IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Arbutus Bay Estates Ltd. v. Canada (Attorney General),* 2016 BCSC 2083

Date: 20161114
Docket: S130225
Registry: Victoria

Between:

Arbutus Bay Estates Ltd.

Plaintiff

And

Attorney General of Canada, Capital Regional District and the Queen in Right of the Province of British Columbia

Defendants

And

Her Majesty the Queen in Right of the Province of British Columbia

Third Party

And

Arbutus Bay Estates Ltd. and Her Majesty the Queen in Right of the Province of British Columbia

Defendants by way of Counterclaim

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for Arbutus Bay Estates Ltd.:	S. Hern C. Boies Parker
Counsel for Attorney General of Canada and Regional Capital District:	M.K. Bulmer O.R. Pulleyblank
Counsel for Her Majesty the Queen in Right of the Province of British Columbia:	D.R. Suntjens M. Butler

Place and Date of Trial:	Victoria, B.C. October 5-9, 2015 October 13-16, 2015 November 23 and 26, 2015 September 19-23, 2016
Place and Date of Judgment:	Victoria, B.C. November 14, 2016

Table of Contents

INTRODUCTION

[1] Paula Buchholz purchased approximately 155 acres of land on Mayne Island (the "Property") in or around 1973. The Property was upland and appurtenant to the public wharf in Horton Bay harbour that had been operating since 1960. There was a registered easement on the Property on which a footpath was built connecting the wharf to Horton Bay Road.

[2] After she purchased the property in 1973, Ms. Buchholz transferred the ownership of the Property to a corporate entity, Paula Buchholz Estates Ltd. The name of the company was changed to the plaintiff, Arbutus Bay Estates Ltd., in 1979. Ms. Buchholz is the principal of the plaintiff.

[3] In January 2013, the plaintiff commenced this action seeking a declaration that the operation of the wharf facilities interferes with its riparian rights, damages for breach of its riparian rights, an injunction restraining the defendants from interfering with its riparian rights, damages for nuisance and trespass, as well as other relief, including the cancellation of the registered easement over its lands. The plaintiff takes the position that the wharf is also unlawful because the registered easement expired when the wharf was expanded and when the federal government turned its operation over to the Capital Regional District (the "CRD").

[4] The defendants, the Attorney General of Canada ("Canada"), the CRD and Her Majesty the Queen in Right of the Province of British Columbia (the "Province") oppose the plaintiff's claims. They have filed counterclaims seeking declarations that the registered easement allows the operation of the Horton Bay harbour public wharf in its present location. In the alternative the defendants seek an order rectifying the registered easement to allow the ongoing operation of the Horton Bay harbour public wharf as was agreed between the parties. They say rectification would not be unjust because Ms. Buchholz had knowledge of the existence of both the easement and the public wharf when she purchased the property in 1973. In the further alternative, the defendants seek a declaration that B.C., Canada, the CRD and their servants, agents, assigns, visitors and members of the general public are entitled to an

easement allowing them to use the path to access the Horton Bay harbour public wharf, and any impairment of riparian rights is authorized so long as the operation of the wharf continues.

[5] Canada and the CRD take the position that the operation of the Horton Bay harbour public wharf is authorized by the registered easement. In the alternative, they take the position that if the registered easement cannot be read to authorize the ongoing use and operation of a public harbour, than the charge fails to reflect the agreement between the parties and should be rectified.

[6] The Province takes the position the wording of the registered easement is ambiguous and should be rectified to reflect the true agreement between the parties. The Province asserts that as the grantee of the licence of water lot 431 it is not liable if there is found to be an infringement of the plaintiff's riparian rights, or trespass from parked vehicles along Horton Bay Road and members of the public who access the wharf via the registered easement, or for any nuisance arising from the operation of the wharf. In the alternative, the Province argues that any infringement of riparian rights, trespass or nuisance is so trivial as to not merit an award of damages.

[7] Canada and the CRD have filed a third party notice against the Province but did not make any arguments regarding the third party claim.

[8] For the following reasons, I have concluded the registered easement authorizes the operation of the Horton Bay harbour public wharf facilities. In the event the registered easement does not authorize the operation wharf facilities, I am of the view that the easement should be rectified to allow the ongoing operation of the public harbour. In my view, such a rectification would not be unjust as Ms. Buchholz had actual notice of the easement and that a public wharf was being operated in Horton Bay harbour prior to purchasing the property and transferring it to the plaintiff.

Issues

[9] The issues raised by the pleadings and submissions are:

1. Is the registered easement a statutory easement governed by s. 218 of the *Land Titles Act*, R.S.B.C.1996, c. 250?

2. Does the registered easement authorize the ongoing operation of the public wharf in Horton Bay harbour, including impacting the plaintiff's riparian rights?

3. If the registered easement does not authorize the ongoing operation of the wharf facilities, should it be rectified?

4. Did the registered easement expire when the public wharf was expanded or when the CRD took over its operation?

5. If the presence of the wharf has infringed the plaintiff's rights and/or the defendants are liable for trespass or negligence, what, if any, damages are the plaintiff entitled to?

Background Facts

[10] In 1959, the federal and provincial governments came together to develop a public harbour in Horton Bay on Mayne Island in response to a population increase and public demands. In May 1959, the federal Department of Public Works ("Public Works") approved the construction of a wharf in Horton Bay.

[11] The plan required that a right-of-way be obtained for a pathway between the proposed wharf and the nearby public Horton Bay Road. In June 1959, Public Works advised the provincial Department of Highways ("BC Highways") of its plan to construct a wharf provided public access from Horton Bay Road could be obtained, and asked BC Highways to secure the required access.

[12] BC Highways approached the upland owner, F.W. Pratt. Mr. Pratt owned a 158 acre plot of land he acquired in 1945 from the Director of Soldier Settlement. Mr. Pratt was unwilling to sell any land, but was in favour of the public wharf. On September 22, 1959, Mr. Pratt sent a letter to the District Engineer of BC Highways, in which he agreed to "grant a 20 foot wide easement for a pathway to a public float to be installed in Horton Bay".

[13] On November 18, 1959, A.W. Walkey, District Engineer in the Harbours and Rivers Engineering Branch of the Department of Public Works, wrote a letter to Mr. Pratt seeking his consent for Canada to "obtain a reserve on the area outlined on the plan for public landing purposes." The letter attached a plan outlining the area of water lot 431. On November 20, 1959, Mr. Pratt replied to Mr. Walkey's letter stating: "I have no objection to the Department of Public Works obtaining a reserve as shown, i.e. the area outlined in red on the plan you sent me showing the proposed landing on Horton Bay."

[14] Public Works applied for and obtained a water lot reserve by Order-in-Council on August 26, 1960, and constructed the Horton Bay harbour public wharf between November 1959 and May 6, 1960.

[15] During the time the pathway and wharf were being constructed negotiations continued between Mr. Pratt and the Province regarding the land needed to access and operate the wharf. On December 17, 1959, Norman Allan, a right of way agent for the Province, sent a letter to L.A. Broddy, an engineer for the Province, stating "an easement registered against the title of the property involved has a legal value, and as Mr. Pratt is only prepared to consider an easement for the footpath, it would appear for the moment that we will have to proceed accordingly". In the letter, Mr. Allan also requested that Mr. Broddy contact Mr. Walkey to see if Canada is prepared to proceed when access can only be secured by means of an easement and to discuss whether the easement "should run for a given period of time, or alternately, in perpetuity." Mr. Walkey then contacted Mr. Wilfred Grimble at the federal Department of Public Works and sent a letter to Mr. Grimble and an internal memo to Mr. Allan, confirming that the Department of Public Works "would be satisfied with a public 20' easement…as long as the public have access over the easement in the present and in the future."

[16] The first version of the easement sent to the Land Title Office was rejected due to an error in the form. Subsequently an easement was executed by Mr. Pratt and registered on title on September 26, 1960. The Province paid Mr. Pratt $50.00

for the easement. Both the pathway and the wharf were constructed prior to the easement being executed by Mr. Pratt and registered on title.

[17] Since its construction the Horton Bay harbour wharf has operated as a public facility. From 1960, and through successors in title to the Property, the public wharf has been continuously used by the public without complaint from any of the former owners.

[18] Members of the Mayne Island community testified regarding the importance of the Horton Bay harbour public wharf to the community. The Horton Bay harbour public wharf is used by both visitors and residents of the island. It has been used for official business for a number of groups, including the police, and the local school. The fire department uses the wharf for a number of purposes, including training, and it is part of Mayne Island's emergency plan.

