

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: **567893 B.C. Ltd. v. Aasen,**
2008 BCCA 303

Date: 20080718
Dockets: CA035129; CA035130

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Between:

**567893 B.C. Ltd. doing business as Canadian Lakeview
Water Reclamation Division, 573248 B.C. Ltd.,
L.B. Chapman Construction Ltd., CLU Utilities Ltd. and
Leonard Brad Chapman**

Appellants
(Plaintiffs)

And

Jack Aasen and Judy Aasen

Respondents
(Defendants)

- and -

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Water Reclamation Division, 573248 B.C. Ltd.,
L.B. Chapman Construction Ltd., CLU Utilities Ltd. and
Leonard Brad Chapman**

Appellants
(Plaintiffs)

And

Carla Rayner, Karen Doucet and William Richard Typusiak

Respondents
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Hall
The Honourable Mr. Justice Frankel

J.G. Hardwick, B.J. Hardwick

Counsel for the Appellants

D. Polley

Counsel for the Respondents,
Carla Rayner and Karen Doucet

Jack Aasen and Judy Aasen

Respondents in Person

Place and Date of Hearing:

Vancouver, British Columbia
8 May 2008

Place and Date of Judgment:

Vancouver, British Columbia
18 July 2008

Written Reasons by:

The Honourable Mr. Justice Hall

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Hall:

[1] This is an appeal by the appellants from a judgment of Rice J. pronounced May 11, 2007. In his judgment, Rice J. dismissed actions in defamation commenced by the appellants against the respondents in these two appeals. The judgment is reported. It can be found at 29 C.E.L.R. (3d) 4. The neutral citation for the judgment is 2007 BCSC 663. An appeal that had been launched concerning the respondent Typusiak was earlier discontinued.

[2] The personal appellant, Leonard Brad Chapman, through his company, L.B. Chapman Construction Ltd., is the developer of a subdivision in the Vernon area, Canadian Lakeview Estates. The respondents resided at the Lakeview subdivision at all material times. The personal appellant, through corporate entities, had control of the water and sewer utilities servicing the subdivision.

[3] On February 22, 2004, a public hearing was conducted by the deputy comptroller of water rights to enquire into an application made by the appellant CLU Utilities Ltd. seeking an increase in water rates for water supplied to the subdivision. In April 2004, the deputy comptroller issued a decision allowing an increase in the water rates. This decision appears to have been unpopular with a number of the residents of the subdivision. In addition to this source of unhappiness, it appears that in the process of additional construction in the area, there occurred dynamite blasting and considerable truck traffic that certain residents viewed as having a negative effect on the quality of life in the subdivision. It is fair to say that by the

summer and fall of 2004, there had developed a feeling of some animosity by certain of the residents to the developer and his corporate entities.

[4] On November 23, 2004, a letter was directed to the deputy comptroller of water rights. The letter was apparently authored by Mr. and Mrs. Aasen, but was concurred in by approximately 50 other residents of the subdivision, including the respondent Doucet. A portion of the letter reads as follows:

Dear Sir,

Re: CLU Utilities Ltd.

This letter and attached correspondence has several purposes. Foremost of these is our formal application for a reconsideration hearing of the decision to grant CLU Utilities an increase in water rates. The date of this decision with reasons and order is April 29, 2004. We apologize for the tardiness of this appeal but we can only explain that we were involved in a number of other time consuming endeavors since the decision. On the other hand, we did not notice a time limitation on appeals or reconsiderations when Mr. Coroux forwarded us information on the reconsiderations and appeals process in response to correspondence from us dated June 4, 2004 (copy enclosed). We have a number of issues to present and we are of the opinion these amount to: errors in fact and law, or a mix of the two, and basic principles which had not been addressed in the proceedings.

The second purpose of this letter and correspondence is to ask for an inquiry into a further rate increase effective October 1, 2004 as a result of, apparently, the Comptroller making another decision to allow a rate increase. The two increases in one year amount to an increase of 42.5% in water rates. We have a number of issues and concerns regarding the second increase and we are of the opinion these amount to errors in fact and/or law. We also feel at least one basic principle is at issue.

The third purpose of this letter is to request information and reasons.

