

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: **567893 B.C. Ltd. v. Aasen,**
2007 BCSC 663

Date: 20070511
Docket: S67664
Registry: Kelowna

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**

Plaintiff

And

Jack Aasen and Judy Aasen

Defendants

IN THE SUPREME COURT OF BRITISH COLUMBIA

Docket: S66950
Registry: Kelowna

Between:

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

Plaintiff

And

Carla Rayner and Karen Doucet and William Richard Typusiak

Defendants

Before: The Honourable Mr. Justice Rice

Reasons for Judgment

Counsel for the Plaintiffs:

David Rush

The Defendants Jack Aasen and Judy Aasen:

Appearing on their own behalf

Counsel for the Defendants, Carla Rayner and Karen
Doucet:

Dave Polley

Counsel for the Defendant William Richard Typusiak:

Donald Johnson

Date and Place of Hearing:

November 23, 2006
Kelowna, B.C.

[1] This is a dispute between the developer of a residential subdivision in Vernon called Canadian Lakeview Estates and some of the 130 individual owners of homes in the subdivision. The plaintiffs complain that the defendants defamed them in statements about the plaintiffs' ongoing construction operations and their ownership of the subdivision's sewer and water utilities.

[2] The plaintiffs commenced two defamation actions in this respect and now seek to have both actions proceed together to judgment pursuant to Rule 18A. All parties agree that the cases are related and that the matters are appropriate for summary disposition. I agree as well.

[3] The individual plaintiff, Leonard Brad Chapman, is a Vernon businessman and developer who owns and controls the other corporate plaintiffs. In and around 2003, they developed Canadian Lakeview Estates. Mr. Chapman managed Canadian Lakeview Estates through a company called 573248 B.C. Ltd., and he carried on construction of homes in and around Canadian Lakeview Estates through another company called L.B. Chapman Construction Ltd.

[4] Through yet another company, 567893 B.C. Ltd., operating under the business name Canadian Lakeview Water Reclamation, Mr. Chapman provided sewer services to Canadian Lakeview Estates. Through CLU Utilities Ltd., he also established and operated a water utility serving the subdivision.

[5] All of the defendants are residents of Canadian Lakeview Estates and were so at the material time. In action No. S66950 (the "Rayner Action"), Katherine Doucet, age 43, is a fulltime homemaker who has lived in Canadian Lakeview

Estates since September 2003. Carla Rayner, age 33, is married with two children and is a homemaker and part-time fitness manager. She too has lived in Canadian Lakeview Estates since 2003. Richard Typusiak purchased a lot in Lakeview Estates in January 2001, and an adjoining lot in December 2003. In action no. S67664 (the “Aasen Action”), Jack Aasen is a judicial justice of the peace and his wife, Judy Aasen, is a retired telecommunications company manager. They too purchased a home in Canadian Lakeview Estates in 2003.

Background and Perspective

[6] The statements that the plaintiffs complain about arise from strife over Mr. Chapman’s management of construction in the area, and his control of the water and sewer utilities. As regards the utilities, of which the plaintiffs were 100% owners, the defendants expressed concern about the power that this conferred with respect to service and rate increases. As regards the construction work, there were nuisance allegations. The plaintiffs continued to develop lots in and around the subdivision. It involved blasting with dynamite and the running of heavy trucks loaded with rock and debris, some of it falling out and littering the local roads.

[7] Ms. Rayner swore that she had watched large and heavily loaded trucks routinely run a stop sign. She noticed the deterioration of road pavement directly in front of her home. She spoke to people in the subdivision who complained about their newly painted homes beginning to show cracks in the paint which they associated with the vibrations caused by the truck traffic. The defendants took it

upon themselves to inform other residents in the subdivision about these concerns, and from time to time their choices of words were unkind to Mr. Chapman.

[8] The defendants' allegations about control and management of the utilities and construction work were not comprehensively documented, but they were clear enough and were substantially unchallenged at face value. The plaintiffs say that the defendants' complaints went further, however, and falsely suggested far more discreditable conduct.

[9] The parties have quite different perspectives on the affair. Mr. Chapman sees these communications in issue as part of a malicious methodical campaign to destroy his name and business. The defendants see their actions as an exercise of their freedom of expression and political right to protest what they see as inadequate regulation of the utilities and nuisance caused by the plaintiffs' construction operations.

Statements in the Aasen Action

[10] The plaintiffs allege that in January and February 2005, Mr. Aasen made statements about the plaintiffs to a private investigator hired by Mr. Chapman. The statements, it is alleged, were as follows:

1. Well the only problem with living here is - it's beautiful, as you can see, and very nice and you've got a nice view from this lot, but we're thinking of putting up signs "Don't Buy Here Unless You Talk To Somebody From Here";
2. ...the guy that owns the utility here is a prick quite frankly...Brad Chapman's his name. He — it's a private utility, sewer and water...we are fighting this guy in court right now and he sues everybody at the drop of a hat... .