[19] The Property changed hands several times after Mr. Pratt owned it. Ms. Buchholz, the principal of the plaintiff, testified that she became interested in investing in real estate in British Columbia in 1969 when she visited Canada with a group of entrepreneurs. At the time, she was involved in the real estate business in Germany, developing high end condominiums. Ms. Buchholz asked a friend and fellow developer, Guenter Adolphs to keep an eye out for suitable properties for her. Dr. Adolphs had moved to B.C. in 1971.

[20] In 1973, Ms. Buchholz received a real estate listing for the Property from Dr. Adolphs, together with several photographs of it, including an aerial photograph depicting the Horton Bay harbour public wharf and the footpath leading to it from Horton Bay Road. The real estate listing has a subheading "anchorage" and states there is a "government wharf suitable for small yachts".

[21] Ms. Buchholz retained the services of Ivan Robertson, a lawyer in Vancouver, to assist her with the purchase of the Property. Mr. Robertson provided Ms. Buchholz with a copy of the easement registered against the title. Ms. Buchholz agrees that she received and read the easement prior to purchasing the Property.

Ms. Buchholz executed an agreement for purchase and sale for the upland property, knowing of both the registered charge on title and the existence and operation of the wharf. The listing price for the Property was $250,000, and Ms. Buchholz purchased it for $150,000.

[22] That same year, Ms. Buchholz assigned the purchase and sale agreement to her company, Paula Buchholz Estates Ltd. Paula Buchholz Estates Ltd. acquired fee simple to the Property on or about January 4, 1978. Paula Buchholz Estates Ltd. changed its name to Arbutus Bay Estates Ltd. in September 1980.

[23] In 1974 and 1978 additional floats C and D were added to the Horton Bay harbour public wharf. A portion of the additional floats was located outside the boundaries of water lot 431. In 2000, float D was removed and float C was shortened and added to the end of float B to bring the wharfage facility back within the confines of water lot 431.

[24] In 1986, the plaintiff began subdividing Property. The Property has now been subdivided into a number of parcels by either the plaintiff or subsequent owners of parcels sold by the plaintiff. Lot A, the property on which the easement is registered, was formed by subdivision of the Property in 2005. The eastern boundary of Lot A is the natural-high water mark.

[25] Ms. Buchholz did not complain about the operations of the wharf while she was owner of the Property. No complaints were made about the operations of the wharf by Paula Buchholz Estates Ltd. The plaintiff did not complain about the operation of the Horton Bay harbour public wharf from 1980, the time the ownership of the Property was put in its name, until 1992.

[26] In the late 1980s, the plaintiff began to pursue the development of a private marina in Horton Bay harbour, immediately east of the public wharf. In August 1989, the plaintiff filed an application with BC Lands for an approximately one hectare water lease for a commercial marina.

[27] Referrals regarding the lease application were sent to other regulatory authorities, including Islands Trust, who is the local land use authority on Mayne Island. Islands Trust responded to the referral in September 1989, noting that approval was not recommended because “current zoning would not permit this use”. In 1989, the plaintiff filed a rezoning application with Islands Trust which was rejected. The plaintiff provided further materials in support of rezoning in 1990 but Islands Trust decided that a commercial marina was not appropriate in Horton Bay.

[28] The plaintiff’s first complaints about the operation of the wharf were made in response to a letter in November 1990 from Philip Gertsman, Acquisition Assistant with the Real Estate Division of Public Works Canada, requesting the plaintiff’s consent, as the holder of riparian rights, for the Province to grant formal tenure to Public Works Canada over the water lot.

[29] In May 1992, legal counsel representing the plaintiff wrote to Public Works Canada and the Department of Fisheries and Oceans stating that it was the plaintiff’s position the water lot reserve had expired. As well, the letter states that the addition of docks added after 1973 constituted a violation of the plaintiff’s rights, since no consent had been obtained. The letter indicated the plaintiff took the position the wharfage facilities would need to be discontinued which would in turn void the upland easement because its term was conditional on its use.

[30] Counsel for Public Works Canada responded disagreeing with the statement that the water lot 431 had expired. The Province took the same position.

[31] In March 1994, the same lawyer wrote on behalf of the plaintiff demanding the removal of the wharf and threatening to block access. Counsel for Canada continued to advise the plaintiff that Canada disagreed the wharf was illegally situated or that the plaintiff had the right to block it.

[32] In 1994 or 1995, Canada announced it would be divesting all recreational harbours. In August 1995, Ms. Buchholz, on behalf of the plaintiff, corresponded with

Canada and the Province suggesting the wharf be privatized and taken over in whole or in part by the plaintiff.

[33] In February 1996, the plaintiff was advised that there was a plan by Small Craft Harbours to divest all recreational harbours, and that Horton Bay harbour fell within the plan. The plaintiff was further advised that if the Horton Bay harbour public wharf was divested, it would first be offered to other federal departments and Crown corporations, the province, local government, non-profit community groups, and finally for sale to the general public by way of public tender. In the event it was put to public tender, the plaintiff would be able to participate in the tender.

[34] In October 1996, Ms. Buchholz wrote to Islands Trust indicating the plaintiff was hoping to reach an agreement with Canada on the privatization of the wharf to avoid a public hearing and the fees required by the rezoning process. However, the plaintiff's proposal to take over operation of the wharf did not move forward due to the local opposition and concerns of Islands Trust.

[35] In April 1996, a senior examiner from BC Lands wrote to the plaintiff, in response to an inquiry from Ms. Buchholz, confirming BC Lands' position that the water reserve had not expired and remained in effect until formally terminated.

[36] In June 1997, the plaintiff began submitting yearly invoices to Canada demanding between $5,000 and $7,280 as a yearly "user fee", dating back to 1973. As of 2013, the plaintiff had rendered invoices, including interest, of approximately $1.9 million dollars to Small Craft Harbours. In September 2015, the plaintiff began purporting to charge daily rent in the amount of $1,000. Ms. Buchholz agreed the amount of $1,000 a day was excessive.

[37] As a result of the ongoing conflict between the plaintiff and defendants regarding the wharf, the Horton Bay harbour public wharf was not divested as planned. Canada operated the public wharf from 1960 to 2007. In June 2007, Canada and the CRD entered into an agreement whereby the CRD agreed to manage the Horton Bay harbour wharfage facilities for one year. Since 2007, the

CRD has operated the Horton Bay harbour public wharf pursuant to various management agreements. Canada has at all times been responsible for the maintenance, inspection and repairs to the public wharf. The Province has been responsible for maintenance, inspection and repair of the pathway between the wharf and Horton Bay Road.

[38] In March and April of 2013, Ian Robertson, an expert in surveying, surveyed the registered easement and found it was not accurately described in an earlier sketch plan. Mr. Robertson determined that the easement did not line up with the wharf as had been shown on the earlier sketch plan. Based on Mr. Robertson's survey, a portion of the wharf structure and a portion of the pathway are outside the boundaries of the registered easement. Mr. Robertson determined the area of the land outside the registered easement that is used to access the wharfage facilities to be 40.9 square metres or 440 square feet in size, which is 0.010 acre.

Is the registered easement a statutory easement?

[39] The plaintiff asserts the registered easement is a statutory easement and only provides for the construction of the footpath and other works, but does not secure any riparian rights for the defendants. The plaintiff submits that the easement does not actually intersect with the wharf or much of water lot 431, so the consent of the plaintiff for interference with its riparian rights is still required.

[40] The defendants do not agree that the registered easement is a statutory easement. The defendants point to the fact that there is a dominant and servient tenement set out in the easement.

[41] The registered easement at issue reads:

> BETWEEN Francis Winterton Pratt
>
> Of Mayne Island, Province of British Columbia
>
> hereinafter called the "Grantor"
>
> AND
>
> Her Majesty the Queen in the Right of the Province of British Columbia

> hereinafter called the "Grantee"
>
> WITNESSETH that in consideration of the sum of $50.00 now paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor doth hereby grant and convey unto the Grantee, the owner in fee of those lands and premises described as Lot 431, Cowichan District, her heirs and assigns and her and their agents, servants and workmen a free and uninterrupted right-of-way in perpetuity but subject to the proviso hereinafter contained, through, along and over that certain parcel of land described as:
>
> > Commencing at a point South 63 15' 30" East, a distance of 263.1 feet more or less from the most southerly corner of Lot 2, Section 2, Mayne Island, Plan 6166, then North 22 02' West 87 feet more or less to High Water Mark of Horton Bay and South 22 02' East 7 feet more or less from the said commencement point and having a width of ten fee on either side of the above described centreline, containing 0.043 acre more or less for the purpose of constructing a footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands owned by the Grantee hereinbefore described.
>
> Provided, and it is hereby expressly agreed, that if and whenever the operation of the said wharfage facilities is discontinued, the said right-of-way and all rights incidental thereto and hereby granted shall cease and determine.
>
> The Grantee for herself, her heirs and assigns covenants with the Grantor his heirs and assigns that the Grantee will at her own expense keep the right-of-way in proper repair and condition.

