COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Arbutus Bay Estates Ltd. v. Canada (Attorney General),* 2025 BCCA 10

Date: 20250114
Docket: CA49445

Between:

Arbutus Bay Estates Ltd.

Appellant
(Plaintiff)

And

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

Respondents
(Defendants)

Before: The Honourable Justice Dickson
The Honourable Justice Griffin
The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia, dated October 4, 2023 (*Arbutus Bay Estates Ltd. v. Canada (Attorney General)*, 2023 BCSC 1726, Victoria Docket S203959).

Representative for the Appellant Company, appearing in person:	P. Buchholz
Counsel for the Respondents, Attorney General of Canada and Capital Regional District:	M.B. Taylor A. Balakumar
Counsel for the Respondent, His Majesty the King in Right of the Province of British Columbia:	M. Butler
Place and Date of Hearing:	Victoria, British Columbia November 27 ,2024
Place and Date of Judgment:	Vancouver, British Columbia January 14, 2025

Written Reasons by:
The Honourable Justice Griffin

Concurred in by:
The Honourable Justice Dickson
The Honourable Mr. Justice Abrioux

Summary:

The appellant in prior litigation challenged the validity of an easement allowing access over its property to users of a public wharf. The Court determined the easement to be valid, and granted the counterclaimed remedy of rectification. In the present claim, the appellant claims the respondents failed to disclose an alleged agreement to decommission the wharf. The appellant also claims that this Court erred in the prior litigation in rectifying the easement. The respondents successfully obtained an order striking the present claim. The appellant appeals from that order.

Held: Appeal dismissed.

It is plain and obvious that the appellant has not alleged a viable cause of action. The alleged undisclosed agreement is not relevant to the remedy of rectification. Further, the appellant's claim seeks to re-argue issues that it lost in the prior litigation, knowing that the wharf continues to be operated in reliance on the easement, and is an abuse of process and vexatious.

Reasons for Judgment of the Honourable Justice Griffin:

Introduction

[1] The appellant, Arbutus Bay Estates Ltd. appeals from a Supreme Court of British Columbia ("BCSC") chambers judgment made October 4, 2023 striking its claim in its entirety without leave to amend. A large part of the rationale for striking the claim is that it is duplicative of prior litigation brought by Arbutus Bay (the "Prior Litigation").

[2] I will describe the Prior Litigation, the nature of the pleadings in this case, and the chambers judgment under appeal, before analyzing the appellant's arguments raised on appeal.

Prior Litigation

[3] The Prior Litigation brought by the appellant challenged the validity of a registered easement on its property granted by a previous owner in 1960, and the operation of a wharf which allegedly interfered with its riparian rights (the "Easement"). The Easement allows for the construction of a "footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands". The

Easement also provides that whenever the operation of the wharfage facilities is "discontinued", the right-of-way will cease and terminate.

[4] The wharf is a public wharf located in a water lot at Horton Bay, Mayne Island, British Columbia. It was constructed in 1960 and opened to the public that year. The wharf is held by the government of Canada and since 2007, it has been operated by the Capital Regional District ("CRD"). Canada remains responsible for maintenance, inspection and repair of the public wharf. An established foot path leads from Horton Bay Road to the wharf. The province of British Columbia (the "Province") has been responsible for maintenance, inspection and repair of this path.

[5] In the mid-1980s through the mid-2000s, the appellant, as well as subsequent owners, subdivided and sold some of the property affected by the Easement.

[6] The appellant wished to pursue the development of a private marina next to the wharf; and failing that, to privatize and become private owner of the wharf, but these efforts were stymied.

[7] The appellant commenced the Prior Litigation in January 2013 against Canada and the CRD, being BCSC Docket S130225, Victoria Registry. The Province was added as a third party in December 2013 and the appellant was granted leave to add the Province as a defendant in April 2014.

[8] The final version of the appellant's claim in the Prior Litigation was set out in the Amended Notice of Civil Claim filed February 2, 2015 ("ANOCC").

[9] In the ANOCC, the appellant advanced numerous causes of action against Canada and the Province, including alleged negligence by the Province in drafting the Easement, declarations that the wharf was unlawful and a trespass, and seeking injunctive relief as well as an order cancelling the Easement and damages for nuisance and trespass. It took the position at trial that the Easement had expired when the wharf's size and configuration changed in the 1970s or alternatively when CRD took over its operation in 2007. Alternatively, it argued that the Easement was a statutory easement and therefore did not secure any riparian rights for Canada

and could not allow for the ongoing operation of a wharf. It further argued that the Easement did not allow for use of the path by anyone other than the Province, its workmen, and fishermen.