The last purpose of this letter is to make formal complaints against CLU Utilities Ltd.

APPLICATION FOR RECONSIDERATION REGARDING THE
DECISION OF THE DEPUTY COMPTROLLER OF WATER RIGHTS
ON APRIL 29, 2004

One of our primary concerns has to do with the relationship of CLU Utilities to Canadian Lakeview Water Reclamation Division. One is the "water" utility and the other is the "sewer" utility. The Deputy Comptroller did not mention this relationship in his decision and, apparently, it was not considered during the hearing. It is our opinion, with respect, that this was a basic oversight and error. We are of the opinion these two companies are related by ownership and their genesis; namely, as part of the development of the area known as Canadian Lakeview estates. We alluded to the possibility of asset "leakage" in our letter of opposition to the rate increase dated November 10, 2003 (copy attached). Furthermore, it must be the case, that at least some of the privately owned "public" utilities have, in the past, used assets of the utility for another firm or private use and by so doing have inflated the costs of operation of the utility while enjoying greater profits personally or by another company.

We are not, necessarily, saying that there was, or is, asset leakage although we believe that it is a real possibility. We are of the opinion, however, that the Comptroller has a fiduciary and legal duty to protect customers of water utility monopolies from excessive rates and financial abuses. We are also of the opinion the Deputy Comptroller could have and, with respect, should have thoroughly investigated the noted relationship even without our letter requesting a thorough investigation. This is even more the case when so-called public utilities are secretive and do not readily provide street addresses and so on. In other words, it is our opinion that officials at Land and Water B.C. should have been sufficiently suspicious in this case to make formal enquiries. In any event, it is our position that there was error in fact, law, and the application of principle.

It is also our position the noted decision was incorrect because it did not take into account the level or absence of customer service provided by CLU Utilities. In our original letter of opposition we pointed out our requests for persons to contact in the event of an emergency and the fact there was no response from CLU Utilities. The decision indicates this issue, and the issue of customer service generally, was not considered by the Deputy Comptroller and it is our respectful position that it ought to have been and that it is an error in both fact and law to not have considered it.

[Emphasis added.]

A copy of this letter was apparently also furnished to the local MLA.

[5] The respondents Rayner and Doucet were involved in publishing a community newsletter to address issues of concern to local residents of the Lakeview subdivision. In January 2005, Issue 1 of this newsletter, *The View*, opened as follows:

You may be aware that a group of concerned citizens have [*sic*] taken the time to meet with various representatives of the City of Vernon with respect to development in the area, water, sewage and the lack of green space. This edition of "The View" Newsletter highlights the minutes of those meetings and discusses future action to be taken by community members.

[6] In the body of the newsletter was contained the following concerning the charging of sewage fees on vacant lots in the subdivision:

An important note for those who hold vacant lots in the neighbourhood: When asked about the cost of sewage fees on a vacant lot in the city, Mr. Campbell said that the City sought a legal opinion about the practice of charging sewage fees for a vacant lot, and told us that the City was advised that it is **illegal** to do so.

[Emphasis in original.]

[7] There was a considerable campaign waged by several residents, at least partly spearheaded by the respondents, to local government representatives complaining about the activities of the personal appellant and his companies, seeking a public inquiry into certain issues and generally protesting about certain development activities and the exaction of rates for sewer and water facilities at the subdivision. Near the end of February 2005, an anonymous flyer entitled "Canadian

Lakeview Customers Beware" was distributed in the area. That flyer was in the following terms:

CANADIAN LAKEVIEW CONSUMERS BEWARE!

Talk to at least two residents of the area before buying property here. Do not believe the real estate agents in Vernon; most of them cannot be trusted. You will be paying very high taxes here to the City of Vernon and you will get nothing for it. Look around, there are: no parks, few sidewalks, poor lighting, and very little else in terms of amenities provided by the City.

In addition to taxes, you will be paying over \$1200 per year for just sewer and water and you can look forward to continuous increases by the owner/operator who is NOT THE CITY. The sewer and water companies are both private and the owner/operator is an ASSHOLE.