3. ...the situation is that he – he has manipulated the situation so that the cost of the sewer company – you know, 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% increase because of his costs." So they gave him a 33% increase and then they snuck in another 9% so they had a 42% 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.
4. You know, it's not the end of the world in some respects, but it's just – I wish somebody would have told me. I might have gone a runnin'. Because it's not just that. It's I don't like to be under the thumb of some guy who I don't like or trust, you know. This guy's in charge of my water, for Christ's sake. How do I know what he does? And so that's – that's the thing that bothers me.... I don't trust this guy... .
5. Its being under the gun of an untrustworthy individual. You know he can charge you for your drinking water...I mean I don't trust this guy.

[11] The plaintiffs allege that on November 23, 2004, Mr. and Mrs. Aasen cooperated to publish a letter that was sent to Pieter Bekker, the Deputy Comptroller of Water Rights for the Province of British Columbia (the "Bekker letter"). The letter stated, amongst other things, the following:

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

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.”

[12] The plaintiffs allege that on or about the weekend of February 25, 2005, the defendants in both actions published a flyer (“Flyer #1”) within the Canadian Lakeview community which stated as follows:

“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.”

[13] The plaintiffs allege that on or about April 12, 2005, Mr. and Mrs. Aasen published and distributed a second flyer (“Flyer #2”), which stated 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. CHAPMAN INVOLVED AS THE PLAINTIFF IN MANY LAW SUITS?*

With copy to:

<i>+ENVIRONMENT CANADA</i>	<i>819 9532225</i>
<i>+CANADIAN CONSERVATION INST.</i>	<i>613 9984721</i>
<i>+CANADIAN ENVIRONMENTAL</i>	

ASSESSMENT AGENCY.	819 9941469
+HUMAN RIGHTS COMMISSION	613 9969661
	604 6662386
	613 9953484
+DEPARTMENT OF JUSTICE CANADA	613 9540811
+DEPARTMENT OF FINANCE CANADA	613 9956938
CANADIAN RADIO TELEVISION AND TELECOMMUNICATION COMMISSION	819 9940218
+FRAUD INVESTIGATION	604 7127506
+CROWN COUNSEL	250 5495579
+MLA TOM CHRISTENSEN	250 5033600
+MP DARREL STINSON	250
2605020	
+VERNON COURT	250 5495422
+CONSERVATION VERNON	250 5581776
+N.O.R.D.	250 5451445
+GOVERNMENT BRITISH COLUMBIA	
+CHBC	
+THE MORNING STAR	
+THE VANCOUVER SUN	
+THE PROVINCE	
+CITY HALL VERNON"	

Statements in the Rayner Action

[14] The plaintiffs allege that the defendants in the Rayner Action were also involved in the publication of the Bekker letter and the two flyers allegedly published by Mr. and Mrs. Aasen.

[15] The plaintiffs allege that Ms. Rayner and Ms. Doucet, in or about January 2005, published in a community newsletter called *The View* the following:

"You may be aware that a group of concerned citizens have taken the time to meet with various representatives at 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.

Meeting: Dean Strachan – Assistant City Planner

Time & Date: December 1st, 2004 ~ 10:30 a.m.

Points for Discussion: bylaw & development concerns

- Will the developer be responsible for fixing the roads he is destroying with his heavy trucks hauling blasted rock to the area he is developing without notice to residents (100 loads/day) – we don't think Taxpayers (City) should pay for cleaning and maintenance of the road – but, to date, nothing has been done. People who are trying to sell their houses are losing buyers because of all the truck traffic.
- Homes are experiencing severe shaking due to the rocks being dumped behind Kestral Court. Some homes have experience structural damage (cracked walls, squeaking floor boards etc.) Who is liable for this damage? How do we express concern?
- The covenants in the area states “no cut trees except to build a house”. Is the developer under the same covenants?

...whose water/sewage rates have already increased DRAMATICALLY over the last year.

Mr. Strachan's Response To Issues Outlined Above:

...how the developer is non-communicative with the residents of the area. It was mentioned that the residents are NOT against development as they are aware it is necessary and needed but that it is the way the development occurs, secretly and how resident complaints are handled that is the issue.

..The issue of safety was raised with regards to the rock walls being built. A complaint earlier from our area brought out the City and the developer was told he needed to hire an engineer to design and build the rock wall. The developer completed this request. No building permit is needed by the developer until he wishes to sell off lots and rezone the property, which is currently zoned agriculture land.

Structural Damage – Unfortunately, the City's hands are tied here as the activity is occurring on private property, as such, any complaints or damages must be brought forward in Civil Court.

Taxes paid by residents of CLD and the lack of services provided.

Sewage and water

- Lack of service compared to Greater Vernon Water and other larger, professionally operated water utilities in the Okanagan Valley.

Development of Canadian Lakeview Estates

- We promote responsible development with accountability to the residents of the community.
- Concerned with recent developments to CLD that affect or infringe on the rights of existing landowners; affect sale-ability of homes; changes in natural slope of land; construction of oversized retaining walls, developer's violation of covenants (cutting of trees for housing construction)
- Use of heavy equipment – GVW exceeded? 100 loads per day; use of Jake brakes (engine brakes);
- Liability for structural damage to existing homes;
- Undersized cul-de-sacs (emergency response vehicles are not able to make complete turns on current cul-de-sac sizes)

Mr. Campbell's Response to Issue #2 As Outlined Above:

An important note for those who hold vacant lots in the neighborhood: 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.