[10] The Province and Canada each brought a counterclaim. Their positions were that the Easement authorized BC and Canada, and members of the public, to use the path to access the wharf, and for the wharf to be operated. In the alternative, if the Easement did not authorize these things, they pleaded that the parties to the Easement intended that the Easement would authorize them, so the Easement should be rectified to reflect that intention.

[11] One aspect of the dispute between the parties concerned whether, in order to use the path granted by the Easement to access the wharf, the public had the right to park vehicles on the side of Horton Bay road, and did some of the public parking trespass on the appellant's property.

[12] After a lengthy trial, the trial judge in the Prior Litigation interpreted the Easement largely in favour of the defendants, in reasons indexed at 2016 BCSC 2083 ("Trial Decision"). The appellant was unsuccessful in setting aside the Easement or in obtaining a ruling that the operation of the wharf was illegal or a violation of its riparian rights. But the judge found that a small portion of the wharf structure and path were outside the area described in the Easement, and therefore did, in a minor way, infringe the appellant's property rights. The trial judge ordered nominal damages in favour of the appellant, plus rectification of the Easement to include all the areas on which the wharf and path were located.

[13] Specifically, the trial judge ordered:

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

[14] The appellant appealed the Trial Decision, challenging the findings regarding the interpretation and effect of the Easement. The Province and Canada cross-appealed the damage award of $7,500.

[15] The appellant's appeal was largely unsuccessful, except with respect to the issue of parking. The cross-appeal was allowed. With reasons indexed at 2017 BCCA 374 ("First Appeal Decision"), this Court ordered:

> [88] I would dismiss the appeal except on the issue of parking, and I would allow the cross appeal.
>
> [89] In order to have the order dated November 11, 2016 conform to these reasons, I would vary it as follows:
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> a) by making para. 1 an order instead of a declaration and revising it by deleting the word "allows" and substituting the words "is rectified to allow"; and
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> b) by deleting para. 6 awarding damages to the plaintiff and adding a new para. 6 declaring that the Registered Easement does not permit those entitled to use the footpath to trespass on any part of Lot A that

> is not included in the parcel of land described in the Registered Easement, as rectified, including parking on any such portion of Lot A.
>
> [90] Although the plaintiff was successful on the first and third issues discussed above, the respondents have been substantially successful in the outcome of the appeal. I would award costs of the appeal to the respondents, and I would award costs of the cross appeal to Canada and the Regional District.

[16] The appellant was then permitted to reopen the appeal, seeking an award of damages for the past trespass that had occurred by reason of unauthorized parking on the appellant's property. The Court accepted the argument that the appellant was entitled to some damages, but not the amount claimed. This Court assessed nominal damages of $2,000 and otherwise dismissed the appellant's trespass claims, in a decision made June 25, 2018: 2018 BCCA 259 ("Second Appeal Decision"). This Court also declined to vary its costs award.

[17] The appellant's application for leave to appeal to the Supreme Court of Canada was denied on October 11, 2018.

Appellant's Present Claim

[18] After the Prior Litigation concluded, CRD and Canada signed an agreement dated November 30, 2018 (the "November 2018 Agreement"). The November 2018 Agreement endorsed the creation of a new public wharf nearby at the end of Anson Road, and the removal of the Horton Bay wharf. If the Horton Bay wharf was discontinued, that would terminate the Easement.

[19] As set out in the reasons under appeal at para. 11, the November 2018 Agreement stated:

> 2.01 Canada hereby sells, assigns, and transfers the Goods and all the right, title, interest, property, claim and demand of Canada thereto and therein, to the CRD, to and for its sole and only use forever as of the Transfer Date. The CRD agrees to remove the Existing Wharf at Horton Bay as soon as conveniently possible, and provide a brief report and photographs to Canada documenting the removal immediately thereafter.
>
> 2.02. CRD agrees to construct a new public wharf, with a minimum moorage capacity of 300 feet, at the terminus of Anson Road, approximately 400 meters north of the Existing Wharf at Horton Bay, Mayne Island. CRD estimate the new wharf will be in operation in 12 to 24 months.