[42] The registered easement contains an explanatory plan, attached as page 5 and entitled "Explanatory plan of R/W required for access to federal government landing is S.E. ¼ Section 2 Mayne Island". The plan shows the location of the right of way leading from Horton Bay Road to the water lot.

[43] Pursuant to s. 27 of the *Land Title Act*, R.S.B.C. 1996, c. 250, Ms. Buchholz was deemed to have notice of the explanatory plan. Section 27 provides:

> 27 (1) The registration of a charge gives notice, from the date and time the application for the registration was received by the registrar, to every person dealing with the title to the land affected, of
>
> > (a) the estate or interest in respect of which the charge has been registered, and
> >
> > (b) the contents of the instrument creating the charge so far as it relates to that estate or interest,
>
> but not otherwise.

[44] Section 42 of the *Land Registry Act*, R.S.B.C. 1960, c, 206, contained a similar provision that the registration of a charge gives notice of the contents of the instrument creating the charge. Section 27(1) of the British Columbia *Land Title Act*, R.S.B.C. 1979, c. 219, contained the same language as the current statute. The definition of charge is in s. 1 and includes a registered easement.

[45] In my opinion, the registered easement does not fall within the definition of statutory right of way set out in s. 218 of the *Land Title Act* and the case law. The relevant portions of s. 218 provide:

> 218 (1) A person may and is deemed always to have been able to create, by grant or otherwise in favour of
>
> (a) the Crown or a Crown corporation or agency,
>
> …
>
> an easement, without a dominant tenement, to be known as a "statutory right of way" for any purpose necessary for the operation and maintenance of the grantee's undertaking, including a right to flood.
>
> (2) To the extent necessary to give effect to subsection (1), the rule requiring an easement to have a dominant and servient tenement is abrogated.
>
> …
>
> (3) Registration of an instrument granting or otherwise creating a statutory right of way
>
> (a) constitutes a charge on the land in favour of the grantee, and
>
> (b) confers on the grantee the right to use the land charged in accordance with the terms of the instrument, and the terms, conditions and covenants expressed in the instrument are binding on and take effect to the benefit of the grantor and grantee and their successors in title, unless a contrary intention appears.

[46] Section 218 allows a person to create, by grant or otherwise in favour of the Crown, “an easement, <u>without a dominant tenement</u>, to be known as a ‘statutory right of way’ for any purpose necessary for the operation and maintenance of the grantee's undertaking, including a right to flood.”

[47] The Court of Appeal decision in *Stasiuk Estate v. West Kootenay Power,* 2000 BCCA 377 at paras. 6-7, confirmed that a ‘statutory easement’ falls within the definition of s.218 only if there is no dominant tenement, stating:

> [7] The ambit of an easement at common law is determined with reference to a dominant tenement. The requirement for a dominant tenement is abrogated for a s. 218 right of way….

[48] The registered easement in this case clearly identifies a dominant tenement, "Lot 431", the water lot the wharf is built on, stating:

> …in consideration of the sum of $50.00 now paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor doth hereby grant and convey unto the Grantee, the owner in fee of those lands and premises described as Lot 431, Cowichan District...uninterrupted right-of-way

[49] Accordingly, it is my opinion that s. 218 of the *Land Title Act* has no application as the registered easement is not a statutory right of way.

Does the registered easement authorize the ongoing operation of the public wharf in Horton Bay harbour, including impacting the plaintiff's riparian rights?

[50] The next issue I will deal with is whether the registered easement authorizes the ongoing operation of the public wharf, including the interference with the plaintiff's riparian rights.

Plaintiff's Position

[51] The plaintiff asserts that:

a) the presence of the wharf is an actionable breach of the plaintiff's riparian rights; and

b) the use of the upland easement by the defendants and their invitees to pass to and from the wharf, and to anchor the wharf to the bank of the plaintiff's property is unauthorized and constitutes a trespass.

[52] The plaintiff says the reason the wharf's interference with the plaintiff's riparian rights is unlawful is because Mr. Pratt's original consent to the interference was never recorded in an instrument that was registered on title to the property, Therefore each subsequent owner had to separately consent to the interference for it to remain lawful. Absent registration, unless the current upland owner consents,

interference with riparian rights is actionable, even if the interference is the result of an activity in the adjacent water lot that has otherwise been licensed or authorized by the Crown. Here, there has been no consent by the plaintiff to the interference with its riparian rights. Mr. Pratt's consent was not put into registrable form and did not bind future owners. The only registered instrument is the upland easement, and on its face that provides for construction of the footpath and other works, but does not secure any riparian rights for the defendants. Moreover, the upland easement does not actually intersect with the wharf or much of water lot 431, so the consent of the upland owner was still required.

[53] The plaintiff asserts that the second reason the wharf is unlawful is because the water lot reserve has expired on its terms when the change of operation occurred. The wharf is no longer being operated by Canada, but rather by the CRD. Mr. Pratt's consent was to Canada, and therefore its authorization ended when the CRD took over operations. The plaintiff argues that the upland easement expired when the public wharf was no longer authorized by virtue of the change in operation.

[54] The plaintiff takes the position that if the use of the wharf was and is unlawful for the reasons advanced by the plaintiff, the defendants' and the public's use of the upland easement is trespass.

Canada and the CRD's Position

[55] Canada and the CRD take the position that the registered easement authorizes the on-going use and operation of a public wharf with public access across the pathway over the upland property. Canada and the CRD assert that when the registered easement is read in accordance with the principles of interpretation, including the maxim that ambiguity is to be resolved in favour of the grantee, the inescapable conclusion is that the charge authorizes ongoing operation of the harbour as a public facility.

[56] The defendants assert the registered easement provided actual notice of the wharfage facilities within water lot 431.The presence and operation of wharfage facilities on and appurtenant to the upland is the central premise of the registered

easement, which authorizes the construction of “a footpath and other works incidental to the operation of wharfage facilities”. The easement is to last until “the said wharfage facilities is discontinued”. The easement therefore is clearly predicated on an operating wharf, and gives purchasers of the Property notice of that wharf and the access across the Property.

[57] The authorization to build a pathway and “works incidental to the operation of wharfage facilities” on the upland property necessarily includes a waiver of riparian rights. Canada and the CRD argue it would be absurd to interpret the registered easement as authorizing the facilities necessary to access and place a wharf on the upland while not authorizing the existence of the wharf attached to such facilities located in the neighbouring water lot.

[58] Canada and the CRD agree that the easement is ambiguous on the type of wharf authorized. The registered easement does not specify what kind of “wharfage facility” is authorized, including who may use and operate the facility. The ambiguity can be resolved by two different means: (i) by resolving the ambiguity in favour of the grantee, or (ii) by resorting to extrinsic evidence. Canada and the CRD assert that under either approach, the ongoing operation of the Horton Bay harbour wharf as a public facility is authorized by the registered easement.

[59] Canada and the CRD submit that the extrinsic evidence makes plain that it was always the intention of all parties that the easement would authorize the presence and ongoing operation of the wharf as a public facility. There is no evidence of any intention to construct anything other than a public harbour in Horton Bay, comprising a wharf and an access pathway, connected on the upland property. At the time the easement was registered the wharf and path had already been constructed. There was no need to authorize anything but their ongoing presence and operation.

[60] The registered easement also provides for and authorizes all such ancillary rights that are necessary for the reasonable and meaningful use and enjoyment of the grant, including a right to reasonable parking on the side of Horton Bay Road.

Province's Position

[61] The Province's position is that consent to a waiver of riparian rights is implicit in the terms of the registered easement, which expressly references water lot 431 and the wharfage facilities. The registered easement, which Ms. Buchholz acknowledges reading prior to purchasing the Property, provided actual notice of the wharf and its location, and implicit notice of a predecessor in title's consent to the infringement of riparian rights relative to the presence of the wharf. The Province asserts that any rational person reading the easement would understand their ability to access the water at the precise location where the wharf meets the foreshore is impaired by the wharf itself. To read otherwise would require an irrational assumption that users of the wharf are leaping from the property's high water mark to the wharf or wading through the water in gumboots.