[8] At a meeting of the Vernon Council held on March 29, 2005, a deputation of residents appeared before Council to air their concerns about what was happening at the Lakeview subdivision. The minutes reflect the following:

Mr. Rick Typusiak attended Council regarding sewer utilities and other related issues. An overview of private utilities was provided, and the experiences of the residents. Mr. Typusiak believes the City of Vernon should be more involved in the issues as the utility may eventually become the responsibility of the municipality. It has been requested that Council draft a resolution to Okanagan Mainline Municipal Association (OMMA), Union of BC Municipalities (UBCM) and the provincial government, requesting that private sewer utilities be regulated by the provincial government.

Mr. Typusiak also discussed the conflict between residents and development in Vernon. Developers are allowed to build retaining walls, re-shape lots, blast rock, remove fill and use heavy equipment which impacts the neighboring properties. He requested that Council develop policies that provide assurance to residents that construction is taking place in their neighborhood, safely adhering to regulation and recognizing the quality of living by the residents.

Ms. Judy Aasen attended Council regarding Canadian Lakeview Utilities and advised that many residents, when purchasing their

homes in this area, were not fully aware of the agreement with the private utility until well after the sale. Many assumed the utility was provincially regulated. Rates are very high and [the] utility provider has threatened to cut off their service. Ms. Aasen requests that Council develop a Bylaw which provides some control of the utility and prohibits cutting of sewer, to any home, unless in an emergency situation.

Ms. Aasen also requested that Council commence a public inquiry into the relationship of the Mayor with Mr. Chapman as the City of Vernon has done nothing to assist in this situation and believes there is a conflict of interest due to the relationship between the two individuals. Ms. Aasen advised she has received a reply to her request from the City's lawyer indicating that the utility issue is a private matter and that the Mayor has only one vote on any matter. And further, that Mr. Chapman was not the Mayor's campaign manager.

Ms. Aasen advised that the City's lack of response or assistance in the situation leaves them to believe there is more to this situation as the Mayor and Administrator should have asked how they can help the residents instead of doing nothing.

[9] On April 12, 2005, an anonymous flyer entitled "What is happening in Vernon?" was distributed in the area. The text of the flyer was as follows:

WHAT IS HAPPENING IN VERNON?

- ON MARCH 2, 2005, **THE MORNING STAR** PUBLISHED AN ARTICLE WITH THE HEADLINE: "**ANONYMOUS FLYER TARGETS INVESTIGATION**"
- SINCE THEN, THE INVESTIGATION INTO CONFLICT OF INTEREST ON MAYOR SEAN HARVEY'S PART HAS BEEN LOST IN THE DARK CLOUD THAT HAS BEEN OVER VERNON FOR SOME TIME
- MR. LEONARD BRAD CHAPMAN HAS DEALS AND CONNECTIONS WITH MAYOR SEAN HARVEY, BUT WE, THE TAXPAYERS, ARE NOT TOLD ANYTHING. **WHY?**
- MR. CHAPMAN'S BUSINESS PRACTICES ARE WELL KNOWN TO AREA CONTRACTORS AND DEVELOPERS.

- A LIST OF COMPANIES WITH WHICH MR. CHAPMAN IS INVOLVED WILL BE PUBLISHED SHORTLY ALONG WITH THE DEVELOPMENTS HE HAS.
- MORE INFORMATION ABOUT ENVIRONMENTAL IMPACT OF CHAPMAN CONTRACTING'S DEALINGS WILL ALSO BE PUBLISHED

WE ASK:

- WHY HAVE ENVIRONMENT CANADA, THE DEPARTMENT OF FISHERIES, THE DEPARTMENT OF HIGHWAYS AND THE CITY OF VERNON NOT DONE ANYTHING ABOUT L.B. CHAPMAN CONTRACTING'S DYNAMITING OF THE LAKE SHORE AT LAKEVIEW ESTATES?
- WHY HAS CHAPMAN CONTRACTING BEEN ALLOWED TO TRUCK THE ROCK FROM THOSE EXPLOSIONS TO HIS OWN PROPERTY WITH HIS OWN TRUCKS?
- WHY IS L.B. CHAMPMAN INVOLVED AS THE PLAINTIFF IN MANY LAW SUITS?

