

# Legal News for Local Governments

*Guild, Yule and Company,  
Barristers and Solicitors*

February 2005

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## SECHELT SEAWALLS BY THE SEASHORE

### Discrimination And City Planning

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The recent decision of the Human Rights Tribunal in *Moser v. District of Sechelt* demonstrates the potential breadth of the application of the Human Rights Code for city planners.

In *Moser* the District of Sechelt built a seawall and walkway along the 1 km length of the Davis Bay shoreline. Phase 1 of the walkway, measuring roughly one quarter of its total length, was built ½ metre narrower than the remainder and also had a greater side to side slope. The complainant, who was confined to a wheelchair or motorized scooter, brought a human rights complaint against the

District, alleging that the narrow, sloped portion of the walkway discriminated against her in that it was hazardous for individuals with mobility concerns and did not have the proper safety features, specifically a railing which would prevent mobility-challenged individuals from falling off the seawall.

The District denied that it had discriminated against those with mobility impairments, noting that the walkway was built in accordance with municipal bylaws and Ministry of Transportation and Highways standards. Moreover, the District argued that because Phase 1 of the walkway was constructed between the highway on one side and ocean on the

other there simply was not room to widen it to conform with the rest of the walkway. Further, as the highway was somewhat higher than the level of the seawall, the walkway at Phase 1 had to be constructed with a greater side to side slope than the rest of the walkway.

The complainant testified that she was concerned about her safety on Phase 1 as there was no barrier between the seaward side of the walkway and the sloped vertical face of the seawall leading to the rocky beach below. As her scooter takes up a lot of room, she was concerned that she may be crowded off the path and over the edge of the wall. The Tribunal ruled that, despite the fact that it was possible to walk three abreast (including the scooter) on the walkway, there was an increased danger to those with mobility restrictions. As a result, The Tribunal held that the design of the Phase 1 walkway denied the complainant, as a person with a mobility impairment, the full benefit of the use of the walkway that is available to non-disabled users.

Having found that the complainant had demonstrated a *prima facie* case of discrimination, the Tribunal applied the test established by the Supreme Court of Canada to determine whether the District had a bona fide and reasonable justification for its conduct. On this point, the District argued that it had accommodated the complainant to the point of undue hardship on the basis of the cost of modifying the Phase 1 walkway. The District argued that its annual budget was \$4 million and that the cost of modifications would be between \$20,000 and \$40,000, plus an increase in maintenance costs. The District further made a 'floodgates' argument saying that a ruling that required it to modify the walkway would open the doors to a variety of other mandatory modifications to other services such as sidewalks and nature trails. Both arguments were rejected by the Tribunal, which ruled that the District had not provided detailed estimates of the cost of

modifications and instead relied on impressionistic evidence of increased expense. With respect to the floodgates argument, the Tribunal held that each case should be dealt with on its own merits and that the District's argument was purely speculative. In the result, the Tribunal found that the District had not established that it had accommodated the complainant to the point of undue hardship.

In terms of remedy, the Tribunal ordered that the District remedy the impact of the discriminatory walkway although, notably, it gave the District the opportunity to determine for itself the appropriate steps by which the walkway would be cured of its discriminatory impact. Additionally, an award of \$1,000 for injury to dignity was made to the complainant.

The case is illustrative of the breadth of applicability of the *Human Rights Code*. Municipal planners likely did not consider the seawall and walkway as a potentially discriminating feature of the shoreline development. However, as this decision makes clear, all municipal developments and construction projects are reviewable under the Code. Municipal planners and councils, therefore, must be alive to issues of potential discrimination, especially in terms of accessibility for the disabled. If municipalities choose to proceed with projects which may negatively affect the disabled, they must be prepared to justify these decisions with detailed, evidence-based explanations of the near-impossibility of accommodation.

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## ON THE RIGHT TRACK?

### The Legal Battle Over Vancouver's Arbutus Corridor

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Recently the Supreme Court of Canada has granted leave to appeal a decision of our Court of Appeal that upheld the City of Vancouver's jurisdiction to effectively block development on private property. In *Canadian Pacific Railway Co. v. Vancouver (City)*, the British Columbia Court of Appeal held that a development bylaw that prevented Canada Pacific Railway from taking any steps to develop the Arbutus Corridor in False Creek was within the authority granted to the City by the *Vancouver Charter*, S.B.C. 1953, c. 55.