[62] The registered easement also provides actual notice that the wharfage facilities are within water lot 431, Cowichan District. Accordingly, the registered easement provides notice to a potential purchaser who may have concerns about the size of the wharfage facilities, or its location relative to the upland property, so that he or she might obtain the plans for water lot 431 if so desired.

[63] In addition to the registered notice of the wharf, the plaintiff admitted Ms. Buchholz knew that the approach of the public harbour met the Property and blocked any ingress or egress at this point on the Property.

[64] The Province points to the fact that the plaintiff relies on s. 218 of the *Land Title Act*, to assert that the easement is a statutory right-of-way and relies on a narrow interpretation of ss. 218(3)(b) to try to limit the Province's rights. The Province takes the position that the section has no application as the easement is not a statutory right-of-way since the easement has a dominant tenement. As well the Province says the sub-section is not applicable because the Province is using the land in accordance with the terms of the easement, i.e.to access the wharfage facilities along the footpath.

[65] In its counterclaim, the Province seeks a declaration that any impairment of riparian rights attached to the part of Lot A that fronts the right of way, the pathway and the Horton Bay harbour public wharf is authorized so long as the operation of wharf continues. The Province is not claiming for rectification of the registered easement to include a waiver of riparian rights, nor is it asserting the reserve of water lot 431 by Order-in-Council authorized any interference with riparian rights.

Analysis

[66] As noted earlier, the plaintiff asserts that the registered easement provides for construction of the footpath and other works, but does not secure any riparian rights for the defendants.

[67] Riparian rights are common law rights arising from the ownership of land adjoining water. The case law has its roots in English authorities.

[68] Riparian rights have been discussed in the case law in B.C. In *North Saanich (District) v. Murray*, [1975] B.C.J. No. 1126 (C.A.), the issue before the Court was whether a riparian owner had the right to construct wharves or other structures upon the foreshore. In finding the riparian owner did not have the right to construct wharves or other structures on the foreshore, the Court of Appeal adopted the following statements as accurately stating the law on riparian rights in British Columbia:

> [11] In so far as the issues that arise in this case are concerned, I think that the general statements contained in 39 Hals., 3rd ed., p. 514 et seq., accurately state the law of British Columbia:
>
> > 675. General right of access by riparian owners. A riparian owner, that is to say, an owner of land abutting on water, is entitled ex jure naturae to access and regress to and from that water ...
> >
> > 677. Nature of right of access. A riparian owner's right of access to the water on which his land abuts is a private and not a public right and any interference with it is actionable without proof of special damage; it does not depend on ownership of the bed of the river or other water in question and it is wholly distinct from the public right of navigation.
> >
> > 678. Exercise of right of access. *In the exercise of his right of access a riparian owner must not* interfere with any public right of navigation which exists in the water on which his land abuts or *put down anything which disturbs the foreshore*. If, however, there is an erection on the

> foreshore, such as a pier or causeway, the riparian owner, and those whom he permits to go on his land, may use it as a means of access [emphasis in original].
>
> 680. Incidental rights. The riparian owner's right of access includes (1) the right to land, or pass over the shore or bed at all states of the water for that purpose, even when the shore or bed is not vested in him; and (2) the right to moor vessels adjacent to his land for such period as is necessary to load or unload them and, in the case of tidal waters, if they cannot be loaded or unloaded in one tide, the right to keep them there until the operation is completed. A riparian owner must not, however, moor a vessel in such a way as to interfere with another riparian owner's right of access or so as to interfere with any public right of navigation.

[69] See also: *Graham v. Andrusyk*, 2006 BCSC 1614 at para. 14

[70] As noted earlier, the plaintiff asserts that the registered easement does not on its face provide any notice of the waiver of riparian rights because the specific words are not used. The plaintiff asserts its riparian rights allow unimpeded access to deep water across every point on the Property's foreshore. The plaintiff argues that without specific reference to the riparian rights in the registered easement, the wharf facilities cannot remain on the Property because it blocks the Property's access to deep water at the point it intersects the land. The plaintiff says even if were found that the registered easement impacted its riparian rights, the ramp to the wharf and the pathway are not entirely within the area covered by the registered easement.

[71] An easement sets out a proprietary right that runs with land, burdening the servient tenement and benefiting the dominant tenement. When a purchaser acquires land burdened by an easement, he or she has no inherent right to demand the easement be cancelled or modified.

[72] A registered easement is a reflection of a contractual agreement, and easements are interpreted in accordance with the principles of contractual interpretation. However, easements are unique in that they are intended to be relied upon by subsequent purchasers and others who were not parties to the original transaction. As a result, rules unique to the construction of easements have developed.

[73] In *McCorquodale v. Baranti Developments Ltd.,* 2015 BCCA 133, the Court of Appeal discussed the interpretation of a grant of easement, noting at paras. 23 and 24:

> [23] As the chambers judge recognized at para. 11 by citing *Community Marine Concepts Ltd. v. The Owners, Strata Plan VIS1889*, 2012 BCSC 1384, in interpreting a grant of an easement, a court must look to the plain language of the grant and will only consider the circumstances surrounding its creation where (a) there is an ambiguity in the wording or (b) the circumstances demonstrate that both parties could not have intended a particular use of the easement that is authorized by the wording of the document: *Granfield v. Cowichan Valley (Regional District)* (1996), 16 B.C.L.R. (3d) 382 at paras. 20-21 (C.A.).
>
> [24] In my view, it is helpful to examine the nature of the grant with reference to both its wording and the relevant legal principles that the drafter would have understood when the grant was made, in order to consider whether there is any ambiguity in its text.

[74] At para. 29, the Court went on to note:

> With respect to the operative terms, it was and is an established principle that the use for which an easement was intended at the time of the grant is not a surrounding circumstance that establishes an objective common intention that an easement would not be put to any other use in the future: *Granfield* at paras. 20-21, citing *White v. Grand Hotel, Eastbourne, Limited*, [1913] 1 Ch. 113 (C.A.). A general grant of access was just that. Limitations on use or circumstances in which a grant would terminate required express language: *Grand Hotel* at 116 (*per* Cozens-Hardy M.R.). Moreover, ambiguity in a grant would be interpreted in favour of the grantee: *Williams v. James* (1867), L.R. 2 C.P. 577 at 581 (*per* Willes J.); see also John Leybourn Goddard, *Gale on Easements*, 8th ed. (London: Stevens and Sons, Limited, 1921) at 342; Edward Douglas Armour, K.C., *Armour on Real Property*, 2nd ed. (Toronto: Canada Law Book Company, 1916) at 21.

[75] In my opinion, the plain language of the easement in this case provides notice to subsequent owners of the impairment of their riparian rights. The grant to the Province included “her heirs and assigns and her and their agents, servants and workmen”. The grant was for a right of way in perpetuity over the Property subject to the provisos in the document. The purpose of the easement is set out as the construction of a footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands owned the Grantee hereinbefore described.

[76] The registered easement provides for a right of way in perpetuity, provided that, if and whenever, the operation of wharfage facilities is discontinued the right of way and all the rights incidental thereto and hereby granted shall cease and determine. The Province is responsible for keeping the right-of-way in proper repair and condition.

[77] It is apparent from the plain language of the grant that it provides for a right of way between Horton Bay Road and the wharfage facilities located in water lot 431. The explanatory plan attached clearly states that the right of way depicted is "required for access to the federal government landing".

[78] The plaintiff asserts the defendants' conduct in seeking its approval for the infringement of its riparian rights is evidence that the defendants recognized the registered easement did not allow the ongoing operation of the wharf facility. However, as stated in *Robinson v. Pipito,* 2014 BCCA 200 at para. 20, conduct of the parties is not determinative:

> [20] Every easement will, to some extent, exclude the servient owner from the property and prevent the servient owner from exercising some proprietary rights over the property reserved for the easement. The degree of occupation or possession, and the question whether that degree of occupation or possession is compatible with the existence of an easement, should be governed by the document conceding the grant. The conduct of the parties in the purported exercise of the rights granted under the easement is not helpful as a guide to interpreting the document; they may misapprehend their legal rights.

