

BC Court of Appeal Decision Concerning Release Provisions in s. 219 Covenants

Local governments can breathe a sigh of relief after the recent decision of the British Columbia Court of Appeal in *Rai v Sechelt*, 2021 BCCA 349.

Background

Multiple property owners brought an action against the District of Sechelt after they were ordered to evacuate their properties as a result of land subsidence and geotechnical instability. The property owners alleged that the District knew or ought to have known that the area was subject to subsidence and other geotechnical problems. They advanced multiple claims against the District and its approving officer, including negligent subdivision approval, negligent development permit approval, negligent issuance of building and occupancy permits and failure to warn the owners of geotechnical issues.

The concerned properties were encumbered by s. 219 covenants that released the District and its officers from any and all liability arising “from or in connection with the construction of any structures on the Lands or use of the Lands” ... “including without limitation any subsidence, settling of any structure including any utility or road infrastructure, loss of slope stability, or any similar matter.” (emphasis added)

Prior to development in 2006, the District had required the developer to execute these s. 219 covenants as a condition of subdivision approval, after consultants identified seepage and slope stability as “issues of potential concern” in their initial assessment. The District also required the developer to provide the District with a comprehensive geotechnical report from a qualified professional confirming that the subject lands were “not subject to land slip, sinkholes or erosion”, which was to be appended to the s. 219 covenants and registered in the Land Title Office as a notice to all prospective buyers.

Lower Court Decision

The owners had successfully argued in the lower court that the s. 219 covenants did not operate to release the District and its officials against their claims. The chambers judge held that s. 219 of the *Land Title Act* (“LTA”) expressly refers to the inclusion in a covenant of an indemnity, but not a release. As a result, he found that the covenants registered on title as a condition of subdivision approval exceeded the scope of s. 219 authority.

The chambers judge went on to narrowly interpret these particular s. 219 covenants, and found that – on the facts of this case – the release language did not apply to the claims advanced by the owners.

The issues before the Court of Appeal were:

1. Whether s. 219 of the LTA authorizes the inclusion of a release in a covenant; and
2. If so, whether the language in these particular s. 219 covenants released the District from the claims advanced by the owners.

Appellate Decision

The Court of Appeal found in favour of the District and its officials on both points. Section 219 of the LTA does authorize the inclusion of release language in covenants described in that section. Further, the specific release language here was broad enough to encompass the owners’ claims against the District.

On the first point, the Court held that section 219 of the LTA contemplates that local governments and their officials may allocate the risk associated with, among other things, subdivision approval, building approval and land or building uses, and provide for public notice through the use of a covenant that runs with the title and binds future owners. The broad wording of the section “contemplates management and allocation of risk, notice to the public, and the protection of the public purse”.

On the second point, the Court reiterated that releases are contracts, and as such, subject to the ordinary approach to contractual interpretation. The factual matrix (surrounding circumstances) – and not just the specific words of the release – must be taken into consideration when determining whether it applies to a given claim. Here, the chambers judge fell into error by narrowly interpreting the scope of the release contained in the s. 219 covenants.

The Court found that the clear purpose of the release language was to mitigate risk to, and absolve the District from, any and all liability arising “from or in connection with the construction of any structures on the Lands or use of the Lands.” (emphasis added)

The claims of the respondents all arose from or were in connection with the construction of structures in the development or the use of development lands generally, including claims based on negligent subdivision approval, negligent development permit approval, negligent issuance of building and occupancy permits and failure to warn respondents of geotechnical issues. These were the precise types of damage, loss, claims and demands contemplated by the s. 219 covenants.

As a result, the Court held that the s. 219 covenants apply to release the District against the claims advanced by the owners.

Takeaways

Section 219 covenants are an invaluable tool for local governments to manage and allocate risk associated with subdivisions, construction and land or building uses that may be subject to future subsidence issues or other geotechnical concerns.

This case demonstrates the benefit of carefully drafted covenants containing release provisions broad enough to encompass all future claims arising from or in connection with all construction on and use of specified lands.

While the specific wording of the covenant remains crucial, the surrounding circumstances will also be taken into consideration, including the intent of the local government to mitigate risk of and absolve itself from a broad range of liability. To this end, appropriate policies and procedures governing the retention of project correspondence and related records can be of great assistance in the event a local government is required to demonstrate the “factual matrix” or intention of the parties when agreeing to a covenant that is later the subject of litigation.

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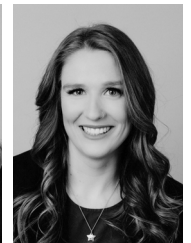
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