STUDY PAPER ON

ACCESS TO NEIGHBOURING LAND AND AIRSPACE FOR CONSTRUCTION-RELATED PURPOSES

BRITISH COLUMBIA LAW INSTITUTE

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Study Paper on Access to Neighbouring Land and Airspace for Construction-Related Purposes

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- promote and carry out scholarly legal research.

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We especially thank the participants in the Roundtable on Construction Crane Overswing and Shoring Access held at UBC Robson Square in November 2025 for their contributions to the vigorous and enlightening public policy debate that took place on that occasion.

BCLI also acknowledges the contribution of its staff members who carried out research and consultation in this project, and drafted this study paper.

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Continuum of alternatives to resolve construction access disputes

Public education (non-site-specific)
General public education campaign on tower crane, shoring techniques, and safety standards. Conducted by industry together with municipalities and support from key agencies (e.g., WorkSafeBC, BC Crane Safety).

Early engagement (site-specific)
Early contact, provision of information, rapport-building with neighbouring landowners.

Informational initiatives (site-specific)
Community briefings, engaging with strata lot owners and councils in informational meetings or presentations at strata corporation SGM or AGM.

Best practices protocol or code
Developed by industry with other stakeholder input, including landholder interests. Draws on experience of successful outcomes In negotiating access.

Voluntary ADR
Mediation, arbitration, mediation-arbitration using available private ADR services. Requires willingness by developer and landowner to participate and accept result.

Mandatory ADR
Mediation-arbitration by existing Surface Rights Board. No automatic access - justification necessary. Requires legislation to give Board power to resolve construction access disputes, grant access, and determine compensation to landowner.

Court-ordered access and compensation
Court decides terms of access and compensation to landowner. No automatic access – justification necessary. Requires legislation to give court these powers.

Trespass exceptions
Crane overswing and shoring installations not amounting to trespass. Non-consenting landowner can't get injunction to stop overswing or get damages (for nuisance) unless substantial interference proven.

No injunction for crane overswing
Non-consenting landowner can't get injunction but can sue for trespass or nuisance and get damages.

Automatic reciprocal access
Developers have automatic right of access for crane overswing and shoring. Landowner has similar right when and if needed to redevelop property. No other compensation to landowner.

Relaxation of ¾ vote requirement for strata corporation to grant access easement
Easier to pass resolution granting crane and shoring access easement over common property.

Executive Summary

This study paper explores legislative and policy options for resolving disputes concerning access by developers to land and airspace bordering a construction site for various construction-related purposes. The issue has become more contentious and acquired a higher profile because of some recent judicial decisions and a few well-publicized accidents on construction sites involving tower cranes and cave-ins. It has also taken on more importance because of the current housing shortage in Canada and the prioritization by all levels of government of building mass housing.

A building permit does not confer authority to enter and use land surrounding the building site that is owned by others. If the developer does not own the land adjacent to a building site, access to that land and airspace needed for shoring excavations and operating a tower crane has to be gained through agreement with the owner.

Access is typically granted through an easement allowing the movement of a tower crane jib (boom) through airspace above the neighbouring land and minor encroachments along and across a property boundary to facilitate the installation and anchoring of shoring walls. This will often involve inserting anchor rods in the subsurface of the adjacent land that are meant to be left in place permanently after construction is completed.

Obtaining a crane and shoring easement usually involves a lump sum payment to the grantor and reimbursement of the legal fees incurred by the grantor to obtain independent legal advice on its terms. Landowners are now more aware of the economic value to developers of these access rights and may demand larger payments as compensation than they did in the past.

When developers and neighbouring owners do not reach agreement on terms of access for purposes like tower crane operation and shoring, building projects can be delayed and costs rise. Sometimes the developer can cope without access by using different techniques and equipment, but these too can prolong building schedules and result in additional cost that is ultimately passed on to consumers of housing and commercial space, contributing to the affordability crisis.

When negotiations for easements have failed, developers have sometimes proceeded unilaterally to operate cranes through airspace over adjacent land and

buildings without the owner's consent, which is technically a trespass. The availability of interim and interlocutory injunctions to restrain an aerial trespass by a crane, confirmed by recent judicial decisions, provides landowners with a significant advantage in negotiations with developers. The jibs of tower cranes must be able to swing 360 degrees with the wind for reasons of safety when idle, so it is impossible to restrict movement altogether over a portion of land within their radius of movement.

Developers maintain the current state of the law concerning trespass, nuisance, and injunctions fosters exorbitant monetary and other demands by landowners for compensation in return for granting access rights during construction. They also maintain that it allows a last-ditch opportunity for opponents of development in a neighbourhood to obstruct building projects that have already received all required approvals through a public planning process.

From the landowners' side, the argument is made that an injunction is the only effective lever ultimately available to compel developers to respect their property rights. Developers should be prepared to compensate landowners at a level that realistically corresponds to the benefit they receive from being able to use landowners' property.

Finding better ways to resolve disputes that threaten to delay building projects and drive up costs is an important aspect of the effort to expand the housing supply. Real solutions will not come, however, from reforms that disproportionately favour the interests of one side over another. This study paper explores a continuum of potential solutions that could be employed individually or in combination.

Chapters 1 and 2 provide background on the reasons why developers and their contractors require access to neighbouring land and airspace during construction. Chapter 3 explains the legal milieu in which construction-related access disputes arise and the way the case law has developed in British Columbia around them.

Chapter 4 covers the continuum of potential solutions referred to above. The continuum starts with initiatives that involve no judicial or quasi-judicial decision-making or legislative intervention whatsoever. It moves next to solutions based on voluntary and mandatory alternate dispute resolution (ADR), then to court-ordered access, and finally discusses solutions involving legislative changes to property and tort law. While the implications of each alternative are discussed, no recommendation is

made for adopting one potential solution over another. The continuum is presented only as a series of alternatives that could be pursued individually or in combination.

Chapter 5 contains concluding remarks.

Chapter 1. The Issue

A. Introduction

Fixed construction cranes are a familiar sight in urban areas undergoing redevelopment. So are the typically deep excavations at building sites that are needed for modern multi-storey buildings. The operations associated with these familiar sights affect properties that neighbour the building site in numerous ways. Access to neighbouring property, including airspace, is sometimes necessary for certain construction-related purposes.

For example, the jib of a tower crane may need to swing over streets and lots neighbouring the building site on which it is installed.[1] The process of shoring an excavation (reinforcing the sides of an excavation to prevent them from collapsing) may involve installation of anchor rods extending into the subsurface of the surrounding land. If the excavation goes deeper than the level of the footings of structures on the land adjacent to the excavation, those structures may need to be underpinned (reinforced to prevent settling) in order to prevent damage to those structures.

A building permit does not give the holder the authority to enter and use land surrounding the building site that is owned by others. If the land adjacent to a building site is in different ownership, the developer of the building site has to gain access to that land and airspace for these common construction-related purposes by agreement with its owner.

Until fairly recently, these matters attracted little controversy. They have now acquired greater profile for a number of reasons. Since 2020 there have been some serious accidents in British Columbia involving tower cranes and the collapse of shoring walls. The fear level amongst the public has likely heightened as a result. Landowners now ask for larger payments from developers in return for granting access, while formerly many were willing to accept relatively nominal amounts of compensation or simply agreed to grant the access on the strength of an offer of reciprocal access rights from the developer in case the neighbouring landowner needed them in the future. Awareness of the economic value of the access rights that developers

1. The jib of a tower crane is what is commonly referred to as its "boom." *Jib* is the industry term for the horizontal projecting arm of the familiar type of tower crane with a fixed vertical mast. "Tower crane" is the term used for this type of crane in this paper.

seek is more widespread. This is probably due partly to the publicity the issues have received and partly because the pace of redevelopment has resulted in more landowners having to deal with requests by developers for access to their land and airspace to carry out construction-related operations.

When developers and neighbouring owners do not come to timely agreements on terms of access for purposes like crane operation and shoring, building projects can be delayed and increased costs are incurred. Sometimes the developer can cope without access or a tower crane by using different shoring techniques and equipment, but these too can prolong building schedules and result in additional cost.

Ultimately, higher construction costs are passed on in the form of higher prices to the consumers of housing and commercial space and contribute to the crisis of affordability in housing. As there is currently an acute shortage of housing in Canada, expanding the supply of housing has become a prominent social and governmental priority. Overcoming impediments to the timely completion of building projects is an important aspect of the effort to expand the housing supply to meet the burgeoning need.

The property rights of neighbouring landowners should not be ignored, however. One-sided solutions that disproportionately favour the real estate development and construction industries over the rights of private landowners to control use of their own properties will not win public acceptance.

B. The Study Paper

This study paper explores legislative and policy options concerning access to land for construction-related purposes. It is a small component of a much broader BCLI initiative that examines contemporary legal problems concerning housing.[2]

BCLI staff consulted with numerous informants in the course of the project that led to this publication. Most of the ideas canvassed in the study paper were vetted in a Roundtable discussion convened by BCLI in November 2025 that brought together

2. The first publication in BCLI's initiative on housing is *The Law at Home: A Primer on Homeownership Tenures in British Columbia* (Vancouver: BCLI, 2025), online: https://www.bcli.org/wp-content/uploads/The-Law-At-Home-Housing-Tenure-Primer.pdf.

representatives of the various interests involved. They included developers, lawyers who advise property owners and property developers, a municipal government official, a representative from BC Crane Safety, and the Condominium Home Owners Association.

BCLI staff also met with three members of the provincial Surface Rights Board to explain and discuss the suggestion made in Chapter 4 of extending the Board's jurisdiction as one option to address construction-related disputes concerning access to land and airspace.

Readers should note that the potential solutions are not ranked in any order of preference, and BCLI does not recommend one over another. The study paper is intended to contribute to a public discussion of the issues it covers, and serve as an informational resource for stakeholders, legislators and policymakers.

Chapter 2. Why Access to Neighbouring Land and Airspace Is Needed in Construction Projects

A. Access for Shoring and Underpinning

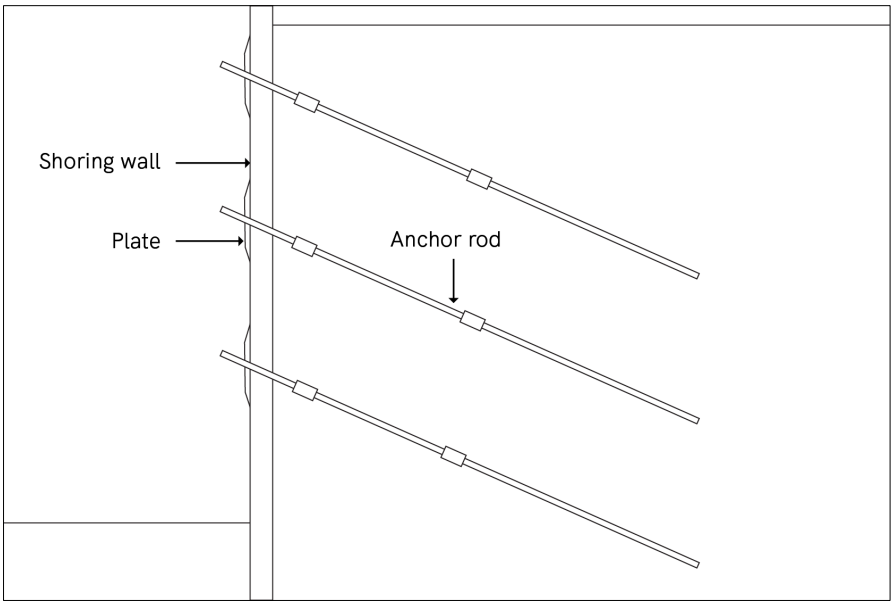
Shoring involves reinforcing an unstable structure or an excavation while repairs or construction is going on. Shoring that is referred to in this paper pertains to reinforcing the sides of excavations created to lay the foundation of a new building.