[79] While the plaintiff asserts there is no express wording in the registered easement indicating it is intended to affect rights over foreshore, the registered easement granted by Mr. Pratt is expressly made for the benefit of and appurtenant to water lot 431, and specifically states it is to provide the grantee with free and uninterrupted right of way to the water lot. In other words, the dominant tenement is water and foreshore lands, and is distinguishable as a result from *Weisner v. Blades*, [1985] B.C.J. No. 182 (S.C.), the case relied on by the plaintiff.

[80] As the upland owner adjacent to the proposed public harbour, Mr. Pratt authorized all the facilities and burdens on his property rights that were necessary to

allow the construction and operation of the wharfage facility in the water lot. This included construction of the pathway, construction of those components of the wharf that needed to be connected to the upland, access via the pathway to the near-by public road, and the on-going presence and operation of the wharf in front of his property.

[81] The plaintiff has provided no authority for its proposition that waiver of riparian rights can only occur as a result of a statutory right of way. The plaintiff relies on a statutory right of way dated 1989, which is attached to the publication, “Riparian Rights of Access to Water: Private Rights and Public Policy” by J. Martin Kyle (1997), as an example of the sort of registered charge that would effectively waives riparian rights. However, it is my view that a document drafted almost 30 years after the easement in issue for a different property does not provide assistance in interpreting the easement in this case.

[82] Finally, even if I were to accept the argument that the easement in issue is a statutory easement, the easement is being used in accordance with the instrument creating it. The easement is providing right of way between the Horton Bay harbour public wharf and Horton Bay Road.

[83] I agree with Canada and the CRD that explicit listing of each and every right granted was not required. It is well established that the grant of an easement includes such ancillary rights as are necessary to enjoy the benefit of that easement.

[84] As stated by the authors in *Gale on Easements,* 17th ed., (London: Sweet and Maxwell, 2002) at 47:

> The grant of an easement is also the grant of such ancillary rights as are reasonably necessary to its exercise or enjoyment. Where the use of a thing is granted, everything is granted by which the grantee may have and enjoy such use. The ancillary right arises because it is necessary for the enjoyment of the right expressly granted.

[85] In *MacKenzie v. Matthews*, (1999) 46 O.R. (3d) 21 (C.A.), the Ontario Court of Appeal discussed ancillary rights in the context of a right of way accessing an island, and determined that the installation and maintenance of a dock was an ancillary right that is reasonably necessary to the use of the easement in question.

[86] In my opinion, when the language of the registered easement is considered in accordance with the applicable legal principles that govern the interpretation of registered charges, the only reasonable interpretation is that the easement authorizes the operation of a public harbour comprising a wharf and a footpath, including the impairment of the plaintiff's riparian rights where the wharf meets the upland property. The wording of the grant gives the right to the Province and its assigns a right of way for the purpose of accessing the public wharf.

[87] The reading suggested by the plaintiff, namely, that it provides for construction of the footpath and other works, but does not secure any riparian rights so as to allow for the ongoing operation of the wharfage facilities, does accord in any way with the purpose of the easement, which was to provide a free and uninterrupted right of way from Horton Bay Road to the wharf until the operation of the wharfage facilities was discontinued. Nor is the reading suggested by the plaintiff that the use of the easement is limited to the Province, its workmen and fishermen, consistent with the wording of the grant which is broader and refers to the Province and its heirs and assigns and agents, and her and their agents, servants and workmen.

[88] The phrase "that if and whenever the operation of the said wharfage is discontinued, the said right-of-way and all rights incidental thereto and hereby granted shall cease and determine" is inconsistent with a narrow grant authorizing construction of a "footpath" and "works" and nothing more.

[89] Having considered the principles of interpretation set out in the case law and the authorities provided by the parties, it is my opinion the appropriate interpretation is that the registered easement was intended to provide all such rights that were required to allow for the construction and continuing operation of the wharfage facility. In my view, "all rights incidental thereto" includes impairment to the upland property's riparian rights as an incidental and/or ancillary right that is reasonably necessary to the use of the easement to access the wharf from Horton Bay Road and to allow the wharf's continued operation.

[90] Canada and the CRD assert that an incidental and/or ancillary right to park vehicles on the side of Horton Bay Road, within a reasonable distance from Horton Bay harbour, is reasonably necessary to the comfortable exercise and enjoyment of the rights granted in the registered easement.

[91] There is no dispute that vehicular access is necessary for the reasonable use and operation of the wharf, which is situated several kilometers outside the village and the nearest store, and is not connected by public transportation. Users of the wharf testified of the need and practice of parking vehicles on the side of Horton Bay Road in order to reasonably use the facility. Ms. Buchholz agreed that people would have to walk half a kilometer or further if they could not park their vehicles on the side of Horton Bay Road.

[92] The documents make it clear that vehicular access was contemplated by the parties at the time of the grant. In his letter of June 1959, Mr. Walkey of Public Works wrote to BC Highways noting that a “turnabout area approximately 23 ft. by 30 ft. would also be required near the start of the proposed approach”. Further, a Public Works Wharf Inspection Report from May 1960 indicates that Public Works understood that the provincial road foreman would install fill for a “car turnaround beside road at head of approach”.

[93] Canada and the CRD rely on *MacKenzie*, for the proposition that parking is an ancillary right. The Court in *MacKenzie* held the parking of vehicles while users enjoy access to the islands was “an ancillary right reasonably necessary to the use and enjoyment of the easement” because the right of way was designed to provide access to the islands, and users of the right of way had to arrive in vehicles that they could not transport to the islands. In *MacKenzie*, the proposed parking was on the registered easement, not on property outside the easement.

[94] The defendants rely on *Moncrieff v. Jamieson*, [2007] UKHL 42, in which the House of Lords discussed the accessory right to park vehicles on the servient tenement. In *Moncrieff*, the dominant tenement lay at the foot of a steep escarpment close to its boundaries with another property. Vehicles could not be driven on to the

dominant tenement. The owner of the servient tenant conceded that some ancillary rights had to be implied given the use that might reasonably have been expected of the right of access. The right to stop and turn a vehicle and to unload and load goods and passengers from it on the servient tenement was conceded as being obviously necessary. However, the owner of the servient tenement took the position that the driver has no right to park his vehicle on the servient tenement. The court noted that would require the driver to leave the servient tenement after dropping off any goods or passengers and park their car elsewhere, and walk back and forth to their vehicle. The nearest point vehicles could be parked was 150 yards away with a steep descent or climb in exposed country. The court found that in those particular and unusual circumstances, the rights ancillary to the express grant of access in favour of the dominant tenement included a right to park vehicles on the servient tenement.

[95] The plaintiff asserts that the B.C. Court of Appeal makes it clear that there is no right to park in an access easement in *Banville v. White*, 2002 BCCA 239 at para. 43-49. In *Banville*, the court adopted the statement in *Brundrett v. Muckle*, [1997] B.C.J. No. 1585 (C.A.), that the right to cross over an easement area does not carry with it a right of parking, noting parking areas may be reasonably incidental, but were not necessarily ancillary to the kind of grant made in that case.

[96] I agree with the defendants that not allowing reasonable parking along Horton Bay Road would substantially defeat the purpose of the easement and make the wharf dramatically less useful to the people of Mayne Island. The evidence is that this is a rural area and there is no public transit to the Horton Bay harbour public wharf facility and no parking available nearby apart from on the side of Horton Bay Road. The nearest place parking is available is 1.5 kilometres away.

[97] Since the time the easement was registered in 1960 persons using the wharf have been parking on the side of Horton Bay Road when accessing the wharfage facilities. The easement specifically refers to the operation of the wharf in connection with the right of way and “all rights incidental thereto”.

[98] While, I agree that the authorities do not support a finding that parking is an ancillary right to the right of easement in the majority of cases, this case is unusual in that there is no parking available within 1.5 kilometres of the wharf. In my view, this is a situation akin to that in *Moncrieff*, and rights ancillary to the express grant of access in favour of the wharfage facilities include a right of parking on the Horton Bay Road while accessing the wharf. As noted earlier, it was contemplated at the time of the grant that people accessing the wharf would use vehicles. Since the time the wharf began operating individuals accessing it have parked on their vehicles on the side of Horton Bay Road.

[99] In my view, the ancillary right for reasonable parking on the side of Horton Bay road arises because it is necessary for the enjoyment of the right expressly granted, i.e. access to the public wharf located on water lot 431 from Horton Bay Road. In the unique circumstances of this case, I find that allowing individuals to park their vehicles along Horton Bay road while accessing the wharf facilities is a necessary ancillary right.