> 2.03 Immediately after the Transfer Date, Canada will send a duly executed Transfer of Administration and Control to the Province of British Columbia cancelling District Lot 431 in the form attached as Schedule "B" cancelling District Lot 431 and concurrently therewith will provide a copy of the executed Transfer of Administration and Control to the CRD.
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> [Emphasis added by chambers judge.]

[20] The Present Claim was commenced by Notice of Civil Claim filed December 9, 2020, as BCSC Docket S203959, Victoria Registry. It is brought against Canada, CRD, and the Province ("Present Claim").

[21] The appellant now alleges that the November 2018 Agreement was preceded by an undisclosed agreement on the same terms (whether written or unwritten is unclear), one that existed during the Prior Litigation and which ought to have been disclosed during that litigation (the "Undisclosed Agreement").

[22] In Part 1, Statement of Facts of the Present Claim, the appellant pleads the existence of the Easement and the Horton Bay wharf. It pleads the fact of the Prior Litigation. It states that it was Arbutus Bay's position that it wanted the operation of the wharf declared unlawful and stopped.

[23] The Present Claim then pleads that: unbeknownst to the appellant, Canada and CRD entered into the Undisclosed Agreement to remove the wharf and construct a new public wharf at the Anson Road Property; this Undisclosed Agreement was made prior to or during the Prior Litigation; the Undisclosed Agreement should have been disclosed during the Prior Litigation according to rules of procedure and was not; the Undisclosed Agreement was directly relevant to the exercise of the court's discretion to order rectification which was a central issue at trial in the Prior Litigation; and had the appellant known the wharf would be removed, it would not have continued the Prior Litigation.

[24] In the Present Claim, Part 2, Relief Sought, the appellant seeks general damages, special damages (unspecified), interest and costs.

[25] The "legal basis" of the Present Claim is set out in Part 3 of the pleading:

> 1. Arbutus Bay claims in the law of conspiracy and fraud on the court.
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> 2. In the Lawsuit, the Defendants had a positive, continuing obligation under the court rules to disclose all records relating to the Undisclosed Agreement. Their decision to keep it a secret breached their obligations of disclosure and was a product of the Defendants knowingly and intentionally misleading the court as to the true state of affairs in order to enhance their defence to Arbutus Bay's claims and enhance the success of their counterclaims for rectification in the Lawsuit.
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> 3. Arbutus Bay had no knowledge of the Undisclosed Agreement during the Lawsuit, or that records relating to it were being withheld.
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> 4. The withholding of the Undisclosed Agreement affected the result of the Lawsuit. The Court of Appeal's decision to rectify the Easement was a discretionary one, and the Defendants presented it as being integral to the continued existence of a public wharf that was essential infrastructure on Mayne Island. Had the court known that in fact it was not integral and would shortly be removed was highly relevant and had a significant chance of changing the result.
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> 5. Arbutus Bay has acted on this fraud on the court in a timely way, in all the circumstances. Because of the outcome of the Lawsuit, the fact is that Arbutus Bay has been in extreme financial distress from the costs of litigation, and has acted as quickly as it has reasonably been able to in notifying the Defendants of this claim and advancing it.
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> 6. The withholding of the Undisclosed Agreement was an unlawful action taken in concert by the Defendants in order to cause Arbutus Bay to lose the Lawsuit and thereby suffer substantial losses.
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> 7. The damages suffered by Arbutus Bay include incurring its own costs of advancing the unsuccessful Lawsuit, incurring the costs now payable to the Defendants as a result of not succeeding in the Lawsuit, and suffering the many costs relating to the foreclosure of Arbutus Bay's properties as a result of the financial distress from the unsuccessful result in the Lawsuit.

[26] Thus the causes of action alleged in the Present Claim are conspiracy and fraud on the court. These causes of action are premised on the allegations that the respondents had the Undisclosed Agreement; they were required to produce it under the rules of court because it was relevant to their plea of rectification; and had they produced it the appellant would have withdrawn the lawsuit because the Undisclosed Agreement would have achieved removal of the wharf.

Judgment Under Appeal

[27] The respondents brought applications to strike the appellant's Present Claim relying on *Supreme Court Civil Rules*, R. 9-5(1)(a), (b) and (d). This rule provides:

> R. 9-5
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> (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
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> (a) it discloses no reasonable claim or defence, as the case may be,
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> (b) it is unnecessary, scandalous, frivolous or vexatious,
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> (c) it may prejudice, embarrass or delay the fair trial or hearing of the proceeding, or
>
> (d) it is otherwise an abuse of the process of the court,
>
> and the court may pronounce judgment or order the proceeding to be stayed or dismissed and may order the costs of the application to be paid as special costs.