...but the distribution system lacked the ability to meet peak demands, thus the need for water restrictions.

- *The Petition “cover letter” outlines the concerns around water and sewage, development that has negatively affected our homes (change in slope and structural damage that will affect home saleability).*

We, the undersigned residents of the Canadian Lakeview subdivision petition the City of Vernon for assistance in resolving the following issues:

The fees charged by the privately run Canadian Lakeview Water Reclamation Division are excessive and unregulated. They are imposed upon the property owners without input from the property owners and without methods of appeal. They are even imposed on undeveloped property where no service is being provided.

We request the City of Vernon assist the property owners by promoting that Provincial Legislation be enacted to control and regulate fees imposed by private utilities. We would also appreciate any other assistance the City of Vernon could provide the property owners.

There is uncontrolled development that routinely occurs in Canadian Lakeview subdivision that negatively impacts existing property owners. Up to one hundred truckloads of heavy rock per day are brought through residential neighborhoods, tearing up the streets. These trucks present a danger to pedestrians including children and pets. They leave mud and dust on the streets, homes and property, and on mailboxes. They utilize engine brakes next to the homes, creating unnecessary noise. They fail to adhere to posted stop signs.

Tons of rock fill is routinely buried behind unsightly rock retaining walls, altering the slope and character of the landscape. Some of these walls tower over residential homes. Heavy equipment is used to compact the rock fill, shaking existing homes for months at a time. Concern exists for the long-term structural integrity of these homes.

No dialogue occurs between the developer and the residents prior to major development being initiated. Residents find out about the project when heavy equipment rolls in next to their property. Calls to the City

of Vernon reveals the City often is unaware a major project is commencing until after it has commenced, because prerequisite permits do not need to be applied for when developing private land. Major construction can occur without penalty, prior to the issuing of permits.

We seek the City of Vernon's assistance in developing by-laws to manage and control this type of development that severely impacts the ability of existing residents to enjoy their homes, property, and neighborhoods. We are not seeking to stop development, only to ensure responsible development."

[16] The plaintiffs allege that on or about February 10, 2005, Carla Rayner prepared, published and distributed an email which stated the following:

"Hi, I thought we could perhaps send this email to the Paper...Let me know what you think. I am going to take a picture of the wall with my digital on my way to get Hannah from school. I thought we could forward this email to someone outside of the community...and better yet, outside of Vernon to send to the paper and delete our forwarding information (cut and paste the information into a new page). This way there would be no trace of who sent the information. Let me know what you think and please feel free to edit the information below...THANKS!! (I won't send it of course if anyone has reservations about the media involvement)

Carla

To the Editor:

I am writing to you regarding some issues we have here in the Canadian Lakeview Development. There has been quite a bit of development in our little area over the last while and we thought the Morning Star may be interested in it.

A couple of residents have been told that tomorrow (Friday) the private utility that runs our sewer (Canadian Lakeview Water Reclamation Division) will be here to dig up their front lawns and cut off their sewer for not paying the full amount owed. (The price for sewer here is

unregulated. We pay an average of \$718 per year for sewer and another \$630 per year for water which is also a private utility run by the same developer.) The people in question refused to pay that amount (after the latest increase) and as it isn't regulated are at the mercy of the developer. We noticed a recent article in the Morning Star ran regarding the sewer rates in Coldstream...ours is even more.

What we are ultimately trying to do is get Provincial Legislation changed to regulate these private utilities. A little coverage from our local media could help bring these issues to light and perhaps more communities in similar situations will come forward. One interesting note, is that the one resident who refuses to pay sewer charges is refusing to pay sewer charges on a vacant lot. The City of Vernon does not charge ANY sewer rates on vacant lots.

In addition to this, I have attached a photo of a rock wall that is being built in the area on the Developer's private land. Apparently no permit is needed for this development and of course the people living in front of this wall weren't told anything was going to happen there until the big machines rolled in. These machines work on the land 6 days a week starting at 7 am. The large trucks bring rock blasted from the lakefront up our roads and into this property all day long and are destroying the roads. The City sends road cleaners to clean these roads and will ultimately have to fix the roads at the taxpayers expense...this doesn't seem right. We have counted an average of 100 truck loads a day. The trucks would routinely run the stop signs in our area creating a safety hazard. One lady in the community now bakes cookies to give to the truck drivers as a thank you if they do stop at the stop signs.

In addition to this a couple of ladies are being sued for libel by the developer (they write a community newsletter and included minutes from several meetings they held with City representatives. This was in response to a petition that was circulated regarding the sewer rates and had 90 signatures gathered out of 92 homes approached). All information written in this newsletter was truthful and there was no intent for malicious or liableness. In my opinion, this is another example of the

bullying and intimidation that goes on here by the developer and his entourage of lawyers.