When soil is excavated in preparation for laying a foundation of a new building, the loss of lateral support may cause the sides of the cavity to cave in unless they are reinforced by a temporary wall. The shoring wall can be made of horizontally laid beams called *lagging* supported by piles driven vertically into the ground. These are known as "soldier piles" because they stand in a row spaced at regular intervals on the inward face of the shoring wall. More commonly nowadays when deep excavations are dug for multi-storey buildings, shotcrete (a concrete slurry sprayed onto a surface) is used for the shoring wall.

A method of reinforcing shoring walls often much preferred to using soldier piles is to insert steel anchor rods (also called "tieback rods") at a downward angle into the subsurface soil adjacent to the sidewall of the excavation. The anchor rods are grouted into place, and their projecting ends are secured to the shoring wall by plates and bolts.

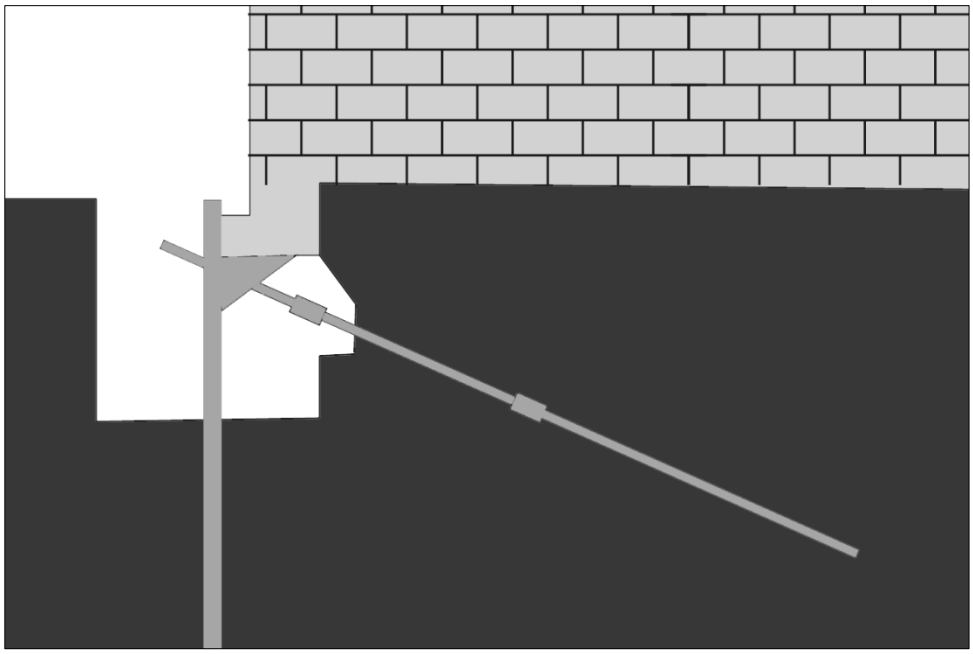
Installation of anchor rods requires the consent of the owner or occupier of the adjacent land, especially as they are usually left in place after construction is completed. If access is not granted, the builder usually has to resort to pile-driving, a less desirable and generally more costly alternative.

Illustration of Use of Anchor (Tieback) Rods



Underpinning may be necessary when the excavation is deeper than the footings of the foundation of an adjacent structure, such as a house or multi-unit residential building. The excavation of adjacent soil withdraws some lateral support for the structure, which could cause it to settle. Underpinning consists of reinforcing the foundation of the adjacent structure using one of numerous techniques, and is done to prevent damage from the subsidence or shifting of the soil underneath it. Underpinning obviously requires physical access to the adjacent land and therefore requires the consent of the owner or occupier.

Illustration of Underpinning



B. Access for Tower Crane Swing

The tower crane is the most familiar kind of static crane seen where multi-storey buildings are being constructed. It consists of a steel lattice vertical mast on a fixed base and a lattice horizontal jib mounted on a turntable at the top of the mast so the jib can rotate 360 degrees. The shorter portion of the horizontal arm projecting from the masthead in the opposite direction is called the "counterjib." It carries concrete blocks that act as a counterweight to the load on the jib to maintain the stability of the crane.

Some tower cranes have a jib that can be raised and lowered. They can be used in smaller spaces, as they allow for loads to be raised closer to the mast. This type is called a "luffing crane."

Tower cranes are used in place of mobile, truck-mounted cranes without jibs that swing in a circular path because they can lift very heavy loads to great heights and

place loads very precisely.[3] For reasons of both safety and efficiency, the base of a tower crane has to be located very carefully on the strength of a thorough assessment of the geotechnical features of the building site. Depending on the position of the mast and length of the jib, the radius of swing of the jib may extend unavoidably over the boundary of the building site into the airspace above the adjacent parcel of land. Legal implications of this when the building site and the adjacent parcels of land are not occupied by the same owner are discussed in the next chapter.

3. DesignHorizons Team, "Understanding Tower Cranes: Features, Types, and Components", online: <https://designhorizons.org/understanding-tower-cranes-features-types-and-components/>.

Chapter 3. The Legal Context

A. Access, Consent, and Trespass

Negotiations and disputes between developers and neighbouring landowners over access rights for crane overswing, shoring, and underpinning play out against a legal backdrop that covers the law of real property and torts, the latter being the body of law that concerns non-contractual civil wrongs, including the torts of trespass and nuisance.

Entering and using land in the possession of someone else for a purpose connected with the development of one's own property requires the consent of the owner or occupier of that other land. Doing so without consent amounts to a trespass.

The owner of the land trespassed upon, or the occupier of that land if the owner is not in possession, can sue the trespasser. The distinction is important in the law of trespass because trespass is a direct interference with the possession of land rather than ownership.[4] For reasons of convenience and brevity, however, we will not distinguish between owners in possession and non-owning occupiers for the purposes of this study paper and we include them both under the term "landowner."

Unlike the case with most other torts, a plaintiff in a trespass action does not have to prove actual damage occurred as a result of the wrongful conduct that is alleged.[5] The essence of the wrong in trespass cases is the unlawful entry itself, though compensatory damages are awarded. When a trespass occurs, but no actual damage occurs as a result, a plaintiff may be awarded exemplary damages nevertheless. Exemplary damages are awarded in order to denounce the wrongdoer's conduct.[6] As such, they can be measured by the amount gained or saved by committing the wrongful conduct if it is quantifiable, in order to deprive the defendant of the benefit of the wrongdoing.[7]

4. L.N. Klar and C.S.G. Jeffries, *Tort Law*, 7th ed (Toronto: Thomson Reuters, 2023) at 132-133 and 134.
5. *Ibid* at 132-133.
6. "Exemplary damages" is another term for punitive damages: *Whiten v. Pilot Insurance Co*., 2002 SCC 18 at paras 47-49; *Syngenta AG v Van Wijngaarden*, 2025 BCCA 334 at para 146.
7. *Austin v Rescon Construction (1984) Ltd.* (1989), 36 BCLR (2d) 21 at 25 (CA).

In addition to the ability to sue for damages, a landowner is usually able to obtain an injunction to prevent the continuation of a trespass. An injunction is an order from a superior court to stop or refrain from doing something or, more rarely, to perform a particular act.

B. Shoring and Trespass

Developers who proceeded with shoring works involving the subsurface of adjacent land without the landowner's consent have been held liable for significant amounts of damages in trespass actions.

In *Austin v Rescon Construction (1984) Ltd.* [*Rescon*] a builder had made what the court considered perfunctory and ineffective efforts to contact the owner of the adjacent lot before going ahead with the installation of 35 to 39 anchor rods underneath the latter's house.[8] The trial judge made a relatively low compensatory and exemplary damages award for the trespass because of the lack of surface damage.

Reversing the trial judge in relation to the basis for the damages award, the British Columbia Court of Appeal awarded exemplary damages to the landowner for the estimated amount the developers saved by trespassing on the adjacent land through use of anchor rods instead of driving soldier piles, which would not have required any encroachment but would have been more expensive.[9]

The Court of Appeal expressly rejected the trial court's reasoning that the rights of a landowner to preserve property against unlawful interference needed to be weighed against the possibility that large awards of damages for interference that did not result in damage or significant inconvenience would "make it profitable for landowners to hold their building neighbours to ransom." Referring to this as "a novel proposition unsupported by authority" and an error in principle, the Court of Appeal judgment stated:

> I regard it as flying in the face of authority which holds that a landowner in occupation is entitled to refuse permission to enter upon his property for any purpose and that if he refuses to do so the applicant for permission is not

8. *Ibid.*

9. *Ibid* at 25.

> thereafter entitled to enter upon the property, trespass, and then contend that the landowner was unreasonable in refusing permission.[10]

In *Epstein v Cressey Developments Ltd.* [*Epstein*][11], a developer's offer of $5,000 as compensation for permission to install anchor rods and shotcrete shoring that would encroach was rejected by the adjacent absentee landowner. When an attempt to install soldier piles failed because of a high water table, and after experiencing a cave-in, the developer reverted to the original plan and inserted anchor rods under the neighbouring landowner's land without further effort to contact her. Evidence was provided in the ensuing trespass action that any future redevelopment of the landowner's property would require new foundations at a depth at least equivalent to those of the developer's building, at an additional cost of between $35,000 to $50,000.

In *Epstein*, the Court of Appeal was invited to overrule *Rescon* with respect to its rejection of the argument that the court should balance the interests of the developer and adjacent landowner, and unreasonable resistance on the part of the adjacent landowner should be penalized by a reduction of the damages award. The Court of Appeal declined to reverse *Rescon* on this point. It upheld an award of exemplary damages of $45,000 made at trial, justifying this amount partly on the probable cost of re-designing the building plans to avoid any encroachment on the landowner's property. The Court of Appeal considered this would approximate the value of the benefit the developer obtained by committing the trespass.[12]

Rescon and *Epstein* are the leading decisions in British Columbia on trespass by builders in carrying out shoring measures.[13] They reflect the high value the existing

10. *Ibid* at 24.

11. (1992), 65 BCLR (2d) 52 (CA).

12. Compensatory damages of $25,000 were also awarded in *Epstein* against the developer for the estimated additional cost of building deeper foundations in any later redevelopment of the landowner's property, reduced to reflect the contingency that redevelopment might not occur and the impossibility of accurately assessing the detrimental effect of the trespass on future redevelopment of the adjacent property.