[28] The respondents argued that the Present Claim should be struck for the following reasons:

a) it was an abuse of process because it sought to relitigate matters that were already decided in the Prior Litigation (R. 9-5(1)(d));

b) it was unnecessary and vexatious (R. 9-5(1)(b)); and

c) the claim failed to disclose a cause of action (R. 9-5(1)(a)).

[29] Among other things, the judge found that the alleged Undisclosed Agreement was irrelevant to the Prior Litigation because it could not change the appellant's legal position with regard to the defendants. Further, what was before the trial judge in the Prior Litigation was the validity and enforceability of the Easement, not the question of what might be the best site for a wharf, which was a policy decision for government. There was no privity between the appellant and the parties to the Undisclosed Agreement, and so the appellant had no right to seek enforcement of that agreement and decommissioning of the wharf. The Undisclosed Agreement was nothing more than a statement of intention that was not acted upon.

[30] The judge also noted that the Horton Bay wharf had not in fact been decommissioned. The judge found that there is no possibility that the appellant could persuade a court that it would not have commenced or continued with the previous

litigation had it been aware of the Undisclosed Agreement, and the Present Claim is doomed to fail and therefore unnecessary and vexatious.

[31] In addition, the judge found the appellant's Present Claim to be an abuse of process. The focus of the claim and Ms. Buchholz's evidence was on her many grievances over the years and her dissatisfaction with the Trial Decision and the Court of Appeal Decision allowing rectification. As the courts have finally and conclusively ruled on the validity and enforceability of the Easement, it would be an abuse of process to permit re-litigation of these claims.

[32] There are some paragraphs in the pleaded Present Claim that allege that respondents' counsel made misleading statements in the Court of Appeal in the hearing of the appeal in the Prior Litigation. The judge did not address this, and it was not an argument pressed in the appellant's factum or submissions. In my view, these allegations do not disclose any cause of action and are bound to fail, and I need not say more about them.

Issues on Appeal

[33] The appellant is represented by its principal, Ms. Buchholz, who filed the factum and made oral submissions on this appeal, and who appeared before the chambers judge on the application below. Ms. Buchholz is not legally trained. Prior to the hearing of the application, Ms. Buchholz had counsel in the court below, who prepared the appellant's notice of civil claim and its response to the application to strike the notice of civil claim.

[34] I will summarize the appellant's arguments on appeal. They are that the judge erred in striking the notice of civil claim because:

a) The alleged Undisclosed Agreement should have been disclosed by the respondents in the Prior Litigation, because

    i. it was relevant to the remedy of rectification; and,

ii. it would have made the appellant's lawsuit challenging the Easement unnecessary, as its existence means that the Easement is not required and is therefore at an end; and

b) The Court of Appeal was wrong to order rectification of the Easement.

[35] The appellant also seeks to introduce "new" evidence on appeal.

[36] The respondents submit there is no merit to the appeal or to the new evidence application.

Analysis

[37] No evidence is permissible on an application to strike based on R. 9-5(1)(a). Rather, assuming the facts as pleaded are true (unless they are manifestly incapable of being proven), the question is whether there is a reasonable prospect the claim will succeed. The approach must be generous in permitting novel but arguable claims to proceed to trial: *R. v. Imperial Tobacco Canada Ltd*., 2011 SCC 42 at paras. 21–22.

[38] Evidence is admissible on an application to strike pursuant to R. 9-5(1)(b) and (d), that is, on the grounds it is vexatious or an abuse of process.

[39] As I will explain, in my view the appellant has not identified any meritorious grounds of appeal.

Is there a cause of action for failure to disclose the Undisclosed Agreement?

[40] The first question I will address is whether the appellant has pleaded a cause of action for the respondent's alleged failure to disclose the alleged Undisclosed Agreement.

[41] The Province is not a party to the alleged Undisclosed Agreement, and the notice of civil claim does not allege any factual or legal basis for finding that it had a

duty to disclose the Undisclosed Agreement. There is no cause of action pleaded against it.

[42] The appellant's theory for why there was a duty on Canada and CRD to disclose the alleged Undisclosed Agreement is based on the rules of civil procedure. It claims the alleged Undisclosed Agreement would have been a relevant document in the Prior Litigation, because it would have affected the availability of the remedy of rectification.