There is also some speculation that the developer in question (Mr. Brad Chapman) may be involved in the property issue with Mr. Armstrong and the Mayor, Sean Harvey. There is also speculation that the Mayor has purchased land in this development as well. (These could be rumours...but probably worth a bit of investigation)

Obviously I would like to stay anonymous in light of the recent legal pursuit by the developer on people in this area. I think you will find many residents are reluctant to speak about the developer for the same fears and in fact many residents have also had legal threats and letters written to them in the past. We joke that we live in "Hazard County" and that we are a bunch of Surfs living under a dictator's thumb.

I hope this information will be enough to get some coverage out here. I invite you to knock on anyone's door for comments on the goings on...if the residents can respond "off-the-record" or anonymously you may be quite enlightened to the stories you hear. FYI the residents with the sewer issues mentioned above live on 21 & 55 Peregrine Way.

Thank you for your time!! I hope to see you out here tomorrow!!!"

[17] The plaintiffs allege that on or about February 10, 2005, Mr. Typusiak joined in the defamation alleged in paragraph 17 by responding to Ms. Rayner's email as follows:

"Carla,

Some cautions, the Water Utility is regulated, the sewer company is not. It is not a utility as I understand it.

On my vacant lot, the fee has increased over 65% in 24 months to \$572.45 for no service provided.

I believe Chapman does require a building permit for the rock wall, if it is deemed a retaining wall. I think he also needs something called a site development permit, or something like that, which can be obtained over the phone. But the City cannot regulate what he is doing until after he submits a subdivision plan for approval.

His work usually goes five days a week, but on occasion it is six days a week, seven am to after five pm. Most of the trucks now stop at the stop sign. They still run their Jake brakes.

Otherwise send it.

Also, does anyone know how DCC's are collected out here? Does Chapman collect for water and sewer work and the City for parks and roads?

Rick"

Defamation

[18] A defamatory statement is one that tends to discredit a person in the eyes of reasonable people in the community: **Botiuk v. Toronto Free Press Publications Ltd.**, [1995] 3 S.C.R. 3 at 24, 126 D.L.R. (4th) 609.

[19] The imputation need not be express or in the form of a positive assertion. It may be insinuated one way or another, including in the form of a question. The onus is upon the plaintiffs to plead and prove a defamatory meaning, which will be the plain and ordinary meaning, unless the plaintiff alleges some other meaning by implication or innuendo: **Brown**, *The Law of Defamation in Canada*, 2nd ed., vol. 1 (Toronto: Carswell, 1999) at 5-3, 5-214.

[20] In both actions, the plaintiffs say that the offending passages carry by implication the following meanings, that is, that the plaintiffs were:

- a) dishonest and despicable and routinely acted contrary to applicable laws, regulations and by-laws;
- b) in the past and currently undertaking the development of Canadian Lakeview Estates in an uncontrolled and unregulated manner, that is to say contrary to applicable laws, bylaws and regulations;
- c) generally disreputable contractors and developers that are undertaking construction of the additional phases of Canadian Lakeview Estates in an unsafe and illegal manner and that the improvements constructed by them were unsafe, poorly constructed and created a hazard to neighboring residents;
- d) generally untrustworthy;
- e) routinely disregarding the interests of residents of Canadian Lakeview Estates by failing to consult with the residents of Canadian Lakeview Estates;
- f) were involved in an improper business and personal relationship with Sean Harvey, the Mayor of the City of Vernon; and that as a result of that improper relationship, Mr. Chapman and his related companies, including the corporate Plaintiffs, obtained improper advantages through approval of subdivisions and the granting of contracts to perform work for the City of Vernon from time to time; and that as a further result of this improper relationship, the City of Vernon was refusing to act on complaints made by the Defendants to the City of Vernon.

[21] Unfortunately, the plaintiffs have not clearly identified the parts of the offending statements which carry the more serious imputations that they plead. It makes the analysis more difficult, but it is not fatal.

[22] These further implications are what is commonly referred to as “false” innuendo. They are in essence offerings by the plaintiffs of their own interpretations of the meanings of the words alleged to be defamatory.

[23] The task of the court is to determine the plain and ordinary meaning of the words and what, if any, other inferences may be drawn from that meaning. In that process, the interpretation offered by the plaintiffs may be adopted or disregarded.

As pointed out in **Brown**, *supra*, vol. 1, at 5-102:

[W]here the words themselves are not defamatory in their ordinary and natural meaning, an innuendo will be absolutely essential to the plaintiff's chances for success. On the other hand, if the plaintiff should not succeed with regard to the innuendo, he or she may fall back upon the ordinary meaning of the words. If the defamation arises from the natural and ordinary meaning of the words, there is no innuendo in a legal sense. Where there is no innuendo, the test as to the defamatory meaning of the words is an objective one. The meaning offered by the plaintiff may be disregarded and treated as mere surplusage.