13. In *Cunningham v Millard*, 2005 BCPC 343, an action in negligence and trespass in which one of the allegations was that a shoring system was installed in the subsurface of the plaintiff's property without consent was transferred from Provincial Court to the BC Supreme Court in light of the likely size of the damages awards, based upon the awards of exemplary damages in the earlier cases *Austin v Rescon Construction (1984) Ltd.*, *supra*, note 7 and *Epstein v Cressey Developments Ltd.*, *supra* note 11.

law places on the right of landowners to control access to their property, and rejection by the Court of Appeal of the proposition that courts should engage in a balancing exercise to accommodate development of a neighbouring property when access is refused.

C. Liability Arising from Excavation and Shoring Operations

A landowner has a right at common law to lateral support of the land from adjacent land, although the right is limited.[14] It is in fact a right not to have support for land removed by acts done on the adjacent land.[15] If the land subsides or slides because lateral support is artificially withdrawn, such as by excavating the adjacent parcel of land, the landowner can sue the adjoining landowner and others who participated in the activity that caused this damage.

The right to support of land only applies to land in its natural state, not to structures on it.[16] Liability is present only if the activity on the adjacent land would have caused the land to subside or move regardless of the presence of buildings and other artificial burdens resting on it.[17] If, however, removal of lateral support would have caused the land to move even if no structure had been built on it, the landowner can be awarded damages for harm to the structures.[18]

Thus, inadequate shoring of an excavation that results in a cave-in and movement of earth from the adjacent land in different ownership can result in liability on the part of the developer and possibly other parties involved in the shoring operation towards the landowner whose property has been affected. Depending on the circumstances, the damages that may be adjudged payable to the landowner could be

14 In fact, what is called a "natural right" to support is actually a right protected by the law of tort through a tortious cause of action: R. Megarry and H.W.R. Wade, *The Law of Real Property*, 4th ed (London: Steven & Sons, 1975) at 814. A "cause of action" is a right to sue.

15. *Ibid.*

16. *Wyatt v. Harrison* (1832), 5 B. & Ad. 871, 110 E.R. 320; *Kramer v Blair*, 2015 BCSC 1194 at para 26; *Lee v. Shalom Branch #178 Building Society*, 2001 BCSC 1760; Megarry, *supra* note 14 at 814.

17. *Stroyan v. Knowles* (1861), 6 H.& N. 454, 158 E.R. 186; *Lotus Ltd. v. British Soda Co. Ltd.*, [1972] Ch. 123; Megarry, *supra* note 14 at 814-815.

18. *Ibid*.

determined by the cost of restoration if it is reasonable in the circumstances, or by the amount by which the value of the affected landowner's property has been reduced.[19] Courts have used both of these measures in cases of property damage from operations conducted on or from neighbouring land.[20]

When there is a danger of an excavation affecting the stability of subsoil supporting a structure on the adjacent land, prudent risk management requires an engineer's assessment of the need for underpinning the foundation of the structure. When underpinning is required, the cost will usually be borne by the developer, but it requires the consent of the landowner because all or some of the work must be done on the land where the structure is located.

D. Crane Operation and Rights Over Airspace

1. Limited Property Rights in Airspace

The rights of landowners to airspace above the area within the boundaries of their land are not well-defined in Canadian law. The Latin maxim *cujus est solum ejus usque ad coelum* (whoever owns the land owns it to the heavens) is still invoked occasionally in legal arguments, although it has never been given literal effect and cannot be treated as accurately stating the law.[21]

In the twentieth century, the invention of powered flight made the maxim untenable. It was held in Canada in 1953 that airspace itself is not something that can be owned, but landowners have a limited right to control the amount of airspace that they can possess or occupy for the use and enjoyment of the land.[22] Within this zone,

19. *Philip v Smith*,1996 CanLII 1441 at paras 45-49 (CA); *Kates v Hall*, 1991 CanLII 1127 (BCCA); *Kramer v Blair*, *supra* note 16 at para 61.

20. *Kramer v Blair*, *supra* note 19; *Nan v. Black Pine Manufacturing Ltd.* (1991), 55 B.C.L.R. (2d) 241 (C.A.); *Taylor v. King* (1993), 82 BCLI (2d) 108 (CA); *Defrane v Argo Contracting Ltd.*, 2010 BCSC 747 at para 89.

21. *Lord Bernstein of Leigh v Skyviews & General Ltd.* ["*Bernstein*"], [1977] 2 All ER 902 at 907 (QB); *Re the Queen and Air Canada* (1978), 86 DLR (3d) 631 at 635 (Man CA); aff'd (*sub nom The Queen (Man.) v Air Canada*), [1980] 2 SCR 303.

22. *Lacroix v The Queen*, [1954] Ex CR 69; *Re the Queen and Air Canada*, *supra* note 21 at 637. See also *Bernstein*, *supra* note 21.

landowners can prevent anyone else from acquiring title or an exclusive right to use of the airspace.[23]

The idea that airspace cannot be owned sits uneasily with the declaration in the *Land Title Act* that air space parcels constitute land.[24] The Act goes on to state that an air space parcel "may be transferred, leased, mortgaged or otherwise dealt with in the same manner and form as other land the title to which is registered under this Act."[25]

It is well-established that overflight by an aircraft at a safe and legally permissible altitude does not interfere with a landowner's limited right to control airspace above the land.[26] Intrusion by mechanical means into a lower zone that an owner or occupier could potentially use or occupy by building into it or using it in relation to a land-based activity is, however, characterized as trespass if done without the owner's or occupier's consent.[27]

2. Crane Overswing as Trespass or Nuisance

(a) General

Landowners can sue for permanent, temporary, or intermittent intrusions into the zone of airspace they could potentially build into or use in connection with ground-based activities. Their chief causes of action (legal grounds supporting a right to sue) would be trespass or nuisance. A nuisance is a substantial and unreasonable interference with the use and enjoyment of land.[28] Unlike trespass, a nuisance does not

23. *Re the Queen and Air Canada*, *supra* note 21 at 637.

24. RSBC 1996, c 250, s 139.

25. *Ibid* s 141(2).

26. *Lacroix v The Queen*, *supra* note 22; *Bernstein*, *supra* note 21.

27. *Didow v Alberta Power Limited*, 1988 ABCA 257 [*Didow*]; *Kelsen v Imperial Tobacco Co.*, [1957] 2 All ER 343. These cases involved permanent overhanging structures.

28. *Antrim Truck Centre Ltd. v Ontario (Transportation)*, 2013 SCC 13, [2013] 1 SCR 594 at paras 18-19; *Gichuru v York*, 2013 BCCA 203; Klar, *supra* note 4 at 913. This is technically a definition of private nuisance. There is also a separate tort known as public nuisance. Public nuisance is not relevant to this study paper.

have to involve an actual entry or intrusion by a person or thing. Usually, though not necessarily, a nuisance results from an activity taking place on other land.

Some judicial decisions in Canada have held or suggested that intermittent passage of a crane jib through airspace without the consent of the surface owner is only a nuisance, not trespass.[29]

The difference between trespass or nuisance is significant in this context, because an owner whose land is being trespassed upon has a "presumptive right" to an injunction to stop the trespassing activity, meaning that an injunction is strongly favoured as a remedy by the court if the owner seeks one.[30] In a nuisance claim, a court may be more inclined to award damages instead of granting an injunction if the degree of harm is slight, the circumstances are such that damages will serve as an adequate remedy, and the consequences of an injunction would have a disproportionately serious effect on the defendant.[31]

An injunction preventing the efficient use of a tower crane can obviously hold serious implications for the schedule and even the viability of a construction project, depending on the circumstances. A construction project may be brought to a standstill if alternatives such as use of mobile cranes are not possible or practical. Whether the consequences of an injunction outweigh the degree of interference with the landowner's use and enjoyment of property is an important consideration for the court even in a trespass claim.

29. *Kingsbridge Development Inc. v. Hanson Needler Corp.* (1990), 71 OR (2d) 636 (HC); *Didow*, *supra* note 27 at para 41. In *Didow* this was stated in an *obiter* comment. The facts of that case did not require the court to decide the point.

30. R.J. Sharpe, *Injunctions and Specific Performance,* 5th ed (Toronto: Thomson Reuters, 2017) at para 4.10. This passage in an earlier edition of Sharpe was cited with approval by the Ontario Court of Appeal in *1465152 Ontario Ltd. v. Amexon Development Inc.*, 2015 ONCA 86 at para 23. The presumptive right does not mean that a landowner whose land is trespassed upon has an absolute entitlement to an interlocutory or interim injunction pending a final decision on the merits of the case: *778938 Ontario Limited v. Annapolis Management Inc.*, 2020 NSCA 19; *Maxwell Properties Ltd. v Mosaik Property Management Ltd.*, 2017 NSCA 76.

31. A test often applied to determine whether damages may be awarded instead of an injunction is set out in *Shelfer v London Electric Lighting Co.*, [1895] Ch 287 at 322-323 (CA): 1. The injury is small; 2. A small amount of damages would be adequate compensation; 3. The damage can be estimated in money; 4. An injunction would be oppressive to the defendant. See Linden and Feldthusen, *Canadian Tort Law*, 12th ed (Toronto: LexisNexis, 2022) at 563-564.

In British Columbia, there are judicial decisions going both ways on the issue of whether the intermittent passage of a crane jib through airspace amounts to a trespass or merely a nuisance if it takes place without the consent of the surface owner or occupier. The more recent decisions have held it to be a trespass, but the characterization of any given situation may depend very much on its particular facts.

(b) Crane Overswing Characterized as Nuisance: Janda

In *Janda Group Holdings Inc. v. Concost Management Inc.*[*Janda*],[32] an oral decision delivered in 2016, some negotiations had taken place for an agreement that would confer shoring and crane operation rights to allow a crane jib to swing over the landowner's two-storey building that held commercial units rented out to tenants. The initial negotiations concerned an offer by the defendants of reciprocal shoring and crane operation rights. The landowner apparently wanted an easement granted by a previous owner that allowed users of the defendants' property to park on the landowner's property to be released as part of the consideration for agreeing to this arrangement. The defendant refused to release the parking easement, and the negotiations failed.

The defendants proceeded to operate the crane over the landowner's building with about forty to fifty feet of clearance. The landowner alleged the crane posed a danger to its tenants, their customers, and employees, and the tenants had complained. Affidavit evidence from one tenant indicated the crane swinging over the building and parking lot was perceived as creating an unsafe situation for its customers and employees. The landowner sued the defendants for trespass and applied for an interim injunction.[33]

The court hearing the application placed weight on cases from Alberta and Ontario that classified an intermittently overhanging crane as a nuisance instead of a

32. 2016 BCSC 1503.

33. An *interim* injunction is a pre-trial order that can be made to give immediate relief to the applicant and usually only for a specific, short period of time. An *interlocutory* injunction is a pre-trial order that remains in effect until the final judgment in a proceeding, unless it is rescinded or varied earlier. If an interim or interlocutory injunction is granted, the litigation often does not go any further.

trespass.[34] The court clearly leaned towards this view, but did not decide this point directly. This was evidently because the defendants conceded that they had intruded into the landowner's airspace after trying and failing to get the landowner's consent.