Copies of this were also sent to various agencies, including the Department of Justice of Canada, Crown Counsel, the local MLA and MP, and various media outlets.

[10] Mr. Chapman had instituted a proceeding for defamation in March 2005. In April 2005, Mr. Chapman sought and obtained a preservation order from a Supreme Court judge restraining and enjoining the respondents from defacing or destroying any computer or computer recording medium or any documents relating to matters at issue in the litigation. Pursuant to this order, seizures were made of certain computers and materials from the respondents with a view to determining who was behind the publication of the materials critical of the appellants. Evidence was developed from a computer expert suggestive of the proposition that a computer

seized from the respondents, Mr. and Mrs. Aasen, might have had something to do with the "Consumers Beware" flyer, but the expert could not furnish a definitive opinion to this effect. These respondents deposed in a December 2005 affidavit that they had "no involvement of any nature whatsoever" with the February flyer. In a statement of claim filed on behalf of the appellants, it was also alleged that the respondents Mr. and Mrs. Aasen had been involved in the dissemination of the anonymous April flyer. These respondents denied in their Statement of Defence that they had been involved in any publication of this flyer.

[11] Concerning the respondents Doucet and Rayner, the appellants pleaded that the reference in *The View* newsletter of January 2005 set forth in para. 6 *supra* alleged that the appellants were engaged in illegal activity by charging sewage rates on vacant lots in the Lakeview subdivision.

[12] In 2005, the appellants engaged a private detective who had interviews with Mr. Aasen on February 15 and February 17, 2005. The detective posed as a prospective buyer of property in the area and engaged Mr. Aasen in conversation. In the course of these interviews, Mr. Aasen made several uncomplimentary references to Mr. Chapman, including the following:

MR. AASEN: [...] Chapman was also the mayor's campaign chairperson, okay, and so the City doesn't want to hear any complaints from us. We're fighting -- our complaints are falling on deaf ears.

[...]

MR. AASEN: [...] So the situation is that he -- he has manipulated the situation so that the cost of the sewer company -- you now, in other words, all -- every roll of toilet paper, every this, every that,

goes into the cost of the -- of the water, but sewer doesn't have any controls over it so, you know, the government agency, the watchdog, says, "Well, gee, you know he needs a 30 percent increase because of his costs." So they gave him a 33 percent increase and then they snuck in another 9 percent so they had a 42 percent increase last year in the water rates and he charges over \$700 for sewer, and of course, we don't think there's any assets in the sewer company, or any costs, that's just pure profit.

[...]

MR. AASEN: [...] [H]e rides around on his horse and he kind of makes the suggestion that he's got the mayor in his pocket and, you know, he's in charge, and people do what I say.

[13] A summary trial took place before Rice J. on two days in May 2006 and one day in November 2006. When the judge delivered reasons for judgment in May 2007, he found that, with the exception of the April 2005 flyer, the written statements were not defamatory and, in any event, were protected by qualified privilege. Concerning the April 2005 flyer, the judge found that the contents were defamatory. However, he found that it was not proven that any of the respondents published this flyer.

[14] With respect to the statement made by Mr. Aasen to the private detective engaged by the appellants, the trial judge found that the statements were not defamatory but that, in any event, if the words were defamatory the defence of fair comment would apply. He said the words might have been insulting but were not defamatory. The judge found that qualified privilege was not made out as a defence to the statements because Mr. Aasen was under no duty to speak about the matters he did to the private detective. On the issue of fair comment, he said this:

[43] If the words are defamatory, I find that the defence of fair comment applies. Mr. Aasen was speaking casually to a person whom he thought to be a potential purchaser. He conveyed true facts as to Mr. Chapman's position of power, and his comments were based in good faith on those true facts. There was no proof of malice. On the contrary, Mr. Aasen's frank admissions of dislike and mistrust tend to cleanse his words of ulterior motives.

[15] I am in general agreement with the conclusions reached by Rice J. concerning the written materials

[16] I agree that the letter to the deputy comptroller should be found to be protected by the defence of qualified privilege. While it is not strictly necessary to determine whether the references to "asset leakage" are defamatory, I tend to agree with the conclusion of Rice J. that the terminology of the letter, particularly the qualification "[w]e are not, necessarily, saying that there was, or is, asset leakage" removes any possible defamatory meaning from this correspondence.