[100] As noted earlier, the plaintiff asserts that, even if it were found that the registered easement authorized the breach of its riparian rights, a recent survey indicates that a small portion of the pathway and wharf structures were placed slightly north of the area described in the easement. The defendants take the position the discrepancy is minimal, however, they seek rectification of the discrepancy. Accordingly, I will next address the issue of rectification.

If the registered easement does not authorize the ongoing operation of the wharf facilities, should it be rectified?

Plaintiff's Position

[101] The plaintiff takes the position that rectification could not bind a third party purchaser for value like the plaintiff, or any owner after Mr. Pratt. The plaintiff asserts that, in any event, the equitable remedy of rectification cannot transform the registered easement into a waiver of riparian rights. Moreover, the plaintiff says the

area covered by the easement is insufficient to prevent an interference with its riparian rights.

[102] The plaintiff says neither Canada nor the CRD have standing to claim rectification. The plaintiff asserts rectification is a remedy only available to the parties to a contract. The easement was negotiated between the Province and Mr. Pratt. The Province retains ownership of the dominant tenement. The plaintiff is the owner of the servient tenement. The plaintiff argues that as a result the Province is the only party who could claim rectification, and Canada and the CRD have no standing. In that regard, the plaintiff relies on *Drapeau v Heald*, [2006] O.J. No. 1147 (S.C.J.) at para 22; and *Gates v. Trainor,* [1979] 23 Nfld. & P.E.I.R. 331 (P.E.I.S.C.) at para 7.

[103] The plaintiff takes the position that even if rectification were an available remedy the defendants do not meet the test for rectification. The party seeking rectification must show that:

a) the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified;
b) there was an outward expression of accord;
c) the intention continued at the time of the execution of the instrument sought to be rectified;
d) by mistake, the instrument did not reflect that common intention.

[104] It is a remedy that is to be employed with significant caution: *Fraser v. Houston et al,* 2006 BCCA 66 paras. 26-30.

[105] The plaintiff points to the fact that rectification is restorative, not speculative. It is used to correct the situation where the parties settled on certain terms but have written them down incorrectly. The plaintiff asserts that the only evidence of what was actually agreed to is the written document and there is no evidence of any other meeting of the parties' minds.

Canada and CRD's position

[106] Canada and the CRD note any question related to Canada and the CRD's standing to seek rectification is moot given the fact that the Province is seeking

rectification of the registered easement. Canada and the CRD support the Province's request for rectification.

[107] Canada and the CRD take the position that if the registered easement cannot be construed as authorizing the operation of the wharf as a public facility and/or permitting reasonable parking along Horton Bay Road, the registered easement should be rectified to reflect such as that was the shared intention of Mr. Pratt and the Province.

[108] Canada and the CRD concede that Mr. Robertson's survey suggests that a small portion of the pathway and wharf structures are outside the area defined in the registered easement. Canada and CRD ask that the registered easement be rectified so as to include the entire pathway and upland portions of the wharf structures in it.

Province's Position

[109] The Province takes the position that rectification is appropriate in this case because there is an ambiguity in the wording of the easement. The easement is granted "in perpetuity", yet ceases and determines when the wharfage facilities are no longer operational. However, the easement as drafted limits its purpose to the construction of the footpath and works incidental to the wharfage facilities, without making any express provision for the actual operation of the wharf.

[110] As well, the Province seeks rectification of the easement to include the small area outside the area defined by the registered easement on which a portion of the pathway and wharf structures have been built.

[111] The Province asserts rectification is appropriate because the evidence establishes it was not the parties' agreement to limit the use of the easement to the Province, "her heirs and assigns and her and their agents, servants and workmen", or to limit the easement for the sole "purpose of constructing a footpath and other works incidental to the operation of the wharfage facilities". If the easement was

intended solely for those persons and for that purpose, then it would frustrate the public's use of and access to what has at all times been a public wharfage facility.

[112] The Province seeks to rectify the easement to accurately reflect the agreement of the parties at the time it was made; that is, to allow the public to use the easement to gain access to the public wharf at Horton Bay. The Province has sought specific wording for the proposed rectification which it submits does not displace the priority scheme of the Torrens system.

Analysis

[113] Rectification is an equitable doctrine that allows the court to correct a written instrument that fails to accurately set out the contractual agreement that was actually made.

[114] The plaintiff asserts that the combination of ss. 27 and 29 of the *Land Title Act* (formerly ss. 42 and 44 of the *Land Registry Act*, R.S.B.C. 1960, c. 208*)* establish that, except where a purchaser has participated in a fraud, a purchaser for value is not affected by any notice of an unregistered interest. This includes barring a claim of rectification of an unregistered instrument negotiated with a prior owner.

[115] In *Banville v. White*, 2002 BCCA 239, the Court of Appeal discussed the doctrine of rectification in the context of a registered easement and whether it was available against a subsequent purchaser. The issue was whether a turnaround that fell outside the area covered by a right of way was intended to be covered by the registered easement. The right of way had been created by the original owners when the lands were subdivided into Lots 1 and 2. The two lots were adjacent to one another and shared a private driveway that ended in a turnaround that was located on Lot 1, now owned by the plaintiffs. The defendants sought rectification, for the first time on appeal, if it was found that the turnaround did not fall within the easement. The dissent noted that the plaintiffs had constructive notice of the existence of the turnaround and in the circumstances would have ordered rectification of the easement to include the turnaround so as to reflect the agreement when the easement was granted. The minority noted at para. 34:

> Therefore, in order to rectify the title in the case at bar, it would be necessary to conclude that the easement as it appears on title is not the true "agreement", and that there was a common intention between the original parties that the turnaround in fact be part of the easement. This would have to have been demonstrated very convincingly. In addition, it would have to be demonstrated that the Whites and Banvilles had notice, when they purchased, that the turnaround was "part" of the easement.

[116] The majority allowed the appeal on the basis that rectification had not been pleaded, stating that the equities in the case favoured the matter being remitted to be determined on amended pleadings seeking rectification.

[117] In the summary trial following the amendments, *White v. Banville*, 2003 BCSC 606, the trial judge ordered the rectification sought by the Whites to include the turnaround within the right of way, noting that it simply reflected the title the Banvilles believed they were acquiring when they bought the lot, and that there was no injustice.

[118] In this case, the plaintiff argues that the Torrens system embodied in the *Land Title Act* and, in particular s. 29, bars rectification. Section 29 provides that a person is not affected by unregistered interests in land or unregistered charges, even if the person has actual or constructive notice, except in the case of fraud. This provision applies to unregistered charges. In this matter, the charge is registered against the title. The plaintiff has provided no case authority for the proposition that s. 29 of the *Land Title Act* bars the rectification of a registered instrument, whereas I have been provided with cases in which courts have granted rectification of a registered instrument.

[119] In *White v. Banville*, the court noted at para. 38, that neither the principles of the *Land Title Act* or the principles of the Torrens System are a bar to the rectification of a registered instrument citing *Hawkes Estates v. Silver Campsites Ltd*. (1991), 79 D.L.R. (4th) 677 (B.C.C.A.).

[120] It is clear from a review of the case law, that rectification is available in situations where it was established there was a common intention between the original parties that is not reflected in the registered instrument, and the subsequent

purchaser had notice at the time they purchased that “part of the easement” included the area sought to be included by the rectification.

[121] In the event that the easement cannot be construed to allow for the operation of the public wharf, it is clear from the evidence that Ms. Buchholz purchased the property in 1973 with the understanding that the registered easement allowed for public access to and from the wharf. I agree that if this was a misunderstanding it was passed on to the plaintiff when Ms. Buchholz transferred the interest to its predecessor company the same year. As well, she was under the mistaken belief that all of the wharf structures and pathway was on an area included in the easement.

[122] As in *White v. Banville*, the plaintiff was a bona fide purchaser for value without knowledge that the easement did not include the foot path and the wharf structures. The facts of this case are distinguishable from the case the plaintiff relies on *Kemp v. Holler*, [1989] B.C.J. No. 1101 (S.C.), where it was found the subsequent purchasers had no notice of the unregistered interest.

[123] The documents from 1959 – 1960, the time the easement was granted, establish that it was the intention of the parties to allow for public access to the wharf across the Property. At the time the easement was executed on September 26, 1960, Mr. Pratt had agreed to grant “a 20 foot wide easement for pathway to a public float to be installed in Horton Bay”, he had sent a letter consenting to the water lot for the proposed public boat landing, the footpath and wharf had been constructed, and Canada had requested the Province to ensure that easement would allow public access to the wharf in the present and in the future.

