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Risk Management and Natural Area/Green Space Parks
Amendments to the *Occupiers' Liability Act*

1. Introduction

The original *Occupiers' Liability Act* (1974) (the "Act") was a piece of legislation full of bad memories. It erased common law distinctions between the duties owed to trespassers, invitees and licensees. It created an affirmative duty to protect all visitors to land regardless of why they were there and what they were doing. The onus was placed on occupiers (land owners and those in supervision and/or control of land) to prove that the injured Plaintiff had willingly assumed all risks. This was a major seismic event in the law of occupiers' liability.

Private land owners and Crown tenure holders reacted to the prospect of legal exposure by, in some cases, completely prohibiting recreational use. The situation was bad enough to lead to calls for a change. And change did come, but not before extensive consultations between the Law Reform Commission and Provincial and national recreational organizations, regulatory authorities in Canada and the US, and the insurance industry.

2. The Purpose of the Amendments to the Act

In its 1994 report, the Law Reform Commission expressed the purpose of the proposed amendments as follows:

> "Encouraging outdoor recreation and development of the Province's recreational potential are central elements of public policy in British Columbia, pursued by successive governments. Through their umbrella organizations, outdoor recreationists have expressed a willingness to assume the risk of hazards on the lands and waters they cross in return for being allowed greater access. <u>While legislators should be careful to avoid reviving the unwieldy distinctions between categories of entrants that were a feature of the former law of occupier's liability</u>, relaxing the occupier's duty of care towards gratuitous recreational entrants will probably receive wide acceptance in British Columbia as a means of encouraging more private and public occupiers to grant

> access. It has been done in Ontario, in England, and in many American states.
>
> Such a change would fit easily into the scheme of the *Occupiers' Liability Act*. The Act already provides in section 3(3) that occupiers have no duty of care towards trespassers on enclosed agricultural land to make the land reasonably safe for them, but only to refrain from doing them wilful harm or act with reckless disregard for their safety. In the Consultation Paper, we tentatively proposed that this relaxed duty of care, rather than the common duty of care to make the premises reasonably safe, should apply to gratuitous recreational entrants on land not specifically designated by the occupier for recreational use. Invited guests would not fall into this category, but merely permitting recreationists to use the premises or failing to prevent entry by recreationists would not amount to an invitation. This proposal received almost universal approval by those who responded to the Consultation Paper." [emphasis added]

3. The New Regime

In 1998, the amendments became law. They define the classes of land subject to a new and lower duty of care. Those classes are as follows:

(a) premises that the occupier uses primarily for agricultural purposes;

(b) rural premises that are:

(i) use for forestry or range purposes;

(ii) vacant or undeveloped premises;

(iii) forested or wilderness premises; or

(iv) private roads reasonably marked as private roads;

(c) recreational trails reasonably marked as recreational trail;

(d) utility rights of way and corridors excluding structures located on them.

The amendments applies to that anyone who enters these classes of land for a recreational purpose, or anyone who is trespassing.

4. The Lower Standard of Care

If the land in question fits one of these definitions, the recreational user is deemed to have voluntarily assumed all risks. An occupier will only be liable in these circumstances if the occupier created a danger with intent to do harm to the person, or the person's

property, or acted with reckless disregard for the person's safety or the integrity of the person's property. Short of creating an alligator pit, an occupier is supposed to enjoy the protection of these shields.

5. The Test of Time

My purpose today is to discuss the effectiveness of these amendments from the time they were made until present. My discussion is based on a number of cases in which judges have considered the amendments including a recent decision of the British Columbia Court of Appeal, *Skopnik v. BC Rail* ("*Skopnik*"), a recent consideration of the amendments and an application of the potentially lower duty of care placed on occupiers. The current state of the law in British Columbia is found in *Skopnik*.

6. Case Review

My colleagues will know that several years ago I wrote a paper called "Occupiers, Cyclists, and One-Eyed Jacks: The Wild Game of Occupiers Liability". In that paper I discussed the amendments in some detail as well as the first case in which the amendments were judicially considered, a decision of Mr. Justice Groberman in *Hindley v. Waterfront Properties Corp.* rendered in 2002. - I don't wish to rehash that discussion. Rather, I'd like to pick up where I left off in that paper . If anyone would like a copy of Occupiers, Cyclists, and One-Eyed Jacks: The Wild Game of Occupiers Liability, I would be happy to oblige.

