

Canadian Pacific Railway v