[24] Generally speaking, mere words of abuse which injure a person's feelings, insult his or her pride, or cause annoyance or embarrassment are not actionable. The law does not redress solely for wounded sensibilities. Nor is there an action for insults which do not diminish a person's standing in the community; the law regards as innocuous language which is merely offensive and vituperative. **Brown**, *supra*, vol. 1, at 4-8.

Defences

[25] If the impugned statements are defamatory, the burden then falls upon the defendants to prove the statements are protected by one of the recognized affirmative defences including, for example, qualified privilege or fair comment.

[26] The defendants, while denying that the statements are defamatory in both actions, have pled qualified privilege and fair comment as defences. In the Aasen action, they have also pled consent and justification.

Consent

[27] An action will not lie where the plaintiff has effectively consented to the publishing of the statement: **Brown**, *supra*, vol. 2, at 11-1. Mr. Aasen raises the defence of consent in the Aasen action in relation to his comments to the investigator sent by Mr. Chapman. [In fact, Mr. Chapman only instructed his investigator to find out what certain individuals had to say about him. That is not enough to substantiate his consent to what Mr. Aasen actually said.] That being so, consent is not a viable defence.

Justification

[28] A plea of justification is essentially a plea that the defendant told the truth, and truth is a complete defence: **Brown**, *supra*, vol. 2, at 10-4. It is the whole statement, not particular parts, of which one or two may not be quite true, that must be considered, and found to be substantially true: **Taylor-Wright v. CHBC-TV**, [1999] B.C.J. No. 334 at para. 33 (Q.L.) (S.C.), *aff'd* (2000), 82 B.C.L.R. (3d) 50, 2000 BCCA 629.

[29] It is open to a defendant to offer a defamatory meaning different from that pleaded by the plaintiff and justify it in defence of the action. The scope of the defence is not dependent upon the way the plaintiff pleads his or her case. It depends solely upon which defamatory meaning or meanings the words complained

of will bear. Thus, if two or more distinct imputations arise from the words complained of, a defendant may justify one of those imputations without justifying the other. **Brown**, *supra*, vol. 2, at 10-42 to 10-46.

[30] The burden is on the defendants to prove the truth of the defamatory remarks: **Brown**, *supra*, vol. 2, at 10-14.

Fair Comment

[31] A few of the statements in the words complained of appear to be not so much statements of fact, but statements of opinion or comment. A fair comment is a comment, not a statement of fact, “made honestly, and in good faith, about facts which are true on a matter of public interest”: **Brown**, *supra*, vol. 2, at 15-2. Such comments are not afforded protection if they are made maliciously.

[32] **Brown**, *supra*, vol. 2, at 15-56 to 15-59, states the following with respect to fair comment:

There is a difference of view whether the opinion expressed need be fair in any objective sense. The opinion, however, must be criticism that a fair-minded person could make under the circumstances. Nevertheless, there is no requirement that the criticism be impartial and well balanced... There is no cause to complain merely because the commentator is foolish, obstinate, biased, prejudiced or wrong, or the comments are rude, severe, extravagant, extreme, embarrassing, exaggerated or even fantastic, or they are expressed in colourful language or the tone is cynical or unnecessarily discourteous. Our court generally will not consider whether the commentary is well founded or reasonable. “Mere extravagance of the language employed will not destroy the privilege unless it is so great or perverse as to warrant a finding of malice.” The opinion expressed may be considered completely wrong headed by every other person acquainted with the facts and circumstances. It is assumed that if the facts are known and the comment is clearly unwarranted, the speaker “libels himself rather than the subject of his remarks.”

[33] However, it has been said that a fair-minded person would not jump to conclusions without first making proper inquiries. Therefore, comments that are reckless are deemed to be unfair (i.e. another form of malice). Where the imputation is one of corrupt or dishonourable motives, the defendants must show, in addition, that such imputations are warranted by the facts. **Brown**, *supra*, vol. 2, at 15-59.

Qualified Privilege

[34] The defence of qualified privilege applies only to an occasion where the defendant has an interest or duty — legal, social or moral — to communicate the defamatory expression, and the recipients of the statement have a corresponding duty or interest to receive the communication: **Botiuk**, *supra*, at para. 78; **Home Equity Development Inc. v. Crow**, 2004 BCSC 124, at para. 122.

[35] The mere fact that the defamatory words relate to matters of public interest, or that the defendant believed that an interest or duty existed, is not sufficient to create an occasion of qualified privilege: **Brown**, *supra*, vol. 2, at p. 13-23; **Home Equity Development Inc.**, *supra*, at paras. 126-127. In a statement endorsed by Cory J. in **Hill v. Church of Scientology of Toronto**, [1995] 2 S.C.R., 1130, 126 D.L.R. (4th) 129, Lord Atkinson in **Adam v. Ward**, [1917] A.C. 309 (H.C.) at p. 334, explained:

... a privileged occasion is ... an occasion where the person who make a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

Therefore, there must be a reciprocal interest/duty which warrants the communication. Also, the communication must be honestly made in the belief that the interest/duty existed.