[17] The appellants submit a sinister meaning can be found in the statement in *The View* about possible illegality in the imposition of sewer fees on vacant lots in the subdivision. The judge said this at para. 68 of his reasons:

[68] The reference to vacant lots being charged for sewage fees, and the [...] alleged advice that it was illegal to do so, is not an allegation necessarily of dishonesty and impropriety against Mr. Chapman. It is a statement simply that someone has given an opinion of the illegality of the practice.

[18] I am in agreement with those comments. In my view, this statement does not rise to the level of defamation of the personal appellant or corporations controlled by him.

[19] Concerning the flyers, it seems to me that the conclusion of Rice J. that the respondents could not be linked to their publication is a factual finding that is entitled to deference: *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, 2002 SCC 33. In my view, it would not be appropriate for this Court to interfere with these factual conclusions of the trial judge and I would decline to do so.

[20] However, I am not able to agree with the conclusions of Rice J. concerning the conversations had between the respondent Mr. Aasen and the investigator Mr. Farr. Having considered the terms of these conversations, it appears to me that Mr. Aasen was asserting to Mr. Farr that because of an allegedly corrupt relationship between Mr. Chapman and the then mayor of Vernon, Mr. Chapman was able to exert a malign influence on City officials to the detriment of himself and other residents of the Lakeview subdivision. These purported to be factual statements and I do not consider that what was said about the relationship can be characterized as "fair comment". While I agree with the judge concerning the non-viability of any defence of qualified privilege concerning such remarks because this respondent had no particular duty to speak to Mr. Farr, I do not agree with the judge that what was said could be found defensible as "fair comment". Fair comment is a defence which protects defamatory criticisms or expressions of opinion; it does not protect defamatory statements of a factual nature. I consider the statements suggesting a corrupt influence on the mayor by the personal appellant purported to be factual and were defamatory of Mr. Chapman.

[21] Since the hearing of this appeal, the Supreme Court of Canada has delivered judgment in the case of *WIC Radio Ltd. v. Simpson*, 2008 SCC 40. It is a

judgment dealing with the parameters of the defence of fair comment. In my view, the judgment has no application to the situation in the case at bar concerning what was said by Mr. Aasen to the detective.

[22] I am of the opinion that the appeal should be allowed against the respondent Mr. Aasen in regard to his allegation of a corrupt relationship. This particular matter should be remitted to the trial court for an assessment of damages. As regards all other aspects of the appeals taken against the several respondents, such appeals should be dismissed.

[23] The respondents Rayner and Doucet seek an award of increased costs in this Court. The case of **Doig v. Laurand Holdings Ltd.**, 2003 BCCA 487, 186 B.C.A.C. 239, was cited and relied upon. In effect these respondents submit the appeal taken in their case lacked any substance. I note that in the case of **Doig**, there was an offer to settle and Ryan J.A. observed at para. 12: "The offer in this case was reasonable and ought to have been accepted, the grounds of appeal were tenuous at best". In the present case, while the appeal against these respondents was not successful in the result, I consider that the grounds advanced were arguable. This Court is effectively the court of last resort for most appeals and I am always hesitant to deter access by litigants to this Court except in clear cases. While something might be made of the circumstance that the respondents did not seek this level of costs in their factum (see **JJM Construction Ltd. v. Sandspit Harbour Society**, 2000 BCCA 93, 133 B.C.A.C. 159), I prefer to base my refusal to order an award of increased costs to the respondents in this case on the circumstance that, in my view, this case is not factually the sort of case that should attract such an award. It is at a

considerable remove from the factual situation extant in *Doig*. I would not therefore accede to the request of these respondents concerning an order for increased costs.

[24] Costs on the usual scale in this Court should follow the event concerning all respondents in the appeals except Mr. Aasen. Having regard to the respective degrees of success of this respondent and the appellants, I would direct that he and the appellants should each bear their own costs in the litigation between them in the trial court and in this Court.

“The Honourable Mr. Justice Hall”

I agree:

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Mr. Justice Frankel”