[124] Canada, the Province and Mr. Pratt clearly intended that the easement was to provide public access to the wharf located in water lot 431.

[125] There is no evidence to suggest that any of the successor property owners, other than the current owner, has ever complained of or questioned the public’s use of the easement to access the wharf. Ms. Buchholz’s attempt at trial, to resile from her admission during her examination for discovery as the plaintiff’s representative, that she understood the easement to allow for public access, is not credible. Prior to

purchasing the Property Ms. Buchholz was aware there was an easement on the Property, and a pathway on it leading from Horton Bay Road to the public wharf.

[126] As noted earlier, the plaintiff did not raise any concerns about the Horton Bay harbour public wharf until after its consent was requested to change the tenure of the water lot. The plaintiff did not raise any concerns about the location of the footpath or the wharf structures until after a recent survey. In my opinion, the facts of this case are similar to the *White* case in that Ms. Buchholz purchased the Property under the mistaken belief that the footpath and wharf structures were included in the easement.

[127] As noted, the intention of the parties at the time the registered easement was entered into was to provide a right of way to the Horton Bay harbour public wharf for access to it from the Horton Bay Road, so long as it was operating.

[128] The fact is that all of Mr. Pratt's successors in title, excepting Ms. Buchholz and the plaintiff, are deceased and there is no evidence as to what they understood the easement to allow. However, as noted, there is also no evidence that anyone other than the plaintiff ever objected to the public's use of the easement since its installation in 1960 and that objection only began many years after the plaintiff acquired title.

[129] This is not a matter of an unregistered easement about which the plaintiff had no notice. On the contrary, notice of the easement was registered on title and the plaintiff's principal, Ms. Buchholz, understood it to provide for access to the public wharf from Horton Bay Road when she purchased the property in 1973. Her understanding passed to the plaintiff when she assigned the purchase agreement to it later that same year.

[130] The plaintiff relies on *Avanti Mining Inc. v. Kitsault Resort Ltd.*, 2010 BCSC 1181, for the proposition that rectification will not be granted against a bona fide purchaser for value without notice. I agree with that proposition. However, in this case it is clear from the evidence that the plaintiff had notice.

[131] I find that Ms. Buchholz purchased the Property, and subsequently transferred it to the plaintiff, under the belief that the registered easement authorized the ongoing operation of the public wharf in Horton Bay harbour, including the right to park on the side of Horton Bay Road while accessing the wharf facility.

[132] In the circumstances, I am of the view that the order for rectification sought by the defendants to include the area of the footpath and wharf structures in the registered easement should be granted. I further order that the defendants bear the costs of preparing the new right of way and other documents required to register the new instrument rectifying the right of way.

[133] I am also of the view that if I have reached the wrong conclusion regarding whether the riparian rights and parking are included in the registered easement, the registered easement should be rectified as sought by the Province, with some modifications as follows:

> WITNESSETH that in consideration of the sum of $50.00 now paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor doth hereby grant and convey unto the Grantee, the owner in fee of those lands and premises described as Lot 431, Cowichan District, her heirs and assigns and her and their agents, servants and workmen, visitors, invitees and members of the public a free and uninterrupted right-of-way for ingress and egress to the wharfage facility and to the maintenance, operation, construction or replacement of the wharfage facility appurtenant to the lands owned by the Grantee hereinbefore described in perpetuity but subject to the proviso hereinafter contained, through, along and over that certain parcel of land described as:
>
> > Commencing at a point South 63 15' 30" East, a distance of 263.1 feet more or less from the most southerly corner of Lot 2, Section 2, Mayne Island, Plan 6166, then North 22 02' West 87 feet more or less to High Water Mark of Horton Bay and South 22 02' East 7 feet more or less from the said commencement point and having a width of ten fee on either side of the above described centreline, containing 0.043 acre more or less for the purpose of ingress and egress from Horton Bay Road to ~~constructing a footpath and other works incidental to the operation of~~ wharfage facilities appurtenant to the lands owned by the Grantee hereinbefore described

[134] The description of the area also has to be rectified to include all of the area on which the footpath and wharfage structures are situated. As noted earlier, the area to be included in the easement is approximately 0.010 acre or 440 square feet.

Did the registered easement expire when the wharf was expanded or when the CRD took over its operation?

[135] The plaintiff pleads that the easement ceased to exist when the wharf was expanded by floats C and D in 1973 and 1978, respectively, and when the CRD took over the operation of the public wharf in 2007. The plaintiff argues the Order-in-Council that created water lot 431 terminated when Canada transferred the operation of the wharf to the CRD because the use and purpose of the wharf changed.

[136] The plaintiff says that Canada decided in 1995 to divest itself of all recreational harbours, including the public wharf in Horton Bay harbour. The plaintiff argues that as a result water lot 431 is no longer being used for the purpose of a federal government wharf. The water lot was granted on its use and purpose, so by its own terms, the water lot reserve has expired.

[137] The plaintiff argues that Canada and the CRD have attempted to circumvent the need for it to consent to Canada's divestiture of the Horton Bay harbour public wharf by purporting not to divest, but rather transferring control and operation of the wharf to the CRD without formally transferring the tenure.

[138] The plaintiff argues the effort must fail, and that by transferring the control and operation of the wharf to the CRD, the use and purpose of the wharf has changed and that has brought about the termination of the water lot reserve. The plaintiff argues that as a result, there is no valid provincial authorization for the wharf and it must be removed.

[139] Canada and the CRD take the position that the plaintiff's assertion that the expansion, reconfiguration or transfer of the operation of the wharf entitles it to demand cancellation of the registered easement rests on an unsustainable reading of the registered charge and on an unsupported allegation that the water lot reserve has expired. Canada and CRD point to the fact that plaintiff did not plead that the water lot reserve has expired in its amended notice of civil claim.

[140] The Province takes the position that water lot 431 has not expired on its terms, and further that the plaintiff has not sought a declaration that the water lot has expired.

[141] The Order-In-Council that created water lot 431 states:

> …Lot 431…be reserved and set apart for the use of the Department of Public Works, Canada, as the site for a wharf so long as required for such purpose.

[142] Apart from that limitation, there is no express mechanism for the termination of the water lot reserve. The Province asserts that in order to terminate the water lot, a declaration is needed and the plaintiff has not sought one in the amended notice of civil claim. Even if the plaintiff amends its pleadings, the water lot is reserved for Canada's use as a site for a wharf. That purpose has not changed since 1960 when the wharf was built.

[143] I agree that even if the Order-In-Council that created water lot 431 is extinguished, the easement determines in accordance with its terms, not the terms of the tenure agreement between the Province and Canada.

[144] When a registered charge can be cancelled is set out in s. 35 of the *Property Law Act* R.S.B.C. 1996, c. 377, which provides:

> 35 (1) A person interested in land may apply to the Supreme Court for an order to modify or cancel any of the following charges or interests against the land, whether registered before or after this section comes into force:
>
> (a) an easement;
>
> …
>
> (2) The court may make an order under subsection (1) on being satisfied that the application is not premature in the circumstances, and that
>
> > (a) because of changes in the character of the land, the neighbourhood or other circumstances the court considers material, the registered charge or interest is obsolete,
> >
> > (b) the reasonable use of the land will be impeded, without practical benefit to others, if the registered charge or interest is not modified or cancelled,
> >
> > (c) the persons who are or have been entitled to the benefit of the registered charge or interest have expressly or impliedly agreed to it being modified or cancelled,

> (d) modification or cancellation will not injure the person entitled to the benefit of the registered charge or interest, or
>
> (e) the registered instrument is invalid, unenforceable or has expired, and its registration should be cancelled.

[145] As stated in *Vandenberg v. Olson*, 2010 BCCA 204 at para. 23, the court's authority to cancel an easement is governed by s. 35:

> The respondents argue, correctly in my view, that the court's authority is no more and no less than that conferred by s. 35(2) of the *Property Law Act*. I also agree with the respondents that s. 35(2) is a comprehensive code (as that phrase is described by Sullivan) which displaces the common law. The authority of the court to cancel an easement is constrained by the specific grounds set out in s. 35(2). In my view, the language of the opening words of s. 35(2) must be interpreted to mean that the Legislature intended to comprehensively describe all the grounds on which an order under s. 35(1)(a) may be made. Consequently, I am of the view that the appellant must bring himself within the s. 35(2) grounds if he is to obtain any relief.

