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Crossing the Line: Trespass, Nuisance, and Construction Cranes

As readers well know, construction can bring with it a high risk of disruption to properties in the surrounding area, especially projects of a more significant scope and scale. Noise, dust, exhaust, and the passage of workers and equipment can all affect neighbours in negative ways, leading to legal consequences that can increase the cost of construction substantially or even bring construction to a halt. The recent publication by the British Columbia Law Institute (BCLI) of its *Study Paper on Access to Neighbouring Land and Airspace for Construction-Related Purposes*[1] provides good cause to revisit the issue of trespass and nuisance in construction, specifically as it relates to construction cranes.

Nuisance

Nuisance[2] occurs where one person interferes with another person's use or enjoyment of land in a way that is both substantial and unreasonable (and typically indirect).[3] The interference can range from physical damage to the land to interference with the health, comfort or convenience of the owner or occupier, but there must be real harm.[4] In one interesting example (to do with the constructed project, not the construction activities), the Supreme Court of British Columbia found a nuisance where intense glare from the metal roof of a newly built house interfered with the use of certain rooms in a neighbouring house.[5]

In respect of more 'direct' effects on surrounding property, nuisance is rarely pleaded and rarely successful as a cause of action. In the case of *Janda Group Holdings Inc. v. Concost Management Inc*,[6] the plaintiff sought an injunction against the passage of an unloaded crane boom over its property, alleging that it was both a nuisance and trespass. The Court left undecided whether the crane boom's movement constituted a nuisance; in assessing whether the Court should issue an injunction, it was enough that the plaintiff had real grounds for a claim of trespass. Ultimately, the Court held that an injunction was not necessary, as there were no special safety concerns about the crane and it was more convenient that the defendant should be allowed to continue construction. The Court concluded that the interference with

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the plaintiff's airspace rights could be sufficiently compensated with damages, although the Court did not decide on the amount, noting merely that the amount should be "more than nominal".[7]

Trespass

In contrast with nuisance, trespass is more frequently pleaded and more easily made out. Trespass occurs where one person enters onto land possessed by another person without lawful justification, regardless of whether harm results.[8] To make out a trespass claim, a plaintiff must show that (1) the intrusion onto land is direct, (2) the intrusion is intentional or negligent, and (3) the intrusion is physical (i.e., something or someone has actually entered or been placed onto the land).[9] As is also the case with nuisance, it is irrelevant *why* a person commits a trespass; a person in possession of land is not required to accommodate others, even if their need or desire to enter the land is reasonable.[10] Whether, and the extent to which, harm occurs, however, plays a significant role in determining the value of damages that may be awarded.

In *OSED Howe Street Vancouver Leaseholds Inc. v. FS Property Inc.*,[11] the plaintiff sought an injunction preventing trespass into its airspace by the counter jib of a crane. In that case, the parties had reached an agreement allowing crane swing during certain hours. The plaintiff's property contained a terrace for use of its residents below the path of the crane swing; under the agreement, the residents would not be allowed access to the terrace during those hours. Within a couple of months of signing the agreement, the defendant advised the plaintiff that the hours were too restrictive, and, without any modification of the agreement, the defendant began operating the crane outside of the authorized hours.

The Court easily determined that the plaintiff had a good case for trespass and breach of the terms of the agreement. The Court also held that an injunction against passage of the counter jib outside of the hours authorized in the agreement was appropriate. It was reasonable for residents to be apprehensive about using the terrace while a several-thousand-pound counterweight swung above them, which would render a significant amenity provided under their lease agreements inaccessible. The suggestion by the defendant that it should be permitted to pass the counter jib through the plaintiff's airspace at all times – ceasing only upon reasonable request to allow intermittent use of the terrace – was an impossible inversion of the agreement. No doubt the defendant would be able to construct its project more rapidly, thereby reducing local disruption sooner, but the plaintiff could not be deprived of all control of its own property to facilitate the defendant's development.

Mitigation of Risks and Future Developments

The standard and best course for developers seeking to mitigate the risk of an action being brought in nuisance or trespass is to obtain advance agreement from those who might be adversely affected. A well-drafted agreement

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can spare parties a great deal of money and stress. But as the BCLI points out, the cost of obtaining agreements has increased in recent years, at least in part because landowners have recognized how valuable access rights can be to developers.[12] Ultimately, however, developers who cannot confine their activities within a parcel's lot lines will pay one way or the other. In *Janda*, the defendant developer had carried out its activities in the absence of an agreement; in *OSED*, the developer simply gave up on the agreement it had obtained.

But given the pressures of development activity, might something more systemic be done to reduce the likelihood of issues arising between property owners, including in the event that they cannot reach an agreement? The BCLI's *Study Paper* proposes a variety of possible approaches. Some of these proposals, as the BCLI notes, are drastic, such as abolition of trespass actions in respect of specified construction activities or prohibiting injunctions against crane swing.[13] Others, such as empowering a tribunal to grant airspace rights following arbitration,[14] are less so. In this environment of rapid and widespread development, we may yet see some such proposal make it onto the provincial order paper.

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1 www.bcli.org/wp-content/uploads/Study-Paper-Construction-Related-Access.pdf.

2 i.e., "private" nuisance, as opposed to "public" nuisance, which concerns interference with the rights of the broader public.

3 *Antrim Truck Centre Ltd. v. Ontario (Transportation)*, 2013 SCC 13 at para. 18.

4 *Tock v. St. John's Metropolitan Area Board*, [1989] 2 S.C.R. 1181 at 1190-91, 1989 CanLII 15 (SCC).

5 *Zhang v. Davies*, 2017 BCSC 1180 aff'd 2018 BCCA 99.

6 2016 BSC 1503 [*Janda*].

7 *Ibid.*, at para. 37.

8 *Glashutter v. Bell*, 2001 BCSC 1581 at para. 26.

9 *AM Gold Inc. v. Kaizen Discovery Inc.*, 2021 BCSC 515 at para. 337.

10 *Shaman v. Meek*, 2019 BCSC 9 at para. 36; *Manak v. Hanelt*, 2022 BCSC 1446 at para. 39.

11 2020 BCSC 1066 [*OSED*].

12 *Supra* note 1, at pp. 1-2.

13 *Ibid.*, at pp. 45-47.

14 *Ibid.*, at pp. 36-40.

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Our lawyers combine legal experience in local government, commercial real estate development, and construction law to provide legal services to local governments, owners, builders and developers on a range of projects, from concept to completion, and beyond.

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