Instead, the *Janda* court decided the case on the basis of a well-established three-part test to determine whether an interim or interlocutory injunction should be granted, which requires the court to determine first whether the plaintiff has a case on the merits, then whether the plaintiff would incur irreparable harm if an injunction is not granted, and finally whether the balance of convenience favours the plaintiff.[35] A case on the merits existed because the defendants had conceded they had intruded into the landowner's airspace. The court found no irreparable harm, however, as it rejected the suggestion that the crane presented any danger to the plaintiff or its tenants, stating:

> I must say, I have great difficulty in this modern age, where construction cranes are all around the Lower Mainland that the suggestion would be that an unsafe crane would be erected and would put out loads outside the property they are working on. I have some difficulty understanding what danger Mr. Sketchley [a witness] and Mr. Janda are talking about.[36]

The court also concluded that the balance of convenience favoured the defendants, as the crane's jib would be in the landowner's airspace for not more than an hour in total in any day. While the court did not accept the suggestion that an injunction would shut down the project completely and cause 50 to 100 workers to lose employment, it considered that a work stoppage would occur and its effects would be "substantial."

In the result, the court concluded there was nothing to indicate that damages would not be an adequate remedy if the landowner was ultimately successful in the proceeding, and dismissed the application for an interim injunction.

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34. *Supra* note 32 at paras 22-25. The cases the *Janda* court chiefly relied upon were *Didow*, *supra* note 27 and *Kingsbridge Development Ltd. v Hanson Needler*, *supra* note 29.

35. *Supra* note 32 at para 26. The three-part test the court applied to determine whether an interim or interlocutory injunction should be granted was laid down by the Supreme Court of Canada in *RJR - MacDonald v. Attorney General of Canada,* [1994] 1 S.C.R. 311. This test does not govern the issue of whether a plaintiff is entitled to a permanent injunction in a final judgment at the end of a proceeding: *Cambie Surgeries Corporation v British Columbia (Medical Services Commission)*, 2010 BCCA 396 at para 27.

36. *Ibid* at para 29.

(c) Crane Overswing Characterized as Trespass: OSED and Witmar

Since *Janda*, the swinging of a crane jib in airspace without the consent of the landowner surface owner has been held to constitute trespass in at least two British Columbia cases. These are *OSED Howe Street Vancouver Leaseholds Inc. v. FS Property Inc.* [*OSED*][37] and *Witmar Holdings Ltd. v. Stober Construction Ltd.* [*Witmar*].[38]

Like *Janda*, *OSED* concerned an application for an interim injunction in a trespass and nuisance action to prevent the movement of a crane jib through the airspace above a commercial building with multiple tenants. Unlike *Janda*, however, it was not the unloaded forward jib but the counterjib loaded with concrete blocks weighing over 10,600 pounds passing over a fourth floor terrace that was used as recreational seating space by tenants and their employees. The counterjib projected about five and one-half feet over the property boundary at a height between 120 and 160 feet. Also unlike *Janda*, the parties started off with an agreement concerning the hours on which the crane, including its counterjib, could move through the landowner's airspace.[39] The agreement provided for these hours to be increased if the landowner agreed to the increased time in writing. Slightly less than two months after the agreement was signed, the defendant developer informed the landowner that the crane operating time was too restrictive, and it wanted the removal of all limitations. On the following day the developer began to operate the crane without regard to the specified hours. The landowner insisted on compliance with the licence agreement, and the developer refused.

The landowner started an action for trespass and nuisance against the developer and applied for an interim injunction, arguing that once a trespass is proven, an injunction should be issued as a matter of law. The court held, however, that the full three-part test that was applied in *Janda* (known as the "RJR-MacDonald" test) must be applied to determine the appropriateness of an interim or interlocutory injunction even in a trespass action.[40]

37. 2020 BCSC 1066.

38. 2023 BCSC 1378.

39. The plaintiff in *OSED* was actually the holder of a ground lease of the building that contained the terrace, and which provided retail, hotel, and office space to tenants. In keeping with the convention explained in Chapter 1, the plaintiff OSED is referred to as the "landowner" for the sake of simplicity.

40. *Supra* note 37 at paras 16-18.

The first step was to determine whether the allegations against the developer made out a case of trespass or nuisance. The court considered the Alberta and Ontario cases that were referred to in *Janda* as well as two later decisions from Nova Scotia that disagreed with those cases regarding the characterization of a swinging crane in airspace as nuisance only. The court preferred the reasoning in the Nova Scotia cases, *Maxwell Properties Ltd. v Mosaik Property Management Ltd.*[41] and *778938 Ontario Ltd. v. Annapolis Management Inc.*, which characterized these circumstances as trespass.[42] The court also referred to a decision of the Ontario Court of Appeal decided after *Janda* which reaffirmed the view that injunctive relief is strongly favoured where there has been interference with property rights.[43]

Applying the *RJR-MacDonald* 3-part test, the court concluded the first branch (whether there was a case on the merits) was satisfied because the landowner had proven a clear right to the airspace over the terrace and the developer's crane operating within it amounted to a trespass.[44] The landowner had not been under any obligation to agree to the amended terms proposed by the developer, and there was no evidence that the landowner had not considered them in good faith. This was not sufficient in itself to justify the injunction the landowner sought, however. The chambers judge stated:

> While injunctive relief is strongly favoured in a case of trespass, that relief is not absolute. This is particularly so where the relief sought is interlocutory. I am not satisfied that this is a case where an injunction ought to issue as of right. FSP [the developer] has raised a number of concerns relating to its ability to complete construction, and the need of neighbours in dense downtown areas to cooperate during the construction process. As such, I will consider the remainder of the tests in the *RJR-MacDonald* analysis.[45]

Applying the second branch of the test, the court went on to find that the landowner would suffer irreparable harm if the interim injunction was not granted to restrain the unlimited operation of the crane in the airspace above the terrace, because access to the terrace by the landowner's employees was needed for maintenance of

41. *Supra*, note 30.
42. *Supra*, note 30.
43. This was *1465152 Ontario Ltd. v. Amexon Development Inc.*, *supra* note 30.
44. *Supra* note 37 at para 26.
45. *Ibid* at para 30.

planters, the tenants' leases accorded them unrestricted daytime use of the terrace, and if they were inhibited in using it because of the counterweight swinging overhead, it would damage the reputation of the building and lessen the chances of the landowner receiving a LEED platinum designation that the landowner was seeking.

The landowner's interest in pursuing the LEED Platinum designation was legitimate and its tenants had a legitimate apprehension of hazard in being under a counterweight weighing 5.3 tons. The court noted as well that the developer's offer to stop the crane's movement when the landowner's tenants wanted to be on the terrace was unsatisfactory as a solution, because it meant in effect that the landowner would have to seek permission to use its own property.

The court proceeded to apply the third branch of the test, namely whether the balance of convenience favoured granting the interim injunction. The developer presented evidence of increased cost unless crane operation was extended. Overtime required because of inability to use the crane for part of the day would add $1.5 million in cost. Additional costs of $68,000 would be incurred for each month the project was prolonged as a result of limited hours of crane operation.

The court considered that the harm to the landowner's interests could not be fully compensated in damages, while the harm to the developer was economic and was compensable. It was the developer who had acted to alter the balance of the relationship between the parties, which on the basis of earlier case law was a factor favouring the opposing party. OSED had given up the use of its terrace for eight hours each weekday and one day on weekends, retaining "a modest use of its terrace space for its tenants."[46] Observing that "there is no perfect solution to construction in a densely populated urban environment like downtown Vancouver," the judge described the licence agreement as "a reasonable balance between the property interests of OSED and the interest of FSP in completing its construction."[47]

The court's conclusion was that the balance of convenience favoured granting an interim injunction against operating the crane outside of the hours covered by the licence agreement.

The reasoning in *OSED* was followed in *Witmar*, where a developer installed a tower crane that could overswing a neighbouring residential building by 20 metres and

46. *Ibid* at paras 54 and 55.

47. *Ibid* at para 55.

operated it without the consent of the neighbouring landowner when negotiations for an agreement to allow access to its airspace failed.[48] The residential building had a rooftop terrace and pergola that was used for recreation by tenants and by the landowner for maintenance. The landowner's reason for rejecting the use of its airspace was that any encroachment by the swinging crane jib would cause apprehension on the part of tenants living underneath it and be disruptive in their use and enjoyment of the building. Approximately a year before the events in *Witmar* took place, a tower crane in the same city had collapsed while being dismantled, resulting in five fatalities.[49]

The landowner sued the developer in trespass and nuisance, and applied for an interim injunction with respect to the claim in trespass. The parties agreed that entry into airspace of adjoining property by crane is appropriately characterized as trespass in BC. As in *OSED*, the court held that the operation of the crane with its ability to swing freely through the airspace over the landowner's building amounted to trespass, and irreparable harm would occur if this was not restrained because it interfered with the use of recreational space by tenants and employees of the landowner. This could not be compensated by damages.

The developer raised arguments around the significant financial loss to itself, its employees and other actors in its project. It also pointed to the inconvenience to purchasers of pre-bought units in its development. Financial loss could be magnified if pre-buyers cancelled their contracts of purchase and sale, especially in light of increased interest rates and changing financial climate. The court dismissed these arguments with the statement that the developer had brought these costs onto itself by its unilateral action in building the crane and operating it without securing an agreement.

In the court's view, the balance of convenience favoured the landowner because the harm it would incur, namely loss of a recreational space, could not be compensated in damages. The harm predicted by the developer, on the other hand, was economic.

48. *Supra* note 38 at para 21.

49. See D. Potenteau, "5 dead in Kelowna, B.C., crane collapse, police say" Global News, 13 July 2021, online: <https://globalnews.ca/news/8024054/kelowna-crane-collapse-update/>.

The developer had acted to alter the balance of relationship between it and the landowner, which strongly favoured the landowner.

The developer addressed arguments to the public interest, which is one of the factors British Columbia courts take into account in assessing the balance of convenience between the parties in an interim or interlocutory injunction application. The developer argued that the public interest was reflected in the employment its building project generated as well as other economic benefits flowing from it. The developer also argued that the public interest would be served by protecting the position of pre-buyers of the units by not disrupting the project.

The court's response to these submissions was that the public interest lay in encouraging resolution of access disputes "by negotiation and agreement rather than a trespass now–perfect permission later (only if required by the courts to do so) strategy."[50]

Finding that the balance of convenience was in favour of the landowner, the court granted a time-limited interim injunction restraining the developer from trespassing in the airspace over the landowner's property for four months with leave to the landowner to seek an extension. The court imposed the time limit in order to encourage the parties to reach an agreement in that interval of time.

E. Obtaining Access Rights by Agreement

1. Easements and Licences

A landowner's consent to access for shoring or operating a tower crane in the landowner's airspace is usually embodied in an agreement granting an easement to the developer. Alternatively, access may be granted by way of a licence. There are important differences in the effect of these two methods of granting access rights.

An easement is a right attached to ownership of land (the "dominant tenement") to access and use the land ("servient tenement") of another owner in a particular manner.[51] It creates an interest in the "servient tenement" that may be registered in the

50. *Ibid* at para 50.

51. A H Oosterhoff and W B Rayner, *Anger and Honsberger: Law of Real Property*, 2nd ed (Toronto: Canada Law Book, 1985), vol. 2 at 925.

land title office against the title to that land, although in the case of temporary construction-related easements, this is not invariably done. Registrability of an easement allows the easement to be enforceable against a subsequent owner of the servient tenement. If the easement is not registered, it will not affect a subsequent owner of the servient tenement.