[36] A number of circumstances should be taken into consideration when determining whether qualified privilege exists. Those factors, as mentioned in **Leenen v. Canadian Broadcasting Corp.** (2000), 48 O.R. (3d) 656 at para. 109, 105 O.T.C. 91, include:

- (a) The seriousness of the allegation. The more serious the charge the more the public is misinformed and the individual harmed if the allegation is not true.
- (b) The nature of the information, and the extent to which the subject-matter is a matter of public concern.
- (c) The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind, or are being paid for their stories.
- (d) The steps taken to verify the information.
- (e) The status of the information. The allegation may have already been the subject of an investigation which commands respect.
- (f) The urgency of the matter. News is often a perishable commodity.
- (g) Whether comment was sought from the defendant. He may have information others do not possess or have not disclosed. An approach to the defendant will not always be necessary.
- (h) Whether the article contained the gist of the plaintiff's side of the story.
- (i) The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
- (j) The circumstances of the publication, including the timing.

Malice

[37] Fair comment and qualified privilege may be defeated if the dominant motive for publication is actual or express malice.

[38] The purity of motive is the test. **Brown**, *supra*, vol. 2, at 16-17 to 16-19, describes malice as follows:

Malice involves “the intentional doing of a wrongful act with the intent to cause damage”. “[A]ny indirect motive, other than a sense of duty, is what the law calls ‘malice’.” The occasion must not be used for some bad, corrupt, dishonest, evil, guilty, illegitimate, improper, indirect, oblique, selfish, unjustifiable, ulterior, wicked, wrongful or even sinister purpose or motive. The privilege will be lost if it is shown that the statement was published for a motive unrelated to the purpose of the particular privilege.

Analysis

[39] I accept the evidence of the defendants with respect to the facts they allege about the plaintiffs construction activities (the blasting, running of trucks etc.) and about the water and sewer utilities (and the rates), and other problems mentioned in these reasons. I find that the words complained of are not defamatory mainly, but where they are, they are protected by the appropriate defences. I find that one passage is defamatory, but the plaintiffs have not proven publication by any of the defendants. I find that the extended more serious meanings alleged by the plaintiffs, except for that one passage, are unwarranted, either that, or in certain cases the words also bear less critical meaning that is not defamatory.

(i) **Aasen Statements to Investigator**

[40] Mr. Aasen's oral statement to Mr. Chapman's investigator in February 2005 includes the word "prick". Such words fit within the category of "insult", which the courts will normally treat as hurtful to a person's dignity, but the weight of authority is against treating such expressions as defamatory.

[41] In his statement, Mr. Aasen also uttered words and phrases such as "manipulated", "I don't trust him" and "untrustworthy individual". In my view, considering the context of the whole conversation, these seemed to be comments more than statements of fact. In context, the suggestion of impropriety seems less apparent than that which one might infer from hearing the words in isolation. If they bear a harsher meaning, they are also capable of meaning no more than that the plaintiffs, holding a position of power through ownership of utilities, are able to take advantage of opportunities available to them. In fact, the defendants' main criticism, it seems to me, was directed at the government for failing to control the activities of the utilities.

[42] In context, words like "untrustworthy", mean untrustworthy in a sense of unpredictable or unreliable, not dishonest or lacking in integrity. They are couched rather carefully as reflections of Mr. Aasen's personal feelings, and there is no particular reference to any fact that demonstrates a corrupt character in Mr. Chapman.

[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.

[44] Another statement [about Mr. Chapman] is that "he sues everybody at the drop of a hat". Mr. Chapman complains of similar words in statements of other defendants. In my view, expressions such as that are not particularly damning. In this instance, it is based on Mr. Aasen's knowledge of more than a dozen actions that Mr. Chapman had initiated in the past, and it is defensible as "fair comment"

[45] Mr. Aasen claims qualified privilege on the basis that, knowing what he knew about the problems with Mr. Chapman, he saw it as his duty to speak frankly with a potential purchaser who communicated an interest to him in receiving the information. There may well have been an interest, but I cannot find, on these facts before me, a duty. The investigator posing as a purchaser was a stranger, and Mr. Aasen held no official position, and neither on any other basis do I believe he had a requisite duty. It was not an occasion where qualified privilege would apply.

(2) The Bekker letter

[46] On November 23, 2004, the defendants sent the Bekker letter to the water rights section of the Land and Water Ministry British Columbia Inc. requesting a reconsideration of the increase in water rates. Fifty-two home owners in the sub-division signed the letter.

[47] In British Columbia, the use of water is governed by the **Water Act**, R.S.B.C. 1996, c. 483, and is vested in the Province, with private rights being granted by licence. A Water Utility is subject to regulation and control by the comptroller. The duties, responsibilities and restraints to which a water utility is subject are the same as those imposed on a public utility under the **Utilities Commission Act**, R.S.B.C. c. 1996, c. 473, and the powers and jurisdiction of the comptroller in relation in respect of water utility are the same as are vested in the British Columbia Utilities Commission.

