, perhaps indefinitely.

Likewise, if the developer is required to pay the local government’s legal fees in connection with the preparation and registration of the Section 219 Covenant (as is often the case), these should be collected prior to the granting of approval. The alternative may be to chase the developer for an unpaid bill after the fact.

Another reason for maintaining control of the registration process is to ensure that the Section 219 Covenant is registered quickly, once it is signed by all of the parties. Section 219 Covenants often contain one or more priority agreements, by which the holder of a charge on title, typically a mortgage, agrees to subordinate its charge to the Section 219 Covenant. This prevents the Section 219 Covenant from being purged from title in the event of a foreclosure. If an owner refinances between the

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time a Section 219 Covenant is drafted and the time it is registered, the priority agreement(s) will need to be updated and the process begun again, so the quicker it can be registered, the better.

Can I get a witness?

On a final note, don't forget to make sure the Section 219 Covenant has been signed by all parties, and that all signatures have been properly witnessed by a lawyer, notary, or commissioner for taking affidavits. It is not uncommon for one or more signatures to be inadvertently overlooked, so taking a moment to double-check can save time and expense in the long run. If you are in doubt about how to properly sign a Section 219 Covenant, your lawyer or the Land Title Office can provide you with instructions.

Michael Hargraves

Awarding Costs in Public Interest Cases

The issue in *Vancouver (City) v. Zhang*, 2009 BCSC 614, was whether costs should be awarded against an unsuccessful party alleging a breach of the party's rights under the Charter of Rights and Freedoms where that party's interest coincides with the public interest.

In the underlying judgment, the petitioner, the City of Vancouver, sought an injunction from the Supreme Court of British Columbia ordering the respondents to remove a structure they had erected on a city street. The respondents were a group of Falun Gong members protesting, in front of the Chinese Consulate in Vancouver, against the persecution of Falun Gong adherents in China. As part of their protest, some of the respondents had erected structures on a grassy portion of the city street abutting the Consulate on one side and the city's sidewalk on the other.

The City of Vancouver argued that such structures were in contravention of S. 71 of the Street and Traffic Bylaw. The respondents argued that the bylaw infringed their constitutionally protected right to freedom of expression, under S. 2(b) of the Canadian Charter of Rights and Freedoms.

The Court held that the erection of the structures violated the bylaw. The protesters' method of expression was incompatible with the purpose of the street and therefore was not protected under S. 2(b) of the Charter. In addition, the City, in enforcing the bylaw, was not acting for an improper purpose.

On the matter of costs, the general rule is that the successful party should be awarded the costs of the case. The unsuccessful respondents argued that it would be unfair and inappropriate for the court to follow the general rule because of the public-interest nature of the respondents' case. In their view, the case concerned a novel, unresolved issue of fundamental importance to society - freedom of expression under the Charter. The issue of government accountability, in examining whether Vancouver acted with

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improper purpose in enforcing its bylaw against the respondents, was also at issue. The respondents' position was that the Court should use its discretion to order each of the parties to bear their own costs.

The Court referred to the leading cases on costs in public interest litigation cases, including *Sierra Club of Western Canada v. British Columbia (Chief Forester)*, *Barclay (Guardian al item of) v. British Columbia*, *British Columbia (Minister of Forests) v. Okanagan Indian Band*, and *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue Agency)*. The totality of the case law sets out the criteria by which a public-interest litigant may be exempted from the rule with respect to costs and also establishes limitations to the application of the exemption.

The relevant factors in the Court's analysis of the question of costs included whether the case involved issues of importance, which extended beyond the immediate interests of the parties involved. If it did, this was indicative of a case that merited special treatment. Likewise, if the respondents did not have a personal, pecuniary interest in the outcome of the case, this might further indicate that an exception could be warranted.

Whether the triable issue had been previously decided by the courts, whether Vancouver had a clearly superior capacity to bear the costs of the litigation, and the fact that the respondents had not engaged in vexatious, frivolous or abusive conduct in pursuing the case, were all matters to be weighed in deciding whether special treatment could be accorded to the respondents.

According to the Court, many of the above factors were similar to those in the governing case law. However, the Court decided that the general rule - that the successful party should be awarded the costs of the case - should not be departed from in this case, and awarded costs to Vancouver.

This case is noteworthy to local governments who are parties to public interest cases for the following reasons:

- The decision upholds the principle that while some litigation on public interest matters may warrant special treatment in regard to costs, not every case under those circumstances will shield a public interest proponent from having costs awarded against them if they are unsuccessful. In this case, the Judge echoed the Supreme Court of Canada's judgment in *Little Sisters* that "an issue of public importance will not automatically entitle a litigant to preferential treatment with respect to costs".
- The decision reaffirms the principle that each case must be determined on its own merits and that a totality of factors must be weighed seriously by the courts in the exercise of their discretion in respect of costs. According to the Honourable Madam Justice Stromberg-Stein, in this case, the essential question remains whether the general rule of costs is "unsuitable on the facts of the case". That seems to indicate that even in the broad context of public interest litigation, preferential treatment regarding costs will only be given in highly exceptional circumstances.

Maja Stupar

The Summer Of Discontent The 2009 Major Industry Tax Revolt

In the midst of the global recession, which has severely affected the British Columbia economy generally and the economies of resource communities in particular, several communities across British Columbia are facing an unprecedented tax revolt by major industry.

In Campbell River, North Cowichan, Port Alberni and Powell River proceedings have been commenced in British Columbia Supreme Court by Catalyst Paper Corporation seeking to set aside the Tax Rates Bylaw in each of those communities, and, pending the decision by the Court, Catalyst has only paid a portion of its municipal taxes.

Similar Court proceedings have also been commenced by West Fraser Mills in Kitimat and Celgar in Castlegar. TimberWest Forest Corp., is also challenging the Campbell River Tax Rates Bylaw and Five Year Financial Plan as a result of the taxes on its Managed Forest Land properties.

In British Columbia resource based communities have historically utilized their major industrial tax base as a source of revenue to build the infrastructure and to provide the services necessary to build and maintain a viable community that will attract and retain residents, including those employed by major industry.

The argument put forward by Catalyst in its various Court proceedings is its belief that the share of taxes paid by major industry should have a direct relationship to the amount of services consumed or used by major industry. In effect, it amounts to an argument that the current system of taxation on the assessed value of land and improvements should be changed to a taxation system based on a user pay or fee for services model only.

Hopefully, the Court will rule that the argument put forward by Catalyst and supported by West Fraser and Celgar in their actions is one that is a purely political question for the elected officials in each community to decide, rather than a legal issue for the Judges in the Courts of British Columbia to determine.

The appropriate level of taxation on major industry is a legislative and tax policy issue for the elected officials on the Councils of each of the affected resource based communities to determine in their political discretion. They are the ones who know best what the needs of their communities are; what they can afford; and how to balance the competing interests within their communities. On these types of legislative issues where elected officials have a wide discretion, the Court should not interfere or substitute its decision for that of Council.

Guy McDannold

An update on the outcome of these cases will be provided in the next issue of Logo.

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