An easement may be permanent or limited in time, depending on the terms on which it was granted. While an easement is in effect, it cannot be revoked unilaterally by the owner of the servient tenement. The owner of the dominant tenement must release it in order for it to be terminated. If the easement has been registered in the Land Title Office, the owner of the dominant tenement must cause the registration to be discharged. Otherwise, the easement will continue to show on the title to the servient tenement even though it may have expired according to its terms.

A licence is a permission to enter land. It makes what would otherwise be a trespass a lawful entry. It is a personal right, enforceable only between the immediate parties. It does not confer an interest in land and therefore is not registrable against the licensor's title. As such, it will not bind a successor in title of the licensor. A licence may be revoked on reasonable notice, unless it is granted under a contract that expressly or impliedly indicates the parties intended otherwise.[52] Obviously, a licence is generally less advantageous to developers than an easement and would only be used when an easement is not obtainable for some reason.

2. Main terms typically covered by crane and shoring easements

Agreements granting crane and shoring easements will identify the dominant and servient tenements by their legal descriptions and specify how long the easement is to be in effect. This may be a fixed period of time or specified by reference to events. For example, an agreement might state that the easement terminates 3 years from the date of signature by the parties or the date on which an occupancy permit for the building project is issued, whichever is earlier.

52. *Winter Garden Theatre Ltd. v Millennium Productions Ltd.*, [1948] AC 173 (HL). A further exception to revocability is a licence to enter that is coupled with a grant of an interest in the land, such as a right to extract sand and gravel. A licence of this kind is irrevocable while the interest in land remains in effect.

The agreement will contain a description of the "works" the developer intends to install under the terms of the easement. For example, works for shoring the excavation on or near the boundary between the dominant and servient tenements and underpinning supports on the servient tenement. The terms may authorize removal of trees and other vegetation on or near the boundary on the servient tenement side during construction and require restoration afterwards.

The agreement will likely have a term concerning the disposition of anchor rods, underpinning, and other aspects of the works after the easement comes to an end. This may allow the developer to leave anchor rods and underpinning in place after the easement has terminated.

The terms respecting tower crane use will give the developer the right to enter and use the servient tenement to move the jib of a construction crane over the servient tenement at a specified minimum height above any structure on the servient lands. They may contain various restrictions to address safety concerns of the landowner. For example, they may specify whether a load on the crane may pass over the servient tenement at any time. They might state that the jib will not be left idle deliberately in the airspace above the servient tenement, but they will stipulate that the jib may be left unsecured when not in use in order to be able to "weathervane" in high wind conditions, as this is imperative for the stability of the crane and is also a legal requirement.[53]

The agreement will contain the essential term that the easements will "run with the land" so as to bind successors in title of the parties. There will likely be a clause requiring each of the parties to obtain the written agreement of a purchaser or transferee of their respective properties to perform all their obligations under the easement agreement before a sale or transfer takes place. The agreement should provide for continuation of the easement on all subdivided parcels following any subdivision or stratification of either tenement that takes place during the term of the easement.

The agreement should provide that the landowner and developer are bound personally only while they remain owners of the dominant and servient tenements. This limitation of personal liability is very important for the protection of the landowner (grantor of the easement) especially, because if a subsequent owner repudiates the

53. Section 14.85(2) of the *Occupational Health and Safety Regulation*, BC Reg 296/97 requires that a tower crane must be able to slew (rotate in a horizontal plane) 360 degrees at all times unless otherwise specified by the crane manufacturer.

easement and refuses to grant the access that the easement calls for, the original grantor could be liable to the developer for breach of contract even though no longer having possession of the servient tenement.

In return for granting the easement, the landowner would typically want the agreement to include a clause requiring the developer to indemnify the landowner for any damage or loss incurred as a result of the exercise by the developer of rights conferred under the easement. There may be additional terms limiting the obligation to indemnify to direct damage and loss, excluding liability for consequential economic losses such as loss of profits or business opportunity.

Insurance is an important matter that would usually be addressed. There would typically be a requirement for the developer to obtain liability coverage of at least a specified amount (e.g., $10 million) and maintain the coverage while the easement is in effect or until another specified event or point in time. The policy required might be of the standard commercial general liability (CGL) type or a "wrap-up" liability policy covering all operators and personnel involved in the building project. The agreement may also require that the owner of the servient tenement be named as an additional insured under the developer's liability policy.

The responsibilities of the developer's project engineer regarding matters of concern to the landowner will be spelled out. These would include supervising the installation and use of tower cranes. They will also include monitoring the excavation and shoring operations, including their effects on the stability of the soil and structures on the servient tenement. The agreement will authorize entry into the servient land of personnel working for or with the developer for the purpose of monitoring subsidence or movement of structures due to the excavation. It is in the interest of both parties that this be done.

The agreement may have terms providing for the landowner hiring their own engineer and other experts and doing their own monitoring of any movement of buildings and soil.

Terms of a kind that are standard in nearly all commercial contracts will also be present. These include severability of individual terms, how notices are to be given between the parties, an undertaking to execute any further documents or other acts needed to give effect to the agreement, and an entire agreement clause to exclude

any oral exchanges or extraneous documents from being interpreted as forming part of the agreement between the parties.[54]

The monetary compensation paid by the developer to the landowner for the easement is seldom set out in the agreement itself. Instead, the agreement will be expressed to be "in consideration of the mutual covenants contained herein and other good and valuable consideration" or will have similar wording to the same effect. This is to prevent the amount actually paid from influencing the course of negotiations with other landowners, which will often be taking place simultaneously.

It is common for the developer to pay the reasonable legal fees of landowners to obtain independent legal advice on easement agreements. Depending on the circumstances, the developer sometimes pays the cost to the landowner of engaging other independent consultants, such as a geotechnical engineer, to examine the developer's shoring design and advise the landowner regarding it.

F. Easements and Licences Granted by a Strata Corporation

Before a strata corporation can grant an easement giving access to its common property for shoring or crane operation purposes, it must comply with section 80(2) of the *Strata Property Act*.[55] As an easement affecting the area in a strata plan outside strata lots, it is a disposition of common property. Section 80(2) requires passage of a ¾ vote of the strata lot owners to approve a disposition of common property. This means that 75 per cent of the eligible voters present and voting at an annual or special general meeting must vote in favour of a resolution to grant the easement.

Developers must take into account the full timeline needed to negotiate the terms for access with the strata corporation and allow it to call a general meeting and pass

54. A governing law clause specifying that the agreement is to be governed and construed by the law of British Columbia may also appear, as in Translink's standard crane overswing agreement, although there is less need of a governing law clause in a contract granting an easement because such a contract will almost universally be interpreted as being governed by the law of the place where the land is situated.

55. SBC 1998, c 43.

a resolution with a ¾ vote in order to make sure that access arrangements will be in place when they are needed in the project schedule.

It can be difficult to secure a ¾ vote. The high threshold for approval means that a minority of strata lot owners resistant to the proposed easement may block the resolution. This can sometimes be accomplished by a very small but motivated minority, because the resolution may not attract a high turnout of eligible voters. Some owners may see resistance to the proposed easement as a means of preventing development on adjacent property. Failure of a resolution approving an easement generally will not prevent development entirely, although the developer may have to employ more cumbersome, expensive, and possibly disruptive strategies like pile-driving if the access is not granted.

Sometimes strata corporations are asked for a licence granting access rather than an easement on the assumption that section 80(2) does not apply because a licence is a mere permission and not a "disposition of common property." The Civil Resolution Tribunal held in *Nass v The Owners, Strata Plan BCS 2025* that section 80(2) does not apply to a licence, but with only very cursory analysis of the point.[56] It is not clear that a licence could never amount to a disposition of common property.[57] In any event, the revocability of a licence and the inability to register a licence against title so as to bind a subsequent owner mean that rights of access granted by licence are less secure than those granted by easement and may not persist for the entire time they are needed.

56. 2018 BCCRT 243 at paras 80-90.

57. The Civil Resolution Tribunal in *Nass* did not consider the broadly extended definition of "dispose" in the *Interpretation Act*, RSBC 1996, c 377, s 29, which is "to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release and agree to do any of these things." See J.L. Neville, "Update on Crane Swing Agreements – What a Strata Council Needs to Know," CHOA Journal, Spring 2025, 5 at 6. Arguably, a licence is a "grant" of permission to enter, and it could arguably amount to a "release" of liability for trespass. Furthermore, the installation of shoring works can involve removal of soil, and there is a potential for disturbance of the subsurface by insertion and grouting of anchor rods. A licence that is accompanied by permission to remove substances from the land (technically a *profit à prendre*) is irrevocable and much more in the vein of a "disposition" of the land than even an easement for entry and transit.

G. Role of Local Governments

Municipal building authorities require developers to adhere to all valid safety requirements for operation of cranes and excavations, but do not regulate access to private land in connection with them. The powers of municipal building authorities do not extend to overriding the need for the consent of private landowners or occupiers to access to their property by developers and their contractors.

The policies of local governments vary regarding willingness to approve plans and issue building permits in the absence of firm arrangements being in place for necessary access to adjacent property. Some require evidence of agreements for access or encroachment. Others will accept written assurances by the applicant for a building permit that negotiations for access are underway. BCLI was informed that in practice, such assurances may be accepted even if the building authority officially requires an executed agreement. Local governments outside major urban areas may not have an established policy on what, if anything, an applicant for a building permit must submit regarding access rights for its shoring plan or crane use, and deal instead with each case individually.

Suggestions were raised in our consultations that easement agreements would be made more easily and on a more level basis if municipalities insisted that applicants for building permits conclude agreements with the affected landowners for any access and encroachments needed for their projects as a precondition to issuing a building permit. This reflects the standpoint of individual homeowners, small strata corporations and housing co-operatives lacking the resources to initiate court proceedings against a developer who might proceed unilaterally in *Witmar*-like fashion after offering minimal compensation, or none at all, for the access rights.

Developers maintain that holding up a building permit would create a point of leverage giving additional encouragement to holdout landowners to make extravagant monetary demands. They point to the possibility of delay in being able to obtain a building permit forcing a close to pre-marketing of strata lots and leasehold units in multi-unit development projects. This, they say, could lead directly to loss of financing for projects, as lender commitments are often conditional on achieving a specified volume of pre-construction sales of units.[58]

58. Early marketing of strata lots, leasehold units, and cooperative interests ["units"] before issuance of a building permit is permitted under Policy Statement 5 issued by the Superintendent of

Municipal governments are in an ambiguous position vis-à-vis landowners and developers. On one hand, their interest lies in facilitating the completion of building projects that have undergone the development approval process by minimizing any remaining roadblocks. These projects add to the municipal tax base. On the other, they are accountable to taxpayers disturbed in the enjoyment of their property by construction in their neighbourhoods.

Municipalities and other local governments prefer to stay out of negotiations and disputes between developers and neighbouring landowners concerning access. Policies they set regarding communications and information exchange between industry and residents may nevertheless influence the tenor of interactions at the neighbourhood level while redevelopment is going on.