[48] In these circumstances, the defendants had an interest in the rate change and a right under s. 57 of the **Water Act**, *supra*, to ask the comptroller to reconsider its decision. The comptroller had a corresponding legal interest to receive the application and decide if a rehearing was appropriate. As stated in **Brown**, *supra*, vol. 2, at 13-241:

Communications ... to ... public officials, who may be expected to act officially in the public interest, are protected by a qualified privilege.

[49] On these facts, I find that the letter was written on an occasion of qualified privilege, in good faith and without malice.

[50] I also do not agree that the letter as a whole is defamatory in the first place. The plaintiffs say that the Bekker letter accuses them of corruption by referring to “asset leakage”. I do not agree that the statements go that far. The letter as a whole does not overtly accuse the plaintiffs of sliding assets from one company to another for improper gain. Rather, it seems to suggest that the plaintiff, as a

privately owned utility, could be more susceptible to asset leakage. As well, there is the statement of assurance given by the defendants that “we are not, necessarily, saying that there was, or is asset leakage.” That statement in my opinion is sufficient to avoid the suggestion of wrongdoing. The thrust of the message, rather clearly, is to urge the deputy comptroller to investigate the possibility of asset leakage.

[51] The evidence disclosed that Mr. Aasen had from time to time in the past expressed animosity towards the plaintiffs. That could suffice as evidence of malice. However, it is not evidence acceptable for proof of defamatory meaning unless the plaintiffs establish some true innuendo, or particular knowledge in the minds of the readers of the Bekker letter that would give a defamatory sense to the words in the letter. No such evidence was adduced. Therefore, I do not accept these allegations as evidence of defamatory meaning.

[52] The dominant motive for the Aasens’ involvement was always their concern for utility service rates. I do not find malice.

[53] In the Rayner Action, evidence was adduced of answers given by Ms. Rayner on her examination for discovery to the effect that the Bekker letter contained allegations of dishonesty. After reviewing the series of questions and answers, I do not find it material to the question of whether the statement was defamatory. The intention of the defendant is not relevant to the meaning of what was published.

(3) The Flyers

[54] Flyer #1 refers to alleged future increases of water and sewer rates. The statement obviously carries speculation of something unwanted that may happen. People generally expect taxes and levies to rise year by year. The allegation does not to my mind imply anything particularly sinister about the plaintiffs. The reference to Mr. Chapman as an “asshole” in the Flyer is again an insult but not defamatory.

[55] As to Flyer #2, the plaintiffs allege that it suggests Mr. Chapman has “deals and connections with Mayor Sean Harvey”. The words are quite capable of a defamatory imputation, and in my view, a reasonable and ordinary person would infer that the deals and connections were not legitimate. Accordingly, I find those words to be defamatory. They are also malicious because they were made by the author(s) while knowing that they had no factual basis for the assertions. Therefore, neither fair comment nor qualified privilege will avail.

[56] However, the defendants in both actions deny authorship of either of the two flyers. Mr. Aasen swore in his affidavit that he and his wife have always put their names to all documents that they have distributed, and that they have never hidden their identity, either in writing or verbally, in reference to issues of concern to them. He denied that he or his wife have ever published or disbursed any anonymous documents. The same denials were made by the defendants in the Rayner Action.

[57] The plaintiffs, whose burden it is to prove publication, raise circumstances that they say constitute proof on a balance of probabilities.

- (a) It is alleged that in November 2004, Mr. Aasen threatened to destroy Mr. Chapman's business reputation if in fact he was sued by the plaintiff Chapman. The source for this is an affidavit by Mr. Ken Stewart who swore that he heard Mr. Aasen say at a meeting in January 2005 that if he were sued by Mr. Chapman he would "shut him down wherever he operated".
- (b) Another allegation was that Mr. Aasen in 2002, when he became unhappy with the real estate agent who sold him his Canadian Lakeview Estates property, erected a plywood sign saying "Before you buy here talk to me".
- (c) It was further alleged that Judy Aasen had made statements at a public meeting on March 29, 2005 about a relationship between Mayor Sean Harvey of Vernon and Mr. Chapman, requesting a public inquiry into alleged conflicts of interest.
- (d) Allegedly, the defendants also made repeated references to a number of lawsuits which Mr. Chapman was involved in.
- (e) Finally, Mr. Chapman swore that he was unaware of any other individuals who have made allegations of the same nature against him.

[58] That evidence, piece by piece, or altogether, is not in my opinion sufficient for me to determine that the defendants were the ones who published the flyers.

[59] To press their suspicion that Mr. Aasen was at least involved in the publication of the flyers, the plaintiffs obtained an order for Mr. Aasen to turn over his lap top computer for inspection, which he did. It was found that a file called "Canadian Lakeview Consumers Beware .lnk" had been set up on the computer. However, any content linked to that file had been wiped from the lap top's hard drive. That left it uncertain whether an original file had simply been opened and/or modified on the lap top, or whether the contents from that file had been saved on the hard drive. Further, if it were established that the original file had been created, modified

and saved on the lap top, that does not prove that Mr. Aasen or any of the other defendants actually published Flyer #2.