(a) ***Hindley v. Waterfront Properties Corp.* (2002)**

This is the first proposed amendment case. Mr. Hindley was riding a bike on decidedly rural land in Parksville in 1999. He and his family were on a family ride along a trail which cut across a vacant and largely undeveloped parcel of land owned by Waterfront Properties Corporation and Pacific Canadian Investments. It was within the boundaries of Parksville and the occupiers allowed the cyclist to use the trail without charge. Mr. Hindley rode into a completely hidden ditch and as a result was an incomplete quadriplegic.

Mr. Justice Groberman considered the amendments and stated:

> "They were to encourage the opening up of rural lands to recreational use. Areas outside cities, particularly those where parcels of land are large and roads are some

> distance apart, appear to have been the main target of the legislation."

He concluded that the area where the cyclist was injured "is of the very nature that the legislation appears to be aimed at". Mr. Justice Groberman determined that the land in question was indeed "rural". Accordingly, the occupiers' duty was limited to not creating a danger with intent to do harm to the person or acting with reckless disregard to the safety of the person or of the person's property.

Despite the ruling as to the character of the land, the case was not dismissed because it was not deemed appropriate for summary disposition. However, given Mr. Justice Groberman's decision, the claim likely "died on the vine".

(b) ***Henderson v. First Nations Band Councils* 629 et al - (2007)**

Mrs. Henderson and her husband were visiting "Village Island", part of the reserved lands held by Her Majesty the Queen for use and benefit of a native band. They were taking part in what they called a "cultural tour". Village Island is a remote uninhabited area. The fact that it has been left in its natural state is one of the features which draws people to the area. It is a site of an old abandoned Indian village in Sayward, BC and under control of the local native band.

The Plaintiff caught her foot under a tree root and tripped. She broke her leg.

She brought an action against both the band and Mr. Sewid, who was a member of the native band and the owner/operator of Village Island Tours.

Counsel for the band argued that the land was vacant or undeveloped, or alternatively forested or wilderness. Because the Plaintiff entered onto Village Island for the purpose of recreational activity, and the band did not receive a payment nor provide any living accommodations as defined by the Act, the band argued it only owed her the significantly reduced duty of care.

A significant factual issue arose in the case as to whether or not the Plaintiff had paid for the privilege of visiting the property. If she had, naturally, then any payment would remove the band from the protection of the *Occupiers' Liability Act*. It turns out that the guide had received payment but had not passed it on to

the band. The Plaintiff argued that the expectation of payment was enough to take her outside of the ambit of the amendments.

The case had all the makings of being a great fight around the interpretation of the amendments. However, the case was before Mr. Justice Warren by virtue of the Defendants' application to dismiss it summarily, in part because the amendments were said to protect the band from any actions. Mr. Justice Warren refused to do so, not because they did, but because a summary process involving two Defendants with overlapping interests was deemed to be unfair. The matter was remitted for a full Trial. Its present status is unknown. Owing to the cost of litigation, and the fact that the Plaintiff's injuries were fortunately not too severe, it was likely settled.

(c) ***Skopnik v. BC Rail Ltd.*** **- Trial (2007)**

At this point in the discussion, I think it's important to discuss the outcome of the Trial between Larry Skopnik and BC Rail Ltd. and Her Majesty The Queen, represented by The Ministry of Transportation and Highways, prior to giving away the punch line, which is a decision of the Court of Appeal.

At Trial, Mr. Justice Leask heard evidence that Larry Skopnik was riding his mother's all-terrain vehicle along a trail approximately 26 kilometres from Chetwynd, BC. He hit a ditch in the trail at speed, became airborne, and suffered a spinal cord injury.

The exact location of the accident was along a right-of-way of BC Rail Ltd.

The *Occupiers' Liability Act* and amendments were considered at length in both the Trial decision and the Court of Appeal decision.

Several issues arose at Trial. The Trial Judge was asked to decide whether the location of the action was either "rural premises" or a "utility right-of-way and corridor". BC Rail argued it only owed the reduced standard of care based on the fact that Mr. Skopnik was either a recreational user or a trespasser, and the property was either rural premises or a utility right-of-way and corridor. Mr. Justice Leask examined the land use issue first.