Real Estate under s 10(3) of the *Real Estate Development and Marketing Act* [REDMA], SBC 2004, c 41 for up to 12 months after the filing by the developer of a disclosure statement, if a zoning bylaw authorizing the units has received third reading. Since February 2025, if the proposed development involves construction of 100 or more residential development units, early marketing before a building permit is issued can persist for up to 18 months after the filing of the disclosure statement under the REDMA Early Marketing Period Pilot Program for Large Developments, subject to the payment of an additional fee. See online: https://www.bcfsa.ca/industry-resources/real-estate-developer-resources/redma-early-marketing-period-pilot-program-large-developments. Once the 12- or 18-month early marketing period has elapsed, the general provisions of Part 2 of REDMA would apply to force sales of units to cease until specified approvals are obtained, which in some cases include the issuance of a building permit.

Chapter 4. Exploring Potential Solutions

A. Potential Solutions Seen as a Continuum

Approaches to dealing with the issue of access to adjacent or nearby land for construction-related purposes like shoring, underpinning and tower crane operation may be seen in light of a continuum of increasing public policy and legislative intervention. At one extreme are approaches consisting purely of private ordering, without any governmental involvement.[59] These include informal voluntary dispute resolution. More formal voluntary dispute resolution with a professional mediator and a mediation agreement, arbitration under a statutory framework like the BC *Arbitration Act*, mandatory dispute resolution, and judicial resolution based on existing common law and equitable principles lie in the middle range of the continuum. Legislative change to the law of property and tort to confer new rights and modify existing ones lies at the opposite extreme. All these alternatives are discussed in this chapter in terms of a continuum in that sense.

The continuum based on an increasing level of governmental and legislative intervention is only a way of presenting alternatives in a logical order. The continuum should not be mistaken for an order of preference. In some of its projects, BCLI works with expert committees to generate law reform reports containing specific recommendations for changes in law, but in a study paper such as this, no position is taken on the desirability of any of the approaches under discussion relative to others. They are presented in this chapter only as alternatives that could be employed individually and in combination in an effort to avoid or reduce the likelihood of stalled negotiations and standoffs.

59. The term "private ordering" refers to informal regulation of an area of activity by norms of behaviour developed by private parties as opposed to rules imposed by laws of a state. It can be applied to a continuum of scenarios with varying levels of state involvement short of full state regulation: S.L. Schwarcz, "Private Ordering" (2002), 97 Nw U L Rev 319 at 323-324.

B. Private Ordering: Seeking Solutions Through Good Practice

1. Public Education Strategy

Raising the general level of public knowledge about common procedures, techniques, and safety regulation in construction of multi-storey buildings could help to reduce the level of concern amongst the public about crane safety in particular. It could also raise awareness on the part of owners of property surrounding a building site that they have a large measure of self-interest in ensuring that necessary shoring and underpinning is carried out in the most effective and efficient manner with a minimum of disruption.

A concerted informational initiative might be conducted for this purpose by municipalities, the construction and property development sector including the construction trades, and regulatory and licensing bodies including WorkSafeBC and BC Crane Safety acting in conjunction.

2. Early Engagement

Practice varies considerably among developers regarding the stage at which neighbouring landowners are initially contacted about rights of access. In our consultations, advisers to landowners stressed the importance of early engagement in avoiding later delays and resistant stances. We were told that if initial contact is made about securing access only after work has started or is about to start, homeowners and strata councils may take what they perceive to be the use of urgency as a pressure tactic as an affront.

Early attention by the developer to securing access to surrounding properties that would be affected by shoring plans and crane operation would seem key to avoiding delays at later stages.

Developers note a practical constraint on commencing negotiations at an early point. There are very many factors involved in a decision to proceed with or withdraw from a building project. If there will be a significant cost to obtain easements, it does not make sense to incur the cost before other obstacles to proceeding with a project have been removed.

Nevertheless, engagement with surrounding landowners at as early a stage as is practicable to make them aware of what access might entail and begin building a rapport within the immediate neighbourhood would be an approach conducive to securing agreements.

3. Informational Initiatives by Developers

(a) Community briefings

In our consultations, informants suggested that negotiations for needed easements might go more smoothly if developers explained the purpose of crane and shoring easements in the overall context of the building project in community briefings for the immediate neighbourhood on the project. This would serve the same purpose as the broader public education strategy described in the previous section, but at the neighbourhood level. Community briefing sessions would allow landowners and other residents to raise concerns and objections about safety and precautions to prevent cave-ins and subsidence and allow them to be addressed at an early stage.

(b) Engaging with strata lot owners as well as strata councils

Another suggestion raised in our consultations was that developers should not limit their interaction with strata corporations to dealings with strata councils. Advisers to strata corporations considered it would be useful for representatives of the developer attend an annual or special general meeting to give an informational presentation to the strata lot owners and answer questions before a resolution on a proposed easement is presented to the owners for a vote. Ideally, the presentation to the owners and question and answer session should take place at an informational meeting organized in conjunction with the strata council before the formal resolution is presented and voted on at a special or annual general meeting. This would provide an opportunity to address objections and concerns of individual owners that could reduce the chances of an affirmative ¾ vote if unanswered.

4. Best Practices Code or Protocol

Another idea suggested for fostering an improved climate for developer-neighbour relations is for the development industry to create a code of good practice or protocol by drawing upon the industry's experience of successful outcomes in negotiating

easements. A code of this kind would have greater credibility and possibly greater uptake if it were produced in collaboration with bodies representing landowner interests.

The code might provide a sample easement agreement. With use, this could contribute to greater standardization of easement terms, possibly making it easier and faster to negotiate agreements.

The code should discourage making only nominal or no offers of compensation for easements because landowners will be motivated to reject these out of hand. Initial offers made at an unrealistically low level will prolong negotiations and start them off in a climate of distrust. Agreements on compensation might be reached sooner if an initial offer has an objective basis. The code should contain a list of objective factors influencing a fair compensation for granting an easement over the landowner's property. Some of these factors would be:

- the length of time access is required,
- the depth of encroachment along boundaries
- whether underpinning is required
- whether trees and vegetation have to be removed
- whether a tower crane will be operating continuously over the neighbouring property or whether its use can be restricted to certain blocks of time.

C. Solutions Involving Alternate Dispute Resolution

1. Voluntary Alternate Dispute Resolution

Alternate dispute resolution or "ADR" is a term that comprises a variety of processes that are alternatives to court litigation, including mediation, arbitration and mediation-arbitration.

Mediation consists of a negotiation facilitated by a neutral mediator who assists the parties to resolve one or more issues in dispute between them, but who makes no decision concerning the issues.

In arbitration, a neutral decision-maker or a panel of decision-makers selected by the parties hears evidence and argument by the parties and makes a decision binding on them. While arbitration is private in the sense that arbitrators may be chosen by the parties, the parties decide the issues to be submitted to the process, and both the process and its results can take place in private, it is governed by a statutory framework. The *Arbitration Act*[60] of British Columbia provides for matters such as requirements of independence and impartiality of arbitrators, procedural fairness, and the appointment of arbitrators in default of appointment by the parties. It also governs the procedural powers of arbitrators, which include ordering parties to produce documents and giving other procedural directions. Among the most important provisions in the Act is the "arbitration stay." A court is required, on application by a party to an arbitration agreement (also called a "submission"), to stay a legal proceeding that has been commenced in respect of a matter covered by the arbitration agreement.[61]

Mediation-arbitration is a hybrid process that commences as a mediation, but continues as an arbitration if the mediation does not result in a settlement of the dispute. In contrast to mediation, which may or may not conclude in a settlement, mediation-arbitration leads to a definite, legally binding result.

Voluntary ADR operates on the basis of consent by the parties to jointly submit the matter in dispute to the process. The option of participating in a voluntary ADR process is always available to the parties in a construction-related access dispute. Many private-sector ADR services exist, as do roster organizations that can assist parties in finding a mediator or arbitrator who is knowledgeable with regard to construction-related disputes.

Voluntary ADR would require no legislative change or other governmental intervention to be applied to construction-related access disputes. The number of cases in which a developer and landowner engaged in failing negotiations would be motivated to resort to a voluntary ADR process would likely be small, however. It would involve payment of fees to the mediator or arbitrator which neither party will want

60. SBC 2020, c 2. The Vancouver International Arbitration Centre (VanIAC) is designated as the "designated appointing authority" under the Act to appoint arbitrators if parties to an arbitration agreement fail to do so once arbitration has been initiated by a party to the agreement. See s 67 of the Act and BC Reg 160/20, s 2.

61. SBC 2020, c 2, s 7.

to incur unnecessarily, even on the usual shared basis. There may still be some scenarios in which the parties may be motivated to take part in voluntary ADR out of self-interest.

If negotiations between the developer and landowner are not leading anywhere, proceeding without an easement is not feasible or is unappealing for technical reasons and cost, and the developer still wants to proceed with the project, then a developer may see ADR as preferable to abandoning the project.

A landowner resisting the developer's terms would have little incentive to participate unless the circumstances are such as to lead the landowner to ADR out of self-interest. That may be the case if they perceive they lack bargaining power and will face having to put up with pile-driving, no contractual commitment from the developer to monitor subsidence of their land and settling or other damage to their buildings, and no compensation if they hold out on granting access. They may then be inclined to participate in an ADR process that may lead to a settlement with compensation that is better than what the developer is prepared to offer at outset.

ADR is usually seen as a much faster means of dispute resolution than litigation, but its speed depends on the nature of the dispute, the volume of evidence, and the pace displayed by the parties and the decision-makers. Avoidance of delay in a voluntary ADR process to resolve an access dispute would be important, because it would be counter-productive for the process to hold up a construction schedule to the same or greater degree than the stalling negotiations. In order to generate a timely and decisive result, the terms of a mediation-arbitration submission could call for a cut-off of mediation by a specified date if that phase does not result in a settlement, followed by an arbitration decision that must be rendered within another specified, agreed-upon interval.

2. Mandatory Arbitration or Mediation-Arbitration

(a) Generally

Mandatory arbitration imposed by legislation, with or without mediation beforehand, is a potential solution requiring a distinct public policy choice.

Unlike voluntary ADR that would be based on the consent of the developer and landowner embodied in a submission agreement, mandatory arbitration or mediation-

arbitration would have to be accompanied by legislative change to confer power on the tribunal to grant a right of entry to land and airspace neighbouring a construction site, authorizing what would otherwise be a trespass. While this would be a significant inroad into the rights of landowners, it would resemble statutory rights of entry that already exist or that may be conferred by a tribunal in other industrial contexts, notably mining, oil and gas production, and land surveying.[62]

Mandatory ADR in default of agreement would overcome any advantage that can be had from stalling and non-responsiveness as tactics to obstruct or hold out for excessive compensation. It would also subject the terms offered by developers to landowners to scrutiny by an impartial body on the basis of fairness and adequacy. The legitimate concerns of both parties would be taken into account by an impartial tribunal.

Expertise in resolving access disputes of this kind would build up in a tribunal that regularly heard construction-related disputes between developers and landowners. Over time, its decisions on monetary compensation would tend to set an average benchmark, which in turn could isolate and discourage both excessive monetary demands and exploitative "lowball" offers. Voluntary ADR would be unlikely to work as well in this respect, because it is an entirely private process. Tribunal decisions including the facts, reasons for decision, and amounts of compensation awarded, could be made publicly available even if the parties are not identified in the published decisions.