[43] The appellant pleads in the Present Claim:

> 23. While dated November 30, 2020, the agreement to remove the Lot A Wharf after the Lawsuit and construct a new public wharf at the Anson Road Property reflected an earlier agreement among the Defendants that was made prior to, or during, the Lawsuit and kept a secret (the **"Undisclosed Agreement").** The Undisclosed Agreement was not, however, information that was properly subject to any common interest privilege among the Defendants, and all records relating to it were, under the court rules, required to be produced to Arbutus Bay within the Lawsuit as part of the Defendants' document disclosure obligations.
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> …
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> 25. … the Defendants knew, that the Undisclosed Agreement and the Anson Road Property were directly relevant to the Lawsuit, because a central issue at trial was whether the Easement should be rectified. Rectification is an equitable, discretionary remedy. The fact that the Easement would not ultimately be needed by the Defendants for a public wharf in light of the Undisclosed Agreement was directly relevant to the exercise of the court's discretion.
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> …
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> 27. Had Arbutus Bay known the Lot A Wharf would be removed on divestiture, Arbutus Bay would not have brought or carried on with the Lawsuit…
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> [Emphasis added.]

[44] Part of this pleading is of a legal conclusion: the existence of the Undisclosed Agreement was relevant to the remedy of rectification in the Prior Litigation, and implicitly, therefore, there was a duty to produce it under court rules. This concedes that relevance is a pre-condition to the obligation to disclose documents in litigation. More precisely, R. 7-1(1)(a) requires parties to produce documents that could be used by any party of record at trial to prove or disprove a material fact.

[45] I do not see any merit to the assertion that the existence of the Undisclosed Prior Agreement was a document that could be used to prove or disprove a fact material to the remedy of rectification.

[46] The proper analysis for rectification, and the one undertaken in the Prior Litigation, considers the intentions of the parties at the time the Easement was created. As stated in the Trial Decision and affirmed in the First Appeal Decision, "[r]ectification 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" at para. 113; First Appeal Decision paras. 38–39.

[47] The remedy of rectification was not and could not be based on future intentions of the parties that were not held at the time the Easement was entered into. The alleged Undisclosed Agreement, if it existed, was irrelevant to the question of whether the agreement should be rectified to reflect the intentions of the parties at the time it was made.

[48] There are other problems with the appellant's pleading of a cause of action in fraud and conspiracy based on the respondents' alleged non-compliance with civil rules of procedure for discovery, but it suffices to say I see no possibility of the appellant proving that disclosure was relevant to rectification.

[49] The next argument advanced by the appellant is that had the alleged Undisclosed Agreement been disclosed, it would have achieved its goal in the Prior Litigation, because it meant that the Horton Bay wharf would not be needed.

[50] The appellant acknowledges that at the time of the Present Claim, the Horton Bay wharf was still being operated, even though a wharf at Anson Road had also been created.

[51] The appellant's argument is that an intention to construct an alternative wharf at Anson Road means the wharf at Horton Bay is no longer "required", which has the effect of terminating the Easement. The appellant's position is that the chambers

judge erroneously failed to consider this, and if he had, he would not have struck the appellant's claim.

[52] However, whether the Horton Bay wharf is still "required" in light of the construction of an additional wharf is not relevant to the interpretation of the Easement. The Easement terminates if the operation of the wharf is discontinued, not if another wharf is built nearby.

[53] The key problem with the appellant's argument that the Easement expired because the wharf was not "required" is that it was already advanced before this Court in the Prior Litigation, and this Court did not accept it. In the First Appeal Decision, this Court held:

> d) Expiry of the Easement
>
> [80] The plaintiff says the trial judge erred in rejecting its argument that the easement expired when the wharf was no longer required by Canada. It says the order-in-council granting the water lot to Canada as the site for a wharf continued only for "so long as required for such purpose". It maintains that the water lot no longer exists and that the wharf is no longer authorized. The easement has therefore expired because it provided that it would cease and determine if "the operation of the said wharfage facilities is discontinued", and it should be cancelled pursuant to s. 35(2)(e) of the *Property Law Act*.
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> [81] In my view, this ground of appeal has no merit for the simple reason that the operation of the wharf has not been discontinued. The easement does not stipulate that Canada must continue to hold the water lot or be the operator of the wharf.
>
> [82] In addition, the order-in-council has not expired or ceased to be operative. Although Canada expressed a desire to divest itself of all recreational harbours, it has continued to operate the Horton Bay wharf by way of a management agreement with the Regional District. The Province — the grantor of the water lot — accepts that Canada's tenure continues.
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> [Emphasis added.]

