

Swinging Construction Cranes—Trespass or Nuisance?

During the development of a project it may be unfeasible to contain all aspects of construction within the boundaries of the land that is being developed. A frequent example involves the use of construction cranes, where the boom of a crane will swing into the area above neighboring properties. The law affecting the rights and remedies of landowners of these neighboring properties has been changing.

The area above a property is known as the “airspace”. There has been a steady decline in airspace rights from the Latin maxim, *cujus est solum ejus est usque ad coelum et ad inferos*, which translates to “a landowner is entitled to the use and enjoyment of his property to unlimited depths below the surface and unlimited heights above”. Modern jurisprudence has sought to balance the public’s interest in using the airspace above a property with the interest of the landowner. The current law in Canada is that a landowner’s airspace rights extend only to a height necessary for the ordinary use and enjoyment of their land. This allows for planes and other aircraft to fly over land without infringing on the airspace rights of landowners.

Still, the boom of a construction crane swinging into the area above a neighboring property is an infringement of the airspace rights of the landowner. Historically, there have been two legal causes of action available for affected landowners, trespass and nuisance. A common remedy in an action for trespass was to obtain an injunction against the use of the crane over the landowner’s airspace because, in a trespass claim, certain of the elements to grant an injunction were likely satisfied, namely: (1) the harm to the landowner cannot be adequately compensated by damages; and (2) the balance of convenience favors the granting of an injunction. This gave landowners significant leverage as an injunction could cause lengthy

delays and cost overruns for developers. In contrast, it is common for damages to be considered an adequate remedy for nuisance claims, particularly where the nuisance is not continuing, making it more difficult to obtain an injunction.

However, recently the law in B.C. has been evolving to support construction without unnecessary delay. In a recent B.C. Supreme Court case, *Janda Group Holdings Inc. v. Concost Management Inc.* (“Janda”), a developer was operating a crane that swung into the adjacent landowner’s airspace. The developer and landowner did not have an agreement giving the developer the necessary permission to use the airspace. The landowner commenced an action for trespass and nuisance against the developer, and prior to trial, sought an injunction to restrict the use of the crane over its airspace. The Court dismissed the application. In its analysis, the Court found there must be a more modern view of airspace rights and that there should not be an automatic finding of trespass for a protruding crane. The Court found that damages were an adequate remedy for the nuisance caused by the developer’s operation of the crane into the landowner’s airspace, and held that an injunction was not appropriate for the following reasons:

- a. it was only the boom and not heavy loads that were swinging into in landowner’s airspace;
- b. the crane was erected in accordance with applicable regulatory and safety standards;
- c. the crane was being operated by an experienced and reputable formwork contractor; and
- d. the crane had a 50-foot clearance above the landowner’s building.

The Court stated that any award of damages should be more than nominal and should reflect the value to the developer for the use of the landowner's airspace. The amount that will be awarded in these types of cases will depend on the facts, including the commercial benefit to the developer, the duration of crane use in the landowner's airspace, any reciprocal rights obtained by the landowner (e.g., a reciprocal crane swing licence for future development) and the conduct of the parties.

Based on the reasoning in Janda, there is incentive on adjacent landowners to negotiate an agreement with a developer for the use of their airspace, rather than using the courts to leverage their bargaining position through injunctive relief.

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This article is intended for the general information of organizations in British Columbia. If your organization has specific issues or concerns relating to the matters discussed in this article, please consult a legal advisor.

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