A specialized arbitration tribunal could be created to deal with construction-related access disputes. Alternatively, jurisdiction could be given to an existing tribunal. The provincial government would be presumably reluctant to form a new tribunal with a relatively narrow jurisdictional mandate if the possibility exists that an existing one could fulfil the mandate.

Among the existing provincial tribunals, only the Surface Rights Board has been specifically created to adjudicate disputes between a landowner and an industrial

62. See *Mineral Tenure Act*, RSBC 1996, c 292, ss 14 and 19; *Petroleum and Natural Gas Act,* RSBC 1996, c 361, s 159(1); *Land Surveyors Act*, RSBC 1996, c 248, s 59.1. In addition, an applicant for a pipeline permit who has submitted a preliminary plan to the BC Energy Regulator has a statutory right of entry onto private land for the purpose of surveying the route of the proposed pipeline, if the applicant has also provided a prescribed security deposit to the regulator to compensate the landowner for damage or disturbance caused by the entry: *Energy Resource Activities Act*, SBC 2008, c 36, s 23(2).

operator that relate to use of privately owned land. For this reason, the Surface Rights Board is the existing provincial tribunal exercising jurisdiction and powers that most closely resemble those that a decision-making body tribunal under a mandatory ADR scheme for construction-related access disputes would need. A brief profile of the Surface Rights Board follows.

(b) The Surface Rights Board: jurisdiction, powers, and procedure

The Surface Rights Board consists of a Chair, Vice-Chair, and four additional members.[63] There is one staff member, a Deputy Registrar who also serves the Building Code Appeal Board and the Safety Standards Appeal Board.[64]

The Surface Rights Board operates under Part 17 of the *Petroleum and Natural Gas Act*[65] and several other Acts that provide for issuance of natural resource tenures and permits for extraction of substances from land in which the Crown holds mineral rights, including tracts of land in which the surface is privately owned.[66] If the surface owner and the holder of the tenure or permit (the "operator") are unable to reach agreement on a surface lease, the Board is empowered to grant a right of entry to private land on terms to allow the operator to conduct exploration, resource development, and production operations.[67] Those terms include the amount of compensation payable to the surface owner for access to the surface for these purposes.[68]

In addition to granting rights of entry on terms, the Board is empowered to resolve disputes between the operator and the surface owner about compliance with the

63. Surface Rights Board, *Annual Report 2024/25*, online: <http://www.surfacerightsboard.bc.ca/Documents/AnnualReports/AnnualReport2024-25.pdf> at 3.

64. *Ibid* at 5.

65. *Supra*, note 62.

66. Other enactments empowering the Surface Rights Board to exercise authority similar to the powers the Board exercises under the *Petroleum and Natural Gas Act* are the *Petroleum and Natural Gas (Vancouver Island Railway Lands) Act*, RSBC 1996, c 362, the *Mineral Tenure Act*, *supra*, note 62, the *Geothermal Resources Act*, RSBC 1996, c 171, s 1(2), the *Coal Act*, SBC 2004, c 15, and the *Mining Right of Way Act*, RSBC 1996, c 294.

67. *Petroleum and Natural Gas Act*, *supra*, note 62, s 159(1)(a).

68. *Ibid*, note 62, s 159(4).

terms of a surface lease.[69] The Board can also determine compensation for damage to the surface or adjacent land caused by the permit holder's authorized operations.[70]

When a surface owner, owner of adjacent land, or an operator applies to the Surface Rights Board for an order to resolve a disagreement within the Board's jurisdiction, the Board first attempts to resolve the matter through mediation conducted by telephone or videoconference.[71] If the mediation does not resolve the dispute, the Board member conducting the mediation may make an order granting a right of entry, require a security deposit from the operator to ensure payment of compensation ultimately determined to be payable and refer the matter to arbitration, or the member may simply refer the entire matter to arbitration without making orders.[72]

If the matter is referred to arbitration, a case conference will be held by telephone or videoconference to finalize the issues and give procedural directions, including deadlines for production of evidence, lists of witnesses and expert reports. The date of the arbitration hearing will also be set.

The arbitration hearing may take place by videoconference or by written submissions, although the Board has the power to summon witnesses and hear oral evidence on oath.

The Board is not bound by rules of evidence and can accept any evidence relevant to a matter in issue. The Board issues a written decision as soon as possible following the hearing. Decisions of the Board are available to the public. An order of the Board granting a right of entry is registrable against the title to the land in question.

The Board has the power to award costs, or in other words order that one party to an application pay the costs of the other party.[73] Costs awards are based on the expenses incurred by a party, including reasonable legal and expert witness fees and

69. *Ibid*, s 164.

70. *Ibid*, s. 163(1)(b).

71. Surface Rights Board Information Sheet #1, online: <http://www.surfacerightsboard.bc.ca/ Documents/InformationSheets/InfoSheet1.pdf>.

72. *Ibid.*

73. *Petroleum and Natural Gas Act*, *supra*, note 62, s 170(1)(a). See also Surface Rights Board Information Sheet #8, online: <http://www.surfacerightsboard.bc.ca/Documents/InformationSheets/InfoSheet8.pdf

disbursements, plus an amount on account of the reasonable value of time spent by a party in connection with the application and the process before the Board.[74]

In applications concerning rights of entry and compensation, the surface owner is normally awarded costs of the mediation process.[75] If the matter proceeds to arbitration, the Board awards costs in its discretion.[76]

The Board may order an operator to pay advance costs to the surface owner to cover the anticipated expenses of the surface owner in connection with the application in question.[77] As a matter of practice, the Board requires that a surface owner seeking payment of advance costs must justify the amount requested and demonstrate inability to take part in the process unless they are paid beforehand.[78]

Orders of the Surface Rights Board are enforceable by filing a copy with the Supreme Court or Provincial Court, after which they may be enforced like a court order.[79]

(c) Extension of Surface Rights Board's mandate to construction access disputes

Extending the jurisdiction of the Surface Rights Board to resolve an inability on the part of developers and a neighbouring landowner to come to an agreement on access would avoid the need to create a new provincial tribunal. The Board has relevant expertise and experience in mediating and adjudicating disputes between private landowners and industrial operators regarding issues of access and compensation.

74. *Petroleum and Natural Gas Act*, *supra*, note 65, s 168 (definition of "actual costs").

75. Rule 4.3(2) of the Board states that the party who applies for a right of entry shall pay the landowner's reasonable costs unless the Board orders otherwise. See Surface Rights Board Information Sheet #8, online: http://www.surfacerightsboard.bc.ca/Documents/Information-Sheets/InfoSheet8.pdf>.

76. Surface Rights Board Information Sheet #8, *supra*, note 75.

77. *Petroleum and Natural Gas Act*, *supra*, note 62, s 169(1).

78. Surface Rights Board Rule 4.3(3). See also Surface Rights Board Information Sheet #8, *supra*, note 75.

79. *Petroleum and Natural Gas Act*, *supra* note 62, ss 174(1) (right of entry enforceable like a writ of possession issued by a court) and 175.

There is one important difference between what the Surface Rights Board does now and what it would be doing in addition if it were given jurisdiction to grant rights of entry to developers and set the terms for their exercise when the rights are necessary and agreement on access has not been reached with landowners. When oil and gas operators apply for rights of entry to the Board, they already have a legal entitlement to extract substances from the subsurface of private land. By contrast, a developer would have no right of access to neighbouring land apart from agreement with the landowner unless and until the Board granted one.

In other aspects, the Board's extended mandate would be similar to the existing one, namely to grant rights of entry to private land for specific industrial purposes and to set the amount of compensation and other terms on which a right of entry may be exercised.[80]

Legislation giving the Surface Rights Board this extended mandate could take the form of a self-standing enactment, or it could be contained in an amendment to the *Property Law Act* or another existing statute dealing with land use. Much of the procedural framework of Part 17 of the *Petroleum and Natural Gas Act* could be made applicable to the resolution of construction-related access disputes by the Surface Rights Board, as is the case under other Acts conferring jurisdiction on the Board.

The Board may need increased resources to take on an additional caseload. The size of the Board may need to be enlarged to ensure that some members at any given time have expertise in geotechnical engineering and the construction of single- and multiple-occupancy buildings. Nevertheless, it is an existing provincial tribunal that fills a role in the legal system similar to one that a decision-making body under a mandatory ADR scheme for construction-related access disputes would have. For these reasons, extending the jurisdiction of the Surface Rights Board would likely be preferable from a provincial government standpoint to establishing a new tribunal.

80. The Surface Rights Board's present jurisdiction under ss 163(1) and (2) of the *Petroleum and Natural Gas Act*, *supra* note 62 to mediate and arbitrate disputes about damage to land or other loss incurred by landowners and occupants as a result of the exercise of a right of entry granted by the Board should probably not be extended to construction-related disputes. Damage claims arising from construction activity can involve many parties due to extensive subcontracting typical in the construction sector. Courts are better equipped in terms of resources and procedure to deal with multi-party structural and other property damage claims of the kind that may arise from construction activity.

D. Court-Ordered Access to Neighbouring Land and Airspace

Enabling legislation could be passed to confer jurisdiction on the BC Supreme Court to order access to land and airspace in the event of failure of the parties to reach agreement on access if the court, weighing the rights and interests of the developer and the neighbouring owner, concludes that access can be granted on terms that protect both. This would be similar in effect to mandatory arbitration, but would involve an application to the Supreme Court for an order granting access and setting terms.

Precedents for court-ordered access to neighbouring land are found in New Zealand, five Australian states and one Australian territory.[81] These jurisdictions have legislation that empowers a court to order access to land when it is necessary for activities on adjacent or adjoining land that are variously described in the enactments, but relate generally to construction, demolition, repair, maintenance, alteration, utility servicing, and similar purposes.[82]

While the details vary between the jurisdictions, the Australian and New Zealand legislation follows a similar pattern. Under these enactments, an application for an order granting access ("statutory right of user") may be made by or on behalf of the owner of the land where the work is to be carried out. The application for a statutory right of user is made on notice to the owner of the land where access is needed. Before making an order, the court must be satisfied that all reasonable efforts have been made to obtain access by agreement or, in some of the jurisdictions, that the access has been unreasonably refused. The court must also be satisfied the owner of the adjacent land can be adequately compensated. Terms and conditions can be imposed on the access rights granted, including ones related to duration of the access and the payment of compensation. Depending on the jurisdiction, the order may take the form of imposition of an easement or simply authorize the access required.

81. The Australian jurisdictions are New South Wales, Queensland, South Australia, Western Australia, Northern Territory, and Tasmania.

82. See the *Property Law Act 2007* (NZ), s 319; *Access to Neighbouring Land Act 2000* (NSW), 2000 No. 2; *Property Law Act 1974* (Qld), 1974 No. 76, s 180; *Planning, Development and Infrastructure Act 2016* (SA), s 140; *Building Act 2011* (WA), ss 76-87; *Law of Property Act 2000* (NT), No. 46, ss 163-166; *Access to Neighbouring Land Act 1992* (Tas.), No. 82.