[60] In these circumstances there is insufficient evidence for a finding that the defendants published Flyer #2.

(4) *The View* January 2005

[61] *The View* was a publication carried on by Mr. Rayner and Ms. Doucet. The purpose of the publication was to convey to the Canadian Lakeview Estates owners what the publishers considered to be important information affecting the community. It was not a one-time publication, nor was it targeted against any single person or group. Its distribution was primarily limited to residents of the community, although it is true that copies were available for others to come and take. It is not in evidence, and it is not likely in my view, that there was much demand at all outside of the community.

[62] In fact, the subject matter of *The View* was mainly issues of public concern, with the publishers expressing their views on city development activity and in this case, the operation of the utilities. Individuals in the community certainly had an interest in these matters, and it is not difficult to identify a social duty on the part of Ms. Rayner and Ms. Doucet to convey information gleaned for instance from a meeting with the City of Vernon representatives.

[63] The plaintiff argues that the allegations in *The View* “go well beyond matters which were of a public concern at the time”, and that the communications were not

urgent or important. I disagree. The distress caused by the construction activities and the matter of the utility charges were reason enough for the defendants to act in a timely manner to organize and disseminate information about this situation, and for the reasons already stated, it does not seem to me that they spoke too strongly or went to too far in what they said. It is difficult to identify a single reference in *The View* that does not deal with concern for a community issue.

[64] There is reference also in *The View* to “speculation that the developer in question [Mr. Brad Chapman] may be involved in the property issue with Mr. Armstrong and the Mayor Sean Harvey”. However, further on the author says “these could be rumours... probably worth a bit of investigation.” In my view, that is adequate to negate an accusation of corruption and would deter a reasonable person from drawing a negative opinion about the plaintiffs.

[65] The author of *The View* also states that “we joke that we live in Hazard County” and “that we are a bunch of Surfs living under a dictator’s thumb”. In my opinion, that is not a statement that would be taken seriously. It is, as the author says directly, a joke.

[66] In my opinion, the defence of qualified privilege and to a lesser extent, the defence of fair comment, would be available to the defendants. On the facts, in context, there was a privileged occasion and the statements were made in good faith with the dominant motive not to injure the plaintiff but to protect the interests of the residents.

[67] The plaintiffs complained that the defendants' use of expressions such as "uncontrolled development" and "structural damage" create an impression of reckless activity causing serious expensive damage to homes. I do not agree that that words suggest anything so serious. In the first place, the writers were careful to limit the meaning of the words "structural damage" to things like cracked walls and squeaking floor boards, not major damage. Also the words "uncontrolled development" are defined — as pertaining to the running of trucks — and in my view, it is in that respect another criticism of the government officials who should allegedly have been controlling the development.

[68] The reference to vacant lots being charged for sewage fees, and the City of Vancouver's 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.

[69] The complaints about excessive fees charged by Canadian Lakeview Reclamation are opinions based on the facts and amount to fair comment, but I point out again, that I do not find it rises to a level of defamation by innuendo as pleaded by the plaintiffs or by any other meaning.

(5) February 10, 2005 Email

[70] The email of February 10, 2005, allegedly published by Carla Rayner, contains nothing defamatory of anyone in the portion that is addressed specifically to the recipient. The rest is apparently a draft letter to the public or the media.

[71] The remarks in the email about the plaintiffs' disruptive road work were true and, therefore, justified regardless of whether they are defamatory.

[72] Mr. Rush for the plaintiff submitted that Mr. Chapman, a businessman in Vernon and the father of high-school aged children is a well-recognized member of the community. He described the defendants, who were residents of Canadian Lakeview Estates, as individuals dissatisfied with aspects of that community, including on-going development, and the fact that water and sewer service to their homes was provided by private utilities which happened to be operated by Mr. Chapman. That much seems to have been so, but I see nothing wrong with that or tending to excite malice. He accused the defendants of embarking on a concerted and deliberate campaign to destroy the personal and business reputation of the plaintiffs. I do not accept that allegation.

[73] In the email, there was an allegation that Mr. Chapman is litigious and that he sues people who get in his way to intimidate them. The facts indicated that, indeed, Mr. Chapman and his companies commenced actions including libel actions quite often. Although the suggestion is harsh, in my view, it is a fair comment given the latitude usually allowed by the courts, and again, in this case, it seems to me that the statement was for the dominant purpose of protecting the defendants' rights.

Conclusion

[74] In summary, none of the words complained of in either action are defamatory except for the one passage in Flyer #2 which the plaintiff ascribes to Mr. and Mrs. Aasen. However, it was not proven that Mr. and Mrs. Aasen or any other defendant

published either of the flyers. The passages in issue contain a number of expressions “untrustworthy individual” for instance, which could be defamatory but for the context in my view. I have found that in the context of this case, they were not defamatory. If that is not correct, if they were defamatory, the defences of qualified privilege and/or fair comment apply in the ways that I have explained.

[75] Accordingly, the case against all of the defendants in both actions is dismissed with costs.

“E. Rice, J.”
The Honourable Mr. Justice E. Rice