BC Rail contended that the land was obviously vacant and undeveloped hence the statute applied. His Lordship disagreed. He held that because the railway track had been developed by construction, it followed that the BC right-of-way was neither vacant nor undeveloped. This forced BC Rail to rely on its alternative argument that the land should fall within the meaning of utility right-of-way and corridor. His Lordship considered this submission and fell to a broader consider of the purpose of the amendments. He adopted the *Hindley v. Waterfront Properties Corp.* decision and Mr. Justice Groberman's considerations as to the legislative intent behind the 1998 amendments. He stated:

> "The context in which the amendments were enacted was an expressed willingness by representatives of recreational users to accept greater risks on unmanaged 'wilderness' type lands in exchange for greater access to those lands."

He indicated that utility rights-of-way, electricity transmission lines and pipeline rights-of-way, were found everywhere in BC and were too ubiquitous to require occupiers to inspect or maintain them once they were built. However, by way of contract, he indicated that the evidence in this case was that BC Rail was required to inspect its rights-of-way twice a week. This requirement, according to Mr. Justice Leask, made the character of the right-of-way along BC Rail tracks different than utility rights-of-way which "can safely be neglected by the occupier once a transmission line or pipeline is completed". He therefore found that railway rights-of-way do not come within the term "utility rights-of-way and corridors" as that term is used in the *Occupiers' Liability Act*.

Given his findings, Mr. Justice Leask did not need to go further and consider whether or not the Plaintiff's use of the right-of-way was recreational. However, he clearly had some views on that subject and decided to express them. He held that the Plaintiff was not using the land for recreational purposes, but instead was using the land to make the journey home to his residence. On this issue, BC Rail looked to the US courts for support.

Many decisions in the US provide that the application of a recreational use statute such as the amended *Occupiers' Liability Act* should not depend on the *subjective* intent of the user. Even if the user does not regard what he is doing

as recreation, as long as riding an ATV would be regarded by the general public as a recreational purpose, that is enough for the statute to apply.

Leask J. rejected that argument, turning to the Law Reform Commission Report for evidence that the government of the day was concerned more with the establishment of the Trans Canada Trail than "deemed" use. He reasoned that many people throughout British Columbia use ATVs for work. He indicated that Mr. Skopnik was not using the right-of-way for a recreational purpose and that "there is no need to give the legislative language any artificial or tortured reading to implement the intent of the legislation".

As to the alternative suggestion that Mr. Skopnik was trespassing, Leask J. held that while he may have been a trespasser at common law, the drafters of the amendments meant to include the definition of trespasser as is found in *Trespass Act* . Under that Act, people are not trespassers unless the premises are enclosed or notices are posted. According to Leask J. , because the property was open, and there were no signs, Mr. Skopnik was not a trespasser.

Lacking the protection of the amendments, BC Railway was exposed to the broader duty of care owed to Mr. Skopnik and as a result was found by the Trial Judge to be 100% liable for his injuries.

(d) ***Skopnik v. BC Rail* - Appeal (2008)**

The chill produced by the *Skopnik* decision in land owner/occupier circles was short-lived. The judgment was appealed and the appeal was handed down less than a year later.

The three-member panel of the Court of Appeal found in favour of BC Rail, with Madam Justice Saunders dissenting.

At the outset of its judgment, the Court acknowledged that "this appeal considers for the first time the scope of amendments made to the Act in 1998 that create a lower standard of care in respect of certain lands and certain users". The Court of Appeal accepted Mr. Justice Groberman's view in the *Hindley* case that the legislation recognizes that the normal duty of care set out in the *Occupiers' Liability Act* might be onerous in a rural setting where land owners may have limited practical ability to control access to their land, and where the cost of

continuous monitoring of land to ensure that it is reasonably safe for all entrants may be high.

Mr. Justice Bauman, writing for the majority, found that the distinction Mr. Justice Leask made between railway rights-of-way and utility rights-of-way, based on the fact that railway rights-of-way are frequently inspected, and utility rights-of-way are not, was faulty. Bauman J. felt that Leask J. overstated the degree to which BC Rail inspected the right-of-way. He also held that there is no evidence that utilities such as hydro electric or pipelines could be "safely neglected by the occupier once the transmission or pipeline is completed". In fact, this was contrary to the directions found in the Onshore Pipeline Regulations and the *Pipeline Act*, both of which call for regular inspections of the pipeline right-of-way.