The Arbutus Corridor had been owned and operated by CPR as a train line since 1901 and comprised almost 45 acres stretching along Arbutus street. CPR started to decommission the line in the 1980s and in 1999, indicated a desire to redevelop the land for potential residential or commercial use or to sell it to the City. The City did not want to purchase the land but wanted to ensure that the property was preserved for use as a public thoroughfare. Talks took place between the City and CPR respecting the purchase of the Corridor but no agreement was reached.

The City seeking to ensure that no development took place on the property, passed a bylaw on July 21, 2000 (the "AC ODP Bylaw") as part of its official development plan. The AC ODP Bylaw designated the lands in the Arbutus Corridor as a public thoroughfare. CPR brought an application before the B.C. Supreme Court challenging the City's authority to pass the AC ODP Bylaw on various grounds. It relied heavily on the argument that the City could not expropriate private property without compensation and that was the practical effect of the AC ODP. CPR further argued that the City did not have the jurisdiction to pass the AC ODP Bylaw pursuant to the *Vancouver Charter*.

The Court noted that the *Local Government Act* provides a Board of a regional district (such as Greater Vancouver) with the jurisdiction to adopt a regional growth strategy for the purpose of guiding decisions on growth, change and development within its regional district.

It was also noted that the *Vancouver Charter* provides the City of Vancouver with the jurisdiction to create a development plan that can designate public thoroughfares that can be adopted by bylaw.

In enacting the AC ODP Bylaw, the City relied on various sections of the *Charter* including section 569(1), which reads:

Where a zoning by-law is or has been passed, amended, or repealed under this Part, or where Council or any inspector or official of the city or any board constituted under this Act exercises any of the powers contained in this part, any property thereby affected shall be deemed as against the city not to have been taken or injuriously affected by reason of the exercise of any such powers or by reason of such zoning and no compensation shall be payable by the city or any inspector or official thereof.

Mr. Justice Esson, writing the reasons for judgment for the Court of Appeal, held that the AC ODP Bylaw was validly enacted and that Vancouver was under no obligation to compensate CPR.

In its reasons, the Court acknowledged that the City had substantial reasons to enact the AC ODP Bylaw because of the unique size of the Corridor, its location and its potential for being utilized for public

purposes. Esson J. referred to a long line of decisions from our Supreme Court of Canada that accepted it is a legitimate exercise of municipal powers to give priority to long term planning and development objectives by removing or placing limits on the right of property owners to deal with their property as they wish.

Mr. Justice Esson also rejected CPR's cross-appeal which argued that the process by which the AC ODP Bylaw was passed had been flawed. Prior to the public hearing, CPR had requested disclosure of an abundance of documents as well as an adjournment of the hearing pending disclosure. This was refused by the City. The court found that unlike a zoning bylaw, there was no requirement that the City even hold a public hearing for the AC ODP Bylaw (The AC ODP Bylaw was a bylaw that adopted an Official Development Plan and not a zoning bylaw). In addition, the Court found that the requests made by CPR were excessively broad and had the City attempted to comply with the requests, would have resulted in a lengthy adjournment of the public hearing. As a result, the Court held that allowing such a procedure would be destructive to the City Council's ability to carry on business.

The final result of this case remains uncertain as the Supreme Court of Canada has given CPR leave to appeal. Also, the concurring reasons of Madame Justice Southin suggest the decision to dismiss CPR's appeal was not easily made. Southin J.A. cited the decision of *Spencer v. Continental Insurance Co.*, in which the Honourable Justice O. Wilson commented that in arriving at a conclusion to which he was compelled by law, "he was obliged to avert his nostrils." She called the situation between CPR and the City "an absurdity."

In her view, the substance of the dispute was that the City and CPR could not agree on a fair and reasonable purchase price for the Arbutus Corridor. If the City Council and CPR Board of Directors could not agree to a reasonable sale price for the property, it was her view that the Government of British Columbia should intervene.

No date has yet been set for the hearing before the Supreme Court of Canada. Look for the update of this case in an upcoming edition of *Legal News*.

## UPDATE

### *Duddle v. City of Vernon*

In our October, 2004 issue of the *Legal News* we reported on the B.C. Court of Appeal's decision in *Duddle v. City of Vernon et al*, wherein the Court found that the City of Vernon was not liable for injuries the Plaintiff sustained when he dove off a lake pier. The Plaintiff sought leave to appeal this decision to the Supreme Court of Canada. This application was dismissed on January 27, 2005.

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