IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *1033040 B.C. Ltd. v. Lumby (Village),* 2023 BCSC 402

Date: 20230316
Docket: S1710138
Registry: Vancouver

2023 BCSC 402 (CanLII)

Between:

1033040 B.C. Ltd.

Plaintiff

And

Village of Lumby

Defendant

Corrected judgment: The text of the judgment was corrected at paragraph 30 on April 5, 2023.

Before: Master Bilawich

Reasons for Judgment

Counsel for the Plaintiff:	L.B. Morris
Counsel for the Defendant:	D.K. Buchanan
Place and Date of Hearing:	Vancouver, B.C. February 22, 2023
Place and Date of Judgment:	Vancouver, B.C. March 16, 2023

2023 BCSC 402 (CanLII)

Introduction

[1] In this action, the plaintiff claims for alleged losses suffered as a result of the defendant having entered upon and altered the plaintiff's mobile home park property during and after a state of local emergency due to flooding.

[2] In this application, the plaintiff seeks leave to make extensive further amendments to its amended notice of civil claim. It also asks to be relieved of the requirement to strike out deleted words and underline new words due to the extent of the proposed amendments.

[3] The defendant opposes the relief sought on the basis that some of the proposed amendments involve claims which fall within a pending statutory claims process under the *Emergency Program Act*, R.S.B.C. 1996, c. 111 (the "*EPA*") and thus amount to a collateral attack on that process.

Background

Parties

[4] The plaintiff owns and operates a mobile/manufactured home park on a property located at 1879 Faulkner Avenue, Lumby, BC (the "Property"). It consisted of 8 pads on the north side of the creek and 1 pad on the south side (Pad 10). Duteau Creek traverses the Property.

[5] The defendant is a municipality incorporated pursuant to the *Local Government Act*, S.B.C. 2015, c. 1 and predecessor legislation. It is subject to the provisions of the *Community Charter*, S.B.C. 2003, c. 26 and is a "municipality" as defined in that legislation.

Flood and State of Local Emergency

[6] In May 2017, the Village of Lumby experienced flooding, including along Duteau Creek. The Property was affected by that flooding. The defendant declared a state of local emergency ("SOLE") pursuant to the *EPA*. The defendant was the

2023 BCSC 402 (CanLII)

"local authority". The SOLE lasted from about May 6, 2017 to May 27, 2017 (the "SOLE Period").

[7] During the SOLE Period, the defendant removed a bridge from a road adjacent to the Property which provided access to Pad 10. The plaintiff says the defendant entered onto the Property and installed earthworks to enforce a neighbouring property's berm, amongst other things.

[8] On October 30, 2017, the plaintiff filed its notice of civil claim, consisting of 12 pages. The plaintiff was self-represented at the time. Relief sought included:

a) An order to access the portion of the Property for which access had been eliminated with the removal of the bridge;

b) Compensation for rental loss for the loss of access to that portion of the Property; and

c) Costs.

[9] On November 24, 2017, the defendant filed a response to civil claim denying liability.

[10] The plaintiff says that in 2018, engineers retained by the defendant concluded that the berm did not meet the criteria for a standard dike. Qualified Environmental Professionals concluded the berm had damaged fish and riparian habitat in the creek.

[11] The plaintiff says it took until June 2019 for the defendant to remove the earthworks. In the period after the SOLE ended, namely June 2017 to November 2019 (the "Post-SOLE Period"), the defendant is alleged to have used the Property as follows:

a) The earthworks remained on the Property from June 2017 and June 2019;

b) The defendant removed the manufactured home at Pad 10 in 2018;

c) Earthworks were erected on the Property where the water and sewer lines were buried 2-3 feet underneath remained from June 2017 to June 2019;

d) Earthworks occupied the Property's RV pad, parking lot and partial driveway from June 2017 to June 2019; and

e) The defendant entered onto and used the Property to remove the berm and stabilize the creek bank, from June 2019 to November 2019.

[12] The plaintiff says the defendant failed to replace the bridge that had been removed and that it has suffered various losses due to the defendant's use of the Property during the Post-SOLE Period.