Similarly, with respect to public utilities, the *Utilities Commission Act* imposes on a public utility a general obligation to maintain its property and equipment. The Court of Appeal disagreed with Mr. Justice Leask that a railway right-of-way generally does not come within the definition of utility rights-of-way and corridors. In fact, he found other cases in which railroads including CPR had been considered public utilities. Finally, in this vein, Bauman J. indicated that the inclusion of railway right-of-ways within the meaning of "public utility" did "no violence" to the purpose of the amendments. Madam Justice Saunders took issue with this aspect of Mr. Justice Bauman's reasons and indicated that a party should not be able to stretch a definition contained in a statute which restricts a duty of care owed under that statute.

This was not the end of the analysis. For the lower standard of care to apply, it was not enough that the land be considered a utility right-of-way. Mr. Skopnik still needed to be characterized as a trespasser or recreational user for the amendments to apply. In this regard, the Court of Appeal held that the Trial Judge was wrong to conclude that the amendments imported the definition of trespasser as found under the *Trespass Act*. In other words, the Trial Judge was wrong in assuming that a trespass could only occur when the land was enclosed and there was signage in place. The Court of Appeal held that the amendments contain no reference to the *Trespass Act*. As a result, the land did not need to be enclosed or signed for a trespass to occur. This, of course, made Mr. Skopnik a trespasser, who entered a utility right-of-way, thereby invoking the amendments.

There was no evidence of any intent to do harm, or reckless disregard on the part of BC Rail. As a result, the case was dismissed.

7. Commentary on *Skopnik*

Mr. Justice Leask's original finding that the lands were not rural is something I thought would have caused more concern than his refusal to fit a railway right-of-way into the definition of a public utility. The Court of Appeal did not need to address this aspect of his reasons tthat undisturbed finding, while obiter dictum, may continue to cause occupier's trouble.

It may be that the excavation itself (removal of material) was thought to have necessitated the involvement of the railway, which in turn led the judge to conclude that the lands were not "undeveloped". That was alluded to by Madam Justice Saunders in her dissenting judgment. She indicated that the Trial Judge's conclusion that the land was not vacant or undeveloped "is supported by the evidence and is beyond the court's ability to second guess". She went further:

> "In my view, the legislature could not have intended that an entire track of land must be engaged in human activity, else could be considered vacant or undeveloped for the purposes of section 3(3.3). I see this issue as a question of the degree of human interference with land and the degree of occupation of that land required for the characterization of it as neither vacant nor undeveloped."

Her thinking was that vacancy may be determining by considering whether there is human presence in the area which might allow a level of monitoring and maintenance. If not, then the land could be considered vacant.

8. Conclusions

What conclusions can we draw from these various judicial considerations? First, the law is by no means settled. Secondly, land use is critical to judicial analysis in these cases. In this respect, Mr. Justice Groberman's original formulation still stands. Land use must be considered *at the time* of the event under consideration i.e. the accident, rather than how the land was used in the past or intended to be used in the future. Thirdly, practical considerations such as the occupiers' ability to manage the land will still have a bearing on the outcome of these cases.

Fourth, in 12 years since the amendments, there have only been a handful of law suits which have gone to court, and there is no record of a successful result by a recreational user or trespasser.

Finally, despite these judicial considerations, an elephant remains in the room. None of the cases since the amendments has considered the definition of "recreational trails reasonably marked as recreational trails", one of the other premises found in the Act. Significant questions remain as to what constitutes "reasonably marked", and how this will be determined. Certainly, each case will turn on its own particular facts, and the law in relation to recreational trails has not been tested.

Inasmuch as the law is meant to serve the interests of an active ,adventure seeking population, it appears to this point to be working. Many aspects of the new amendments have not been tested, but the jurisprudence to date has indicated a robust and purposeful approach to their interpretation. Surely this is consistent with the original calls for reform and intended result of the legislation. The challenge for park managers is to act in a way which limits the prospect of successful claims (and judging from the cases this may in some instances mean doing less to create the perception of activity) while at the same time being proactive and doing what is necessary to increase public safety.

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