An additional example of legislation providing for court-ordered access is found in the United Kingdom. The *Access to Neighbouring Land Act 1992* applicable to England and Wales provides for access orders if a court is satisfied that entry on adjoining or adjacent land is necessary to carry out works reasonably necessary for the "preservation" of other land."[83] The definition of "preservation works" covers primarily maintenance, repair and renewal and does not expressly include new construction, but can include an "improvement" and demolitions on the other land.[84]

British Columbia has a somewhat similar provision dealing with certain encroachments, namely section 36(2) of the *Property Law Act*.[85] This provision concerns encroachments over property boundaries by structures and fences that are found by survey. It empowers the Supreme Court to correct or to validate the encroachment in several ways. One of the ways is to make an order declaring the encroaching owner has an easement on the land encroached upon and directing the payment of compensation to the owner of that land in an amount the court sets.

As section 36(2) gives the Supreme Court the authority to validate a permanent encroachment in this manner, it would not appear to be out of keeping with the law of property in British Columbia to confer powers on the Supreme Court similar to those in the Australian and New Zealand legislation to authorize temporary encroachments in airspace, the surface and the subsurface by way of easement or otherwise that are needed to facilitate construction on adjacent land.

The enabling legislation would presumably allow for registration of an access order against the landowner's title. It could also provide for automatic expiration of a registration after a fixed period in case the developer neglects to file a discharge of the registration when the access rights are no longer required.

83. 1992, c 23, ss 1(1), (2).

84. *Ibid*, ss 1(4), (5). The legal meaning of "improvement" of land includes the erection of buildings and other structures affixed to the land: *London & South African Exploration Company, Limited. v De Beers Consolidated Mines Ltd.*, [1895] AC 451 at 455 (PC).

85. RSBC 1996, c 377.

E. Solutions Involving Change in Property and Tort Law

1. Generally

At the opposite end of the continuum from private ordering under the legal status quo to solutions engaging greater governmental intervention are legislative changes to the common law of property and torts to make inroads into rights of land ownership and quiet enjoyment in occupation for the purpose of facilitating construction on neighbouring land.

The law already provides a route to a compromise between the rights of owners of land to develop their property and the rights of other owners to be free of interference with its use and enjoyment. This is reflected in the fact that the court's power to grant an injunction to restrain a trespass into airspace, or even one on the ground, is discretionary. While an injunction is strongly favoured as the remedy for trespass, this does not mean it must be granted in all cases. In a 2017 decision, the Nova Scotia Court of Appeal stated:

> Equitable discretion involving injunctions is exercised in relation to the relief sought, not the cause of action pleaded. Injunctions are creatures of equity and there is an obvious difference between remedying the wrong of routinely crossing someone's garden to reach the street and constructing a commercial building next to others, accompanied by temporary airspace incursions. The case for an injunction is compelling in the first instance; it need not be in the second. That is especially so where interlocutory injunctive relief is sought to enjoin a temporary and unobtrusive trespass….[86]

And later:

> Equally…the law encourages a reasonable "give and take", particularly in high density circumstances where some accommodation may be expected arising from the forced intimacy of urban development.[87]

In that case an interlocutory injunction was ultimately refused on appeal because the court considered the inconvenience resulting from overhanging scaffolding was

86. *Maxwell Properties Ltd. v Mosaik Property Management Ltd.* [*Maxwell*], *supra* note 30 at para 33.

87. *Ibid* at para 39.

minimal even though amounting to an aerial trespass, and the balance of convenience thus favoured the defendant using the scaffolding to add cladding to its building.

The discretion a superior court may exercise to refuse an injunction relates only to the appropriateness of that remedy in a particular set of circumstances. Its exercise does not mean the plaintiff landowner is disentitled to relief against trespass altogether, nor does it validate a trespass however inconsequential it may be.

Denial of a remedy altogether or validation of a trespass, which amount to the same thing, would require a policy choice by the legislature to drastically increase the level of accommodation by landowners the Nova Scotia Court of Appeal spoke of when it referred to the "give and take" that "may be expected arising from the forced intimacy of urban development."[88] Most of the potential solutions discussed in this section and the next do not go that far, though all involve some change to the law of property and land-based torts. The common thread is that they provide a means to overcome an unreasonable refusal to grant entry to land and airspace.

2. Legislating Construction-Related Exceptions to Trespass

Provincial legislation could change the law relating to the tort of trespass in British Columbia by providing that specified construction activities requiring access to neighbouring land do not amount to trespass. This would have the effect of removing a presumptive right to an injunction that potentially could shut down or severely complicate a construction project.

Specified activities declared not to amount to trespass would principally include the intermittent movement of a crane jib through airspace.[89] Entry for the purpose of monitoring for subsidence might be another. A further specified activity might be

88. *Ibid*.

89. Successive bills were introduced in the state of Hawaii in 2024 to enact a similar change in the law relating to civil trespass, but lapsed before being passed. See; HB 1355, 32nd Legislature, Reg Sess, HI, 2023, s 2(a); HB 1987, 32nd Legislature, Reg Sess HI, 2024; SB 2078, 32nd Legislature, Reg Sess HI, 2024.

the installation of shoring installations along a property boundary that encroach onto the adjacent land, including the insertion of anchor rods beneath its surface.

Neighbouring owners who are affected by the activities specified as non-trespassing would retain the right to sue for nuisance, but would have to prove the developer's interference with the use and enjoyment of their property is unreasonable and substantial, not necessarily in the form of physical harm. A stronger case would have to be made for an injunction than in an action for trespass.

It may be easier for the public to accept a legislative declaration that overswing by a tower crane jib does not amount to trespass than one that does the same in relation to encroaching shoring installations. Insertion of anchor rods into the subsurface of neighbouring properties is a greater intrusion than intermittent passage of a non-load-bearing section of a crane jib through the air, especially as the rods are often left permanently in the ground. If anchoring is competently done without damage, however, the degree of interference with the use and enjoyment of the land is minimal.

The elimination of a cause of action for trespass would increase the bargaining power of developers significantly in dealings with neighbouring landowners, because it would seldom be worthwhile for landowners to sue a developer in nuisance unless the construction activities cause actual damage to their land and buildings or very substantial interference with their use and enjoyment of them. In other cases, damages recoverable in a nuisance action might not exceed the cost of litigation. The question for policymakers and legislators would be whether legislation removing the right to sue in trespass for encroachments through specified construction-related activities would actually produce more resolutions by agreement or instead have a one-sided effect of encouraging developers and their contractors to ignore landowners' rights on more occasions, as there would be significantly less legal risk in doing so.

3. Elimination of Injunctions in Actions Based on Crane Overswing

A narrower and somewhat less one-sided reform than the one described in the preceding section would be to eliminate the remedy of injunction in trespass or nuisance claims based on intrusion of a crane jib into airspace. This would prevent a

construction project from being effectively shut down or significantly impeded by an injunction preventing crane operation. It would not, however, prevent a landowner from suing in either trespass or nuisance for damages if the aerial intrusion took place without the landowner's consent.

As the right to sue in trespass would remain under this reform, substantial damages could be awarded for an intrusion into airspace even in the absence of any actual harm. Despite the unavailability of an injunction, the potential for an award of substantial damages would continue to serve as a disincentive for developers and their contractors to ignore the proprietary rights of neighbouring landowners in airspace. It would tend to drive both parties towards a negotiated resolution in situations where the only, or principal, cause of dispute is the overswing of a tower crane.

4. Automatic Reciprocal Access

A suggestion was made in the November 2025 Roundtable that provincial legislation should confer an automatic right of access to land neighbouring a building site if the access is needed to carry out construction-related procedures. This was the most drastic approach that was suggested in our consultations. The importance of building urban environments was offered as justification for the measure.

An automatic statutory right of access would place developers at a great advantage by removing the need for negotiation with landowners altogether. Adjacent landowners would lose the ability to protect their interests through contractual terms.

In essence, an automatic right of access to neighbouring property for purposes related to construction on an adjacent site would be equivalent to a private right to expropriate an easement from the neighbouring landowner.

A theoretical reciprocity would substitute for the monetary compensation that is conventionally paid to the servient tenement owner in return for the grant of a crane use and shoring easement. Neighbouring landowners compelled to provide access could have the benefit of the same statutory right if they were to require similar access in connection with redevelopment of their properties at some future time.

While superficially balanced, reciprocity of access would be largely illusory as an equalizing feature. A reciprocal right of access would have no immediate value to landowners whose dwellings or complexes are already built, and who do not intend

to redevelop their property or market it to others for redevelopment in the foreseeable future. It is difficult to envision public acceptance of a measure of this kind that disproportionately favours the convenience of the property development industry over the rights of landowners.

5. Amendment of Section 80(2) of the *Strata Property Act* to Relax the ¾ Vote Requirement

Another option suggested in the November 2026 Roundtable was to remove the requirement for a ¾ vote by strata lot owners under section 80(2) of the *Strata Property Act* to approve the grant of a disposition of common property. This reform would make it possible for a simple majority of strata lot owners to pass a resolution approving an easement agreement with a strata corporation. It would prevent situations where a relatively small minority of dissident strata lot owners can obstruct passage of a resolution due to low turnouts by those eligible to vote.

An amendment to the *Strata Property Act* to remove the ¾ vote requirement could be limited to temporary dispositions of common property, such as a crane and shoring easement persisting for a specified period or until an occupancy permit is issued for the development in question, signifying the completion of construction. This would not endanger the policy reflected in section 80(2) of requiring a strong measure of owner approval for significant dealings with common property. The amendment could be even more narrowly framed to remove the need for a ¾ vote only in respect of temporary easements for tower crane use in airspace and shoring or underpinning to prevent subsidence and settling of the common property.

In combination with a policy of early and trust-building engagement with strata corporations, relaxation of the ¾ vote requirement would help to overcome the delays and other difficulties developers complain of in dealings with neighbouring stratified communities to secure access needed during construction.

Chapter 5. Conclusion

Reduced to their fundamentals, disputes over access to neighbouring land and airspace for purposes connected with construction are based on tension between the conflicting private interests of two sets of owners, namely those owners who are attempting to build on their property and other owners wishing to remain undisturbed in theirs.

Much of the dialogue around this simple picture is framed in terms of the drive to relieve the current housing shortage in Canada. This tends to distort the picture into one of a clash between the public interest in building mass housing and self-interest on the part of landowners seeking to maximize compensation for the use of their property. That characterization ignores the underlying reality that legitimate self-interest is in play on both sides of a construction-related access dispute, and there are areas where the interests of the two sides converge.

One area where the interests of developers and those of landowners converge is in minimizing the duration and intensity of the disruption produced by redevelopment. The modern tower crane unquestionably contributes to this. Another area where interests converge is in ensuring the effectiveness of shoring and underpinning, measures that protect properties of neighbouring owners as well as that of the developer. Raising the level of public knowledge about these matters and approaches to resolution that focus on commonalities of interest, where they exist, are likely to bring good results.

In the first chapter, we said that even in the midst of an acute housing shortage, reform that unduly favours the interests of developers over those of other owners of land will not obtain public acceptance. This will remain true for the long run even if it is accepted for the sake of argument that the existing law is inadequate to deal with issues of access that arise in a modern urban building environment. The challenge in legal and public policy is to find the balancing point. It is hoped this study makes a significant contribution to that search.

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