This Action

[13] On July 9, 2018, the plaintiff filed an amended notice of civil claim, consisting of 39 pages. It was still self-represented at the time. New factual allegations included that the defendant had constructed a dike on a neighbouring property, demolished a mobile home on the Property, damaged the Property by depositing soil/earth using heavy machinery and alleged loss of use of the Property due to the creation of a berm on it. Relief sought included all of relief set out in the original notice of civil claim, plus the following new categories:

a) Compensation for diminution in value, losses and damages;

b) Restoration of the Property to pre-flood condition; and

c) A declaration that the plaintiff may replace the mobile home units that had been removed as a result of the flood.

[14] On August 14, 2018, the defendant filed an amended response to civil claim denying liability.

[15] On October 17, 2018, the defendant filed an application to strike portions of the amended notice of civil claim. The plaintiff retained legal counsel, Mr. Shragge, shortly after receiving the application. The defendant agreed to adjourn the application on the basis that plaintiff's counsel would draft a further amended notice of civil claim.

2023 BCSC 402 (CanLII)

2023 BCSC 402 (CanLII)

EPA Claim

[16] On January 2, 2019, plaintiff's counsel made a claim to the defendant pursuant to a process provided for in the *EPA* and the *Compensation and Disaster Financial Assistance Regulation*, B.C. Reg. 124/95 (the "*Regulation*") regarding losses suffered due to the defendant's use of the Property related to the 2017 flood. Counsel's letter included the following:

> I our view, the Plaintiff has two essential claims:
>
> > 1. for compensation pursuant to section 19(1) of the [*EPA*] and Part 1 of the [Regulation] for losses suffered due to the Defendant's use of the Plaintiff's property to respond to or alleviate the effects of the 2017 flood (eg. removing the bridge and reinforcing the berm); and
> >
> > 2. for compensation pursuant to section 33(2) of the *Community Charter* or, alternatively, section 41 of the *Expropriation Act*, for injurious affection to the mobile home part caused by the Defendant's removal of the bridge.
>
> We have redrafted the notice of civil claim to plead the second of these causes of action. The claim under the *EPA*, however, causes some procedural difficulties.
>
> In basic terms, sections 10(1)(d), 13(1)(b) and 19(1) of the *EPA* obligate the Defendant to compensate the Plaintiff for any losses suffered as a result of the Defendant's use of the Plaintiff's land in 2017. These sections of the *EPA* are mandatory, and they require that compensation must be investigated, established and, if necessary, litigated in accordance with the *Regulation*.
>
> …
>
> In our view, the Defendant is in breach of its obligations under the *EPA* and the *Regulation*. Since as late as service of the amended notice of civil claim on or about July 9, 2018 (and probably much earlier), the Defendant had detailed particulars of the Plaintiff's claim under section 19 of the *EPA*.
>
> Although it would be open to the Plaintiff to now apply to court (under the *Arbitration Act*) for the appointment of an arbitrator, we think that it would be appropriate for the Defendant to have recourse to the procedures under section 3 of the *Regulation*. We say this largely as it appears neither party turned its mind to the applicability of the process required to resolve a section 19 claim. We would also note that neither party would be well served by a multiplicity of proceedings.
>
> In light of the foregoing, please consider this letter as the Plaintiff's claim for compensation under section 19(1) of the *EPA* and Part 1 of the *Regulation*.
>
> As a result of the Defendant entering on and using the Plaintiff land to prevent, respond to or alleviate the effects of the Duteau Creek flood (in or around May 2017), the Plaintiff suffered substantial property losses, including:

> (a) damage to Pad 10;
>
> (b) damage to Pad 7;
>
> (c) damage to underground water and sewer lines;
>
> (d) damage to electrical infrastructure;
>
> (e) damage to roads and driveways;
>
> (f) damages to fences and gates;
>
> Please confirm that your client will comply with section 3 of the Regulation. If it will not, please provide particulars of its refusal.
>
> Once this matter is resolved, we shall provide you with a copy of the further amended notice of civil claim for your review.

2023 BCSC 402 (CanLII)

[17] The defendant agreed that claims for damage to property be resolved under the *EPA* Claim.

[18] On January 16, 2019, the defendant appointed an Adjuster pursuant to the *Regulation* to determine the *EPA* Claim. The Adjuster's investigation went from January 2019 until August 2021.

[19] During the investigation, in March 2020, the plaintiff provided the defendant a Calculation of Disturbance Damages as of December 31, 2019 (the "Loss Report"), prepared by a Chartered Business Valuator. The report was not in evidence on this application.

[20] On August 3, 2021, the Adjuster provided his assessment of compensation payable to the plaintiff. He determined that the following losses were compensable under the *EPA* and *Regulation*:

Damage to RV / parking pad next to Pad 9	$5,430
Damage to sanitary system, water service	$10,000
Damage to park driveway – repairs	$8,450
Total	$23,880

[21] The Adjuster determined that, for the following claims, there was either insufficient evidence of loss or the loss was not compensable under the *EPA*:

a) Removal of excess dirt/gravel and compromised stability of parking area – insufficient evidence;

b) Damage/upgrades to park electrical system – required upgrading prior to flood and was not compensable;

c) Restoration of Pad 7 – damage likely caused by flood, not defendant's actions;

d) Rental loss for Pad 7 – loss of rent or income not compensable; and

e) Increased cost of snow plowing/storage – insufficient evidence.

2023 BCSC 402 (CanLII)

[22] Defendant's counsel wrote to plaintiff's counsel asking whether the Adjuster's determination was agreeable. The plaintiff did not formally respond, despite several follow-ups. The *EPA* Claim process has effectively been stalled.

Draft Amendments

[23] On November 1, 2021, plaintiff's original counsel withdrew. On April 14, 2022, plaintiff's current counsel assumed conduct.

[24] On August 29, 2022, plaintiff's counsel delivered a draft further amended notice of civil claim and requested that the defendant consent to it being filed. While the defendant agrees that amendments are necessary, it objects to portions of the draft which duplicate claims that were or ought to have been addressed in the *EPA* Claim.

Plaintiff's Position

[25] The plaintiff says it suffered many types of loss and damage which are not compensable under the *EPA*. These include:

a) Loss of rent or income due to the defendant's actions which rendered the Property inaccessible;

b) Increased expenses due to the Property being inaccessible;

c) Increased travel costs incurred for repairs of parking lots, driveways and underground water and sewer pipes;

d) Increased water bill due to broken water pipes;

e) Increased snow plowing costs during 2-year presence of the earthworks;

f) Loss of metal gates and fences;

g) Loss of power pole;

h) Loss of water and sewer infrastructure on the lot; and

i) Loss of property value.

2023 BCSC 402 (CanLII)

[26] Due to the adjuster's determination concerning damages available under the *EPA* and the harm the plaintiff says it suffered during the Post-SOLE Period, it now wishes to pursue those in this action.

[27] Counsel suggests the proposed amendments narrow issues considerably by pleading claims that fall outside the statutory compensation scheme in s. 19(1) of the *EPA*. Included among these is a claim for use, nuisance and injurious affection under s. 33(2) of the *Community Charter* or s. 41 of the *Expropriation Act,* R.S.B.C. 1996, c. 125.

<u>Defendant's Position</u>

[28] The defendant says certain of the proposed amendments involve claims that were made in the *EPA* Claim. By seeking to raise them again, this constitutes as collateral attack on the *EPA* compensation process. It opposes duplicate claims, including:

a) Damage to Pad 7 [part 1, para. 21(c)];

b) Damage to underground water and sewer lines [part 1, para. 21(d)];

c) Damage to electrical infrastructure [part 1, para. 20(f), (h), 21(e), 37];

d) Damage to roads, parking lots and driveways [part 1, para. 21(f)];

e) Damage to fences and gates [part 1, para. 21(g)];

f) Loss of rent [part 1, para. 21(h)].

[29] The defendant also opposes amendments which contain allegations which it says ought to have been included in the *EPA* Claim, including:

a) Traversing the Property to reinforce a berm [part 1, para. 20(a)];

b) Traversing the Property to dredge the creek [part 1, para. 20(b)];

c) Traversing the Property to install a lock-block on Pad 10 [part 1, para. 20(d); and

d) Traversing the Property to install earthworks on it [part 1, para. 20(e)].

[30] The defendant says it does not oppose amendments which advance claims under the *Community Charter* and *Expropriation Act* or claims in trespass and nuisance arising from the defendant's actions in the Post-SOLE Period.

Legal Basis

Amendment of Pleadings

[31] Rule 6-1(b)(i) allows a party to amend pleadings at any time with leave of the court:

> When pleadings may be amended
>
> (1) Subject to Rules 6-2 (7) and (10) and 7-7 (5), a party may amend the whole or any part of a pleading filed by the party, other than to change parties or withdraw an admission,
>
> (a) once without leave of the court, at any time before service of the notice of trial, or
>
> (b) after the notice of trial is served, only with
>
> (i) leave of the court, or
>
> (ii) written consent of the parties.

[32] Evidence is not required on an application to amend a pleading. The facts alleged are assumed to be true. The court can consider evidence bearing on an allegation that the amendment will give rise to prejudice or constitute an abuse of process, but not to address the substance of the claims: See *W.O.M. Mastercraft Construction Ltd. v. TFN Meadows Development Limited Partnership*, 2020 BCSC 1345 at para 10.

2023 BCSC 402 (CanLII)

[33] In *Peterson v. 446690 B.C. Ltd.*, 2014 BCSC 1531 at para. 37, Justice G.P. Weatherill summarized principles relating to amendment of pleadings as follows:

> (a) Amendment to pleadings ought to be allowed unless pleadings fail to disclose a cause of action or defence: *McNaughton v. Baker*, (1988) 25 B.C.L.R. (2d) 17
>
> (b) Amendments are usually permitted to determine the issues between the parties and ought to be allowed unless it would cause prejudice to party's ability to defend an action: *Levi v. Petaquilla Minerals Ltd.*, 2012 BCSC 776.
>
> (c) The party resisting an amendment must prove prejudice to preclude an amendment, and mere, potential prejudice is insufficient to preclude an amendment: *Jones v. Lululemon Athletica Inc.* 2008 BCSC 719.
>
> (d) Costs are the general means of protecting against prejudice unless it would be a wholly inadequate remedy.
>
> (e) Courts should only disallow an amendment as a last resort: *Jones, McNaughton, Innoventure S & K Holdings Ltd. et al. v. Innoventure (Tri-Cities) Holdings Ltd. et al.*, 2006 BCSC 1567.

[34] In *Langret Investments S.A. v. McDonnell*, [1996] B.C.J. No. 550, 21 B.C.L.R. (3d) 145 (C.A.) at para. 34, the court of appeal indicated amendments are allowed unless prejudice can be demonstrated by the opposite party or the amendment will be useless:

> **34** Rule 24(1) of the Rules of Court in British Columbia allows a party to amend an originating process or pleading. Amendments are allowed unless prejudice can be demonstrated by the opposite party or the amendment will be useless. The rationale for allowing amendments is to enable the real issues to be determined. The practice followed in civil matters when amendments are sought fulfils the fundamental objective of the civil rules which is to ensure the just, speedy and inexpensive determination of every proceeding on the merits. …

[35] In *Canadian Dewatering L.P. v. Directional Mining & Drilling Ltd.*, 2018 BCSC 517 at paras. 22-23, Master Keighley considered what constitutes prejudice:

> **22** As to what constitutes prejudice, the fact that an opposing party is affected negatively by an amendment does not necessarily mean that the party is prejudiced. In order to be considered as "prejudice" for the purposes of this analysis, "prejudice must affect the ability of the party to respond to the amended claim" *Bel Mar Developments Inc. v. North Shore Credit Union Square* [2001] B.C.J. No. 512, 2001 BCSC 388 (CanLII). In such a case, the court must balance the prejudices between the parties keeping in mind that in general terms, it is the plaintiff who will suffer more harm in losing the ability to prosecute a claim than a defendant who loses a "windfall opportunity" to

2023 BCSC 402 (CanLII)

2023 BCSC 402 (CanLII)

> prevent a claim from being asserted against it, *Takenaka v. Stanley* 2000 BCSC 242 (SC Master).
>
> **23** The onus is on the defendant to show *actual* prejudice such as an impaired ability to defend itself through a loss of witnesses, loss of evidence or other factors relating to the passage of time. In *Middelaer*, Jenkins J. said at paragraph 28:
>
>> There is no evidence of any prejudice to Delta involving lost or destroyed evidence, witnesses who are no longer available, or any other prejudice caused by the passage of time beyond the limitation period. The only prejudice suffered by Delta is the opportunity to rely on the statutory limitation period. There is no unfairness to Delta because it has not lost its ability to defend itself in this action. The very same actions or inactions of Delta, which form the basis of their defence to the companion actions, would be at issue in this action.

EPA Compensation Process

[36] Section 19 of the *EPA* sets out the compensation procedure where a person has suffered a loss of or to property that a local authority acquired or used. This contemplates mandatory arbitration if there is a dispute regarding the amount of compensation:

> Compensation for loss
>
> **19** (1) Despite section 18, if as a result of the acquisition or use of a person's land or personal property under section 10 (1) (d) or 13 (1) (b) or (c), the person suffers a loss of or to that property, the government or the local authority that acquired or used or directed or authorized the acquisition or use of the property must compensate the person for the loss in accordance with the regulations.
>
> (2) Despite section 18, if a person suffers any loss of or to any land or personal property as a result of any other action taken under section 7, 8 (1), 10 (1) or 13 (1), the government or the local authority, as the case may be, that took or authorized or directed the taking of the action may compensate the person for the loss in accordance with the regulations.
>
> (3) If any dispute arises concerning the amount of compensation payable under this section, the matter must be submitted for determination by one arbitrator or 3 arbitrators appointed under the *Arbitration Act* and
>
>> (a) the person who is to be compensated must, in a notice served on the minister, elect whether one or 3 arbitrators are to be appointed, and
>>
>> (b) the *Arbitration Act* applies to the dispute.

[37] Section 6 of the *Regulation* sets out the process for paying compensation. Subsection (6) addresses appointment of an adjuster. Subsection (11) contemplates arbitration if a claimant does not accept the amount of compensation offered:

> Procedure for paying available compensation
>
> **6** (1) A claimant referred to in section 5 (1) must, within the period of time specified under section 5 (2) (b), provide to the government written notice that the person is claiming compensation.
>
> (2) After the government receives the notice referred to in subsection (1), it may
>
> (a) determine that the claimant is not eligible to receive compensation under this section, or
>
> (b) if it considers that the claimant may be eligible for compensation,
>
> (i) make an offer of compensation to the person, or
>
> (ii) if no offer is made or the offer made is rejected, appoint a person to act as an adjuster to assess the amount of compensation, if any, to which the claimant may be entitled.
>
> …
>
> (5) If a person is appointed as adjuster under subsection (2) (b) (ii), the adjuster must, in consultation with the claimant, determine the maximum amount of compensation that could be paid under the guidelines established under section 5 (2) and notify the claimant of that determination.
>
> (6) The adjuster must notify the government of the maximum amount of compensation that the adjuster has determined could be paid to the claimant under section 5 and whether
>
> (a) the claimant agrees with the determination, or
>
> (b) the claimant disputes the determination.
>
> (7) After receiving a notice from an adjuster under subsection (6), the government must determine the amount of compensation, if any, that it is willing to provide to the claimant and must
>
> (a) if that amount is equal to the maximum amount referred to in subsection (6), promptly provide payment of that amount to the claimant and notify the adjuster of that payment, or
>
> (b) in any other case, notify the adjuster, in writing, of the amount of compensation, if any, it is prepared to provide to the claimant.
>
> (8) An adjuster who receives a notice under subsection (7) (b) must advise the claimant as to the amount of compensation, if any, the government is prepared to provide and seek a written notice of acceptance of that offer from the claimant.
>
> …

2023 BCSC 402 (CanLII)

2023 BCSC 402 (CanLII)

(11) If the claimant does not accept the amount of compensation offered under subsection (7) (b), the claimant must, if the claimant wishes to have the claim arbitrated, provide written notice to the minister

(a) requesting the initiation of the arbitration proceedings provided for in section 19 (3) of the Act, and

(b) electing the number of arbitrators to be appointed under that section.

Arbitration Act

[38] Section 4(1) of the *Arbitration Act*, S.B.C. 2020, c. 2 provides that a court must not intervene unless so provided in the Act. Section 58 provides for limited judicial intervention with arbitral awards. In *Terrace Community Forest LLP v. Skeena Sawmills Ltd.*, 2022 BCCA 37 at para. 55, the court of appeal indicates that the scheme of the *Arbitration Act*, as a whole, generally minimizes court involvement.

Community Charter* and *Expropriation Act

[39] The defendant concedes that a claim for compensation under the *Community Charter* and *Expropriation Act* are appropriate to include in the amendments. Section 33 of the *Community Charter* is as follows:

Compensation for expropriation and other actions

33 (1) Unless expressly provided otherwise, if a municipality expropriates real property or works under this or any other enactment, compensation is payable to the owners, occupiers or other persons interested in the property for any damages necessarily resulting from the exercise of those powers beyond any benefit that the person claiming the compensation may derive from the work resulting from the expropriation.

(2) If a municipality

(a) exercises a power to enter on, break up, alter, take or enter into possession of and use any property, or injuriously affects property by the exercise of any of its powers, and

(b) exercises a power referred to in paragraph (a) that does not constitute an expropriation within the meaning of the *Expropriation Act*,

compensation is payable for any loss or damages caused by the exercise of the power.

(3) For the purposes of subsection (2), compensation must be paid as soon as reasonably possible in an amount set

> (a) by agreement between the person claiming compensation and the municipality, or
>
> (b) if no agreement is reached, by the Supreme Court.

[40] Section 41 of the *Expropriation Act* is as follows:

> Injurious affection if no land taken
>
> **41** (1) In this section, "injurious affection" means injurious affection caused by an expropriating authority in respect of a work or project for which the expropriating authority had the power to expropriate land.
>
> (2) The repeal of the *Expropriation Act*, R.S.B.C. 1979, c. 117, and the amendments and repeals in sections 56 to 128 of the *Expropriation Act*, S.B.C. 1987, c. 23, are deemed not to change the law respecting injurious affection if no land of an owner is expropriated, and an owner whose land is not taken or acquired is, despite those amendments or repeals, entitled to compensation to the same extent, if any, that the owner would have been entitled to had those enactments not been amended or repealed.
>
> (3) An owner referred to in subsection (2) who wishes to make a claim for compensation for injurious affection must make his or her claim by applying to the court, and the court must hear the claim and determine
>
> (a) whether the claimant is entitled to compensation, and
>
> (b) if entitled to compensation, the amount of the compensation.
>
> (4) Without limiting any other provision of this section, the BC Transportation Financing Authority has no greater liability to compensate an owner for injurious affection than does the minister responsible for the administration of the *Transportation Act*.

[41] The elements necessary to make out a claim for injurious affection were summarized in *Gautam (c.o.b. Cambie General Store) v. Canada Line Rapid Transit Inc.*, 2020 BCCA 135 at para. 174-175:

> **174** As correctly noted by the judge below, the four conditions for a claim for compensation for injurious affection are set out in *The Queen v. Loiselle*, [1962] S.C.R. 624 at 627:
>
> > The conditions required to give rise to a claim for compensation for injurious affection to a property, when no land is taken, are now well established ... These conditions are:
> >
> > (1) the damage must result from an act rendered lawful by statutory powers of the person performing such act;
> >
> > (2) the damage must be such as would have been actionable under the commonlaw, but for the statutory powers;
> >
> > (3) the damage must be an injury to the land itself and not a personal injury or an injury to business or trade;

2023 BCSC 402 (CanLII)

> (4) the damage must be occasioned by the construction of the public work, not by its user.
>
> **175** The second condition for a claim in injurious affection requires that the respondents prove that they suffered damage that would support a claim at common law in nuisance, but for the successful defence of statutory authority (the first condition): see *Antrim Truck Centre Ltd. v. Ontario (Transportation),* 2013 SCC 13.

Trespass and Nuisance

[42] In *Ward v. Cariboo (Regional District)*, 2021 BCSC 1495 at paras. 49-54, Justice Taylor summarized the elements of trespass. The tort of trespass is committed by entry upon, remaining upon or projecting any object upon land in the possession of the plaintiff without lawful excuse. The party claiming has to establish that the intrusion onto the land is direct, the interference with land must be intentional or negligent and the defendant's interference must be physical. Trespass is actionable *per se* and does not require proof of damage.

[43] The plaintiff also claims in nuisance arising from circumstances relating to the exercise of statutory authority conferred by the *EPA*, referring to *Rosewall v. Sechelt (District of)*, 2022 BCSC 20 at para. 79. After I reserved on this application, the court of appeal issued reasons on an appeal from that decision: see *British Columbia (Minister of Public Safety) v. Latham*, 2023 BCCA 104. The court summarized its conclusions at paras. 94-96:

> **94** In light of the authorities discussed above, I would conclude that a defendant government entity must, at a minimum, be engaged in a use of land in order to attract liability in nuisance. It is not sufficient for competing uses of land to be involved in a general sense. I would also conclude that the tort of nuisance does not extend to regulatory action by a public body that directly interferes with a claimant's use of land, even where those decisions are subsequently found to be unlawful in an administrative law sense. In my view, it makes no difference to the analysis whether one focusses on the Minister's extensions of the SOLE or on the Province's contribution to the funding of a fence.
>
> **95** Here, there is no suggestion that the Province owned, occupied, or made use of land from which a nuisance emanated. The source of the alleged nuisance -- the Province's interconnected extensions of the SOLE and funding of the fence - - involved an exercise of its statutory powers, a regulatory response under the *EPA* to the geotechnical instabilities in Seawatch. Whether or not a portion of the fence may have been constructed on adjacent land, the purpose of the fence was to directly impede the

2023 BCSC 402 (CanLII)

> respondents' access to property as a means of enforcing the evacuation order. Furthermore, it was the District, not the Province, that arranged for its construction: Reasons at para. 7. I do not consider purely regulatory activity impacting land, without more, to be a "use" of that land that could attract liability in nuisance.
>
> **96** To state my conclusions in a somewhat different way: this case does not concern competing uses of land, but rather a government body's exercise of emergency powers to directly regulate the respondents' properties. …

Analysis

[44] The defendant argues that the paragraphs in the draft further amended notice of civil claim to which it objects deal with claims which have been addressed or which should have been addressed in the *EPA* Claim. If the plaintiff disagrees with the Adjuster's determination, the appropriate remedy is arbitration pursuant to s. 19(3) of the *EPA* and s. 6(11) of the *Regulation*. The attempt to pursue these again in this action amounts to a collateral attack on the *EPA* Claim and is an abuse of process.

[45] At part 1, para. 20 of the draft, the plaintiff sets out a summary of steps taken by the defendant on or around the Property in response to the flood, which it defines collectively as "Emergency Works". The particulars do include numerous steps which correspond to claims the plaintiff made in the *EPA* Claim.

[46] At paras. 21 and 22, the plaintiff sets out particulars of loss of or to the Property which were suffered as a result of the defendant entering onto the Property to conduct the Emergency Works. These too include several items which correspond to claims made in the *EPA* Claim. These appear to be included as background narrative regarding the SOLE period, as opposed to describing claims that are being made in the further amended notice of civil claim.

[47] The draft goes on to describe the plaintiff's *EPA* Claim. At para. 24, it asserts that the Adjuster determined that various losses and damages suffered by the plaintiff were not compensable under the *EPA* and defines these collectively as "Non-EPA Damages". These include:

> (a) loss of rent or income as a result of the Defendant's actions which rendered the Property inaccessible;

2023 BCSC 402 (CanLII)

2023 BCSC 402 (CanLII)

> (b) increased expenses incurred because of the Property being inaccessible;
>
> (c) increased travel costs incurred for the repairs of parking lot, driveway and underground water and sewer pipes;
>
> (d) increased water bill from broken water pipes;
>
> (e) increased snow plowing costs during 2-year presence of the Earthworks;
>
> (f) loss of metal gates and fences;
>
> (g) loss of power pole;
>
> (h) loss of water and sewer infrastructure of the Lot; and
>
> (i) loss of property value.

[48] The draft then describes the defendant unilaterally entering on and using the Property during the Post-SOLE Period, including:

> (a) traversing the Property to remove the lock-block on Pad 10;
>
> (b) traversing the Property to remove manufactured home 10 in or around April 2018; and
>
> (c) traversing the Property to remove utility cables, and water and sewer pipes of Pad 10.

[49] It also alleges that the presence of the earthworks from June 2017 to June 2019 physically prevented the plaintiff from accessing and using the Property after the state of emergency ended, including:

> (a) occupying the RV pad, parking lot, and partial driveway of the Property;
>
> (b) making the vehicles parking and turning difficulty;
>
> (c) blocking the ground water such as rainwater and melting snow from draining out to the creek; and
>
> (d) requiring a special loader to push snow up onto the Earthworks.

[50] It also references that from June 2017 to June 2019, the earthworks were erected on land where the water and sewer line are buried 2-3 feet underneath, failure to remove the earthworks until June 2019, failure to replace the bridge, failure to replace electricity to the park, failure to restore the power pole and wire connections, and failure to restore the fence and gate.