[54] I see no error in the judge's conclusion that even if plans were discussed by CRD and Canada to build an alternative wharf and to decommission the Horton Bay wharf, the appellant was not a party to any such prior agreement and so does not have the right to enforce it and insist the Horton Bay wharf be decommissioned. As a stranger to the agreement, the appellant has no rights and no cause of action under the alleged Undisclosed Agreement, even if it did exist. The existence of the alleged

Undisclosed Agreement therefore did not terminate the Easement and did not provide the remedy that the appellant was seeking in the Prior Litigation.

[55] In my view it is plain and obvious that the notice of civil claim does not plead anything that if proven, would establish a cause of action for the alleged non-disclosure of the Undisclosed Agreement.

Is there a cause of action based on allegations that the Court of Appeal erred in the Prior Litigation?

[56] The other argument advanced on appeal seems to be that the Court of Appeal erred in multiple ways in the First Appeal Decision, including in ordering the Easement to be rectified.

[57] This argument fails to appreciate that we do not sit on appeal of another division of this Court. There is no merit to an argument that the First Appeal Decision made an error in granting the remedy of rectification or in interpreting the Easement.

[58] This aspect of the Present Claim violates a fundamental principle of justice, namely, that court judgments are final unless a party is successful on appeal in challenging the result. The appellant sought leave to appeal to the Supreme Court of Canada but its application was dismissed: 37892 (11 October 2018).

[59] It is an abuse of process to relitigate a claim that has already been determined *Toronto (City) v. C.U.P.E.*, Local 79, 2003 SCC 63 at para. 37.

Additional Problems with the Pleading

[60] There are also arguments raised in the appellant's factum that are simply personal attacks on the chambers judge. These ignore the judge's reasons and are unfounded. There is no basis to say that the chambers judge ignored property rights, as he was not determining property rights; he was considering whether the appellant pleaded a cause of action. Nothing in the judge's conduct or reasons reveals bias of any sort. The appellant is a corporation and does not possess human rights, nor did the chambers judge conduct himself in any unfair way to the corporation's personal representative, Ms. Buchholz.

[61] Further, there are parts of the Present Claim that are vexatious. The evidence before the chambers judge was that the Horton Bay wharf was not in fact decommissioned, and it was not the CRD's intention to decommission it. Therefore, to the extent the Undisclosed Agreement existed, it was not carried out and the Horton Bay wharf continues to be operated, and so the Easement continues to be relied upon by Canada and CRD.

[62] The causal link in the Present Claim between the Undisclosed Agreement and the appellant's alleged damages is pleaded as follows:

> 16. What the Defendants never disclosed to Arbutus Bay and the court was that after the Lawsuit and appeals from it were concluded, they would remove the Lot A Wharf and relocate the public wharf to the Anson Road location. In other words, the Defendants never told Arbutus Bay and the court that Arbutus Bay was going to achieve its primary goal in the Lawsuit without having to incur the massive costs that litigation against the governments would require.
>
> …
>
> [Emphasis added.]

[63] The premise in the Present Claim is that Arbutus Bay has achieved its primary goal that it was seeking in the Prior Litigation — cessation of the operation of the wharf. However, the appellant well knows and in fact complains that has not occurred. The wharf is still there and being operated as a public wharf and the respondents continue to rely on the Easement, as rectified. When combined with the abuse of process evident from the appellant's attempt to relitigate issues, the only available inference is that there is no point to the Present Claim other than to duplicate prior arguments because the appellant refuses to accept the finality of the Prior Litigation. This claim meets the definition of a vexatious claim.

New Evidence

[64] The new evidence the appellant seeks to introduce on appeal is not relevant to the issues on appeal and I would not admit it. Ms. Buchholz's affidavit evidence complains about the present operations of the wharf and raises questions about whether the operations are authorized. However, by asking to introduce this

evidence she ignores our jurisdiction as an appeal court. The question of whether or not the present operations are authorized is not properly before this Court.

[65] Her evidence also revisits her arguments made in the Prior Litigation against the validity of the Easement and arguments that previous Court decisions were wrong. As I have already stated, the appellant lost its court challenge to the validity of the Easement, and that decision is final.

Disposition

[66] For these reasons, I would dismiss the application to introduce new evidence on appeal and would dismiss the appeal.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Abrioux"