[146] The court went on to state that ss. 35(2)(a) to (e) are to be read disjunctively

[147] Even if a party can satisfy the court that one of the conditions for cancellation in s. 35 is met, there is a residual discretion to allow the charge to stand as set out in *Dykes v. Nagel*, 2011 BCSC 1549 at para. 46:

> …It is equally clear that the authority of the court is discretionary. Falling within the language of a subsection of s. 35(2) does not entail that a charge must be cancelled if there are proper reasons not to do so: *Firman v. Michaleski*, 1995 CarswellBC 710 (WL Can) (B.C.S.C.).

[148] The list of grounds for cancellation in s. 35(2) does not include a change in the operator of a facility on the dominant tenement. The plaintiff relies on s. 35(2)(e) that the registered easement has expired.

[149] The plaintiff argues that Mr. Pratt's consent to the creation of the water lot reserve was only to the wharf as it was configured in 1960 and that it had to be operated by the federal government. The plaintiff asserts that any change to the size or configuration of the wharf, or the operator results in the cancellation of the easement.

[150] However, the operation of the wharf has not been discontinued. There is nothing in the language of the easement or the surrounding circumstances which

suggest that Mr. Pratt and the Province intended to only agree to a particular size and configuration of the wharf, or that the operator could only be Public Works Canada.

[151] As noted in *McCorquodale v. Baranti Developments Ltd.*, 2015 BCCA 133 at para. 29:

> With respect to the operative terms, it was and is an established principle that the use for which an easement was intended at the time of the grant is not a surrounding circumstance that establishes an objective common intention that an easement would not be put to any other use in the future: *Granfield* at paras. 20-21, citing *White v. Grand Hotel, Eastbourne, Limited*, [1913] 1 Ch. 113 (C.A.). A general grant of access was just that. Limitations on use or circumstances in which a grant would terminate required express language: *Grand Hotel* at 116 (*per* Cozens-Hardy M.R.). Moreover, ambiguity in a grant would be interpreted in favour of the grantee: *Williams v. James* (1867), L.R. 2 C.P. 577 at 581 (*per* Willes J.); see also John Leybourn Goddard, *Gale on Easements*, 8th ed. (London: Stevens and Sons, Limited, 1921) at 342; Edward Douglas Armour, K.C., *Armour on Real Property*, 2nd ed. (Toronto: Canada Law Book Company, 1916) at 21.

[152] In *Hillside Farms Ltd. v. British Columbia Hydro and Power Authority*, [1977] B.C.J. No. 1010 (C.A.), the Court of Appeal rejected an argument that limitations on the voltage carried and location of power poles could be read into a power line right of way, stating at para. 14 that “a general grant of a right-of-way will not be limited to the extent of user originally contemplated when the grant was made so long as it is of the same general nature and kind”.

[153] There are no conditions in the registered easement as to the size, configuration or operator of the wharf. The historical documents show Mr. Pratt was in favour of a public wharf. As noted earlier, he allowed construction of the pathway and wharf prior to the easement being registered.

[154] In my opinion, the evidence does not support the plaintiff’s argument that the registered easement and/or water lot have expired or terminated. The Horton Bay harbour wharf has operated since 1960 as a public wharf facility to provide moorage to residents and visitors to Mayne Island. The public wharf in Horton Bay harbour continues to be of the same nature and kind as was agreed to by Mr. Pratt.

[155] As a result, I find that the registered easement did not expire when the CRD took over the operation of the public wharf. In my opinion, that change did not result in the discontinuance of the operation of the wharfage facilities such as to terminate the grant.

[156] Given my conclusions, I need not address the defendants' alternative arguments. The arguments of equitable easement by promissory estoppel, and whether the area was a public highway only needed to be addressed if it was found that the registered easement did not allow for the ongoing operation of the Horton Bay harbour public wharf, or should not be rectified.

What if, any, damages is the plaintiff entitled to?

[157] The plaintiff asserts that if rectification is ordered, or it is found that its rights were infringed it is entitled to damages. In this case, I am ordering the easement be rectified to include the portion of the pathway and wharf structures that are outside the area identified in the easement.

[158] In the event rectification of the registered easement is ordered, the plaintiff is claiming in negligence against the Province for damages on the basis of such diminishment of property rights that would be the result of the negligence of the Province in failing to properly prepare and register the true agreement, and for damages for loss of opportunity to use the portion of Lot A that falls within the registered easement.

[159] The easement was drafted in 1960 by employees, servants or agents of the Province. The Province is not vicariously liable for acts or omissions of employees, servants or agents prior to August 1, 1974: *Arishenkoff v. British Columbia*, 2005 BCCA 481 at para. 56; *Richard v. British Columbia*, 2009 BCCA 185 at para. 44.

[160] Accordingly, the plaintiff cannot claim damages against the Province for negligent drafting of the registered easement, since its claims are premised on negligent act that occurred in 1960, prior to the *Crown Proceeding Act*, S.B.C. 1974, c. 24, coming into force on August 1, 1974.

[161] In any event, the plaintiff's negligence claim would be barred by effluxion of time. As set out earlier, the plaintiff sought legal advice regarding the registered easement and its riparian rights in 1992 and did not file this action until 2013: *Limitation Act*, S.B.C. 2012, c. 13, s. 6.

[162] The damages being claimed by the plaintiff for infringement of its rights are based on the presence of the wharf, not the presence of the easement. The plaintiff states in its argument that since 1988 it has been trying to have the wharf removed in order to obtain the full value of the Property. The plaintiff asserts that damages must be based on an overall loss in value of the Property, which reflects the value of the range of uses to which the Property might have been put if the public wharf was not situated in Horton Bay harbour.

[163] Given that I have found the ongoing presence and operation of the wharf facility is authorized by the registered easement, the plaintiff is not entitled to damages it is claiming that are predicated on the removal of the wharf. However, there is a minor and technical infringement of the plaintiff's rights in that a portion of the footpath and wharf structures were built outside the boundaries of the registered easement. As noted earlier, the area in issue is 0.010 acre.

[164] There is no evidence of any damages as a result of a small portion of the pathway and wharf structures being located outside the area defined in the easement. The plaintiff's only expert appraisal evidence refers to the loss of value to the Property as a result of the presence of the wharf.

[165] Keith Pritichard, an expert appraiser retained by the plaintiff, valued the entire Property based on $250,500 an acre. The value of 0.010 acre based on the plaintiff's expert appraiser would be $2,505.

[166] David Osland, an expert appraiser retained by Canada and the CRD valued the land covered by the easement, being 0.043 acres, and the other land which is outside the easement on which the wharf structure and footpath have been constructed, being 0.010 acres. Mr. Osland placed a value on the 0.053 acres. Based on Mr. Osland's valuation 0.010 acre would be worth approximately $4,000.

[167] In the circumstances and in light of the fact that the infringement of the plaintiff's rights is minor, it is my view a nominal damage award is appropriate in the circumstances. Having considered the appraisal evidence, it is my view that a nominal award in the amount of $7,500 to the plaintiff for the infringement of its rights is warranted.

Conclusion

[168] Accordingly, I am granting nominal damages to the plaintiff for the infringement to its rights that has resulted from a small portion of the pathway and wharf structure being outside of the easement in the amount of $7,500. I am dismissing the remainder of the plaintiff's action.

[169] I am making the following declarations:

- The easement allows the Province and its servants, agents and assign, visitors and invitees, including Canada, the CRD and members of the public to use the footpath to access the Horton Bay harbour public wharf from Horton Bay Road;

- The easement allows Canada, the CRD and their assigns to maintain and operate the Horton Bay harbour public wharf in its present location.

- Any impairment of riparian rights attached to the part of Lot A that fronts the right-of-way, the footpath and the Horton Bay wharf is authorized so long as the operation of the Horton Bay harbour public wharf continues.

[170] I also order that the registered easement be rectified to include all of the area on which the footpath and wharf structures are located. I further order that the defendants bear the costs of preparing and registering the new right of way and other documents required to rectify the right of way.

[171] In the alternative, in the event I am incorrect in my interpretation of the easement, and for the reasons set out, I am of the view an order should be made that the easement be rectified to contain the agreement made between the Province

and Mr. Pratt at the time the registered easement was executed. If necessary, the easement should be rectified to allow the Province, and its servants, agents, assigns, visitors and invitees, including Canada, the CRD and members of the public to use the footpath to access the Horton Bay harbour public wharf, and to authorize Canada, the CRD and their assigns to maintain and operate the Horton Bay wharf in its present location.

[172] Given that the defendants have been substantially successful in this action, they are entitled to their costs at Scale B.

"Gerow, J."