[51] Starting at para. 33, the plaintiff addresses damages. These include loss of access to and enjoyment of Lot 10 since the bridge was removed, loss of rent and

2023 BCSC 402 (CanLII)

property value. Paragraph 34 refers to loss of access to and possession of the RV pad, parking lot and partial driveway during the presence of the earthworks in the Post-SOLE Period, resulting is loss of rent, costs and expenditures for repairs and maintenance. Paragraph 35 addresses the earthworks being placed over land where the water and sewer lines were buried 2-3 feet underneath during the Post-SOLE Period, causing increased repair and maintenance costs, travel costs for repairs and an increased water bill. Paragraph 36 addresses heavy equipment used in removal of the earthworks in 2019 causing damage to RV pad, parking lot, driveway, buried water and sewer pipes. Paragraph 37 refers to the defendant disconnecting electricity, cutting the power pole and wire connections and allege extra repair cost for electrical infrastructure for the Property. Paragraph 38 refers to removal of electrical infrastructure, water and sewer lines, metal gates and fences causing loss or rent and loss of these items. Paragraph 39 alleges the plaintiff was deprived of use of the RV pad due to the failure to restore the power supply. Paragraph 40 states that the plaintiff claims for Non-*EPA* Damages and for damages suffered as a result of the defendant's conduct during the Post-SOLE Period.

[52] It does appear that the plaintiff is attempting to duplicate several classes of claims which were made under the *EPA* Claim by characterizing them as Post-SOLE Period claims. The Adjuster's report indicates that claims he considered did include items which continued into the Post-SOLE Period. The evidence on this point is admittedly limited, including Mr. Shragge's letter of January 2, 2019 initiating the *EPA* Claim and the Adjuster's report of August 3, 2021. The Loss Report that the plaintiff submitted to the Adjuster was not in evidence before me.

[53] Other parts of the amendments do set out relief which falls into non-contentious categories, including the *Community Charter*, *Expropriation Act*, nuisance and trespass. Under Part 2, Relief Sought:

> 1. Statutory compensation for injurious affection to the Property as a consequence of the Defendant's actions.
>
> 2. Further or in the alternative, statutory compensation for the Defendant's acquisition or use of the Property.
>
> 3. In the further alternative, damages for nuisance or trespass.

> 4. Costs.

[54] Under Part 3, Legal Basis, the plaintiff includes:

> 1. Pursuant to section 33(2) of the *[Community] Charter*, the Defendant must compensate the Plaintiff for the alteration or sue of, or injurious affection to the Property.
>
> 2. Alternatively, pursuant to section 41 of the Expropriation Act. the Defendant must compensate the Plaintiff for the injurious affection to the Property.
>
> 3. In the further alternative, by entering on the Property, the Defendant committed common law trespass and nuisance against the Plaintiff, causing the plaintiff loss, damage and expense.

2023 BCSC 402 (CanLII)

[55] In my view, it is necessary and appropriate for the plaintiff to set out facts regarding the flood, the defendant's entry onto the Property, steps taken in its response to the flood and regarding the *EPA* Claim process. These set the stage for the complex factual and legal landscape in which this claim finds itself. However, it is not appropriate for the plaintiff to include in its claim for "Non-EPA Damages" categories of losses and damages which have already been addressed or which ought to have been addressed under the *EPA* Claim. Specifically, the items identified at paras. 28 and 29 of these reasons do appear to be issues that have already been addressed or which ought to have been addressed in the *EPA* Claim and thus cannot be claimed in this action.

[56] Unfortunately, given that the duplicate references appear in numerous locations in Part 1, paras. 24-40 of the draft, there is no simple way to excise them. It is accordingly necessary to dismiss the plaintiff's application for leave to file the proposed draft. The plaintiff has leave to re-apply with a revised draft that removes categories of losses and damages which have been addressed at paras. 28 and 29 of these reasons from the plaintiff's claim for loss and damage.

Conclusion

[57] The plaintiff's application for leave to file the further amended notice of civil claim in the form attached as Appendix "A" to its application filed October 5, 2022 is

dismissed. The plaintiff has leave to reapply based on a revised draft which addresses the duplicate claims issue identified in these reasons.

[58] The defendant is entitled to costs of this application from the plaintiff.

"Master Bilawich"

2023 BCSC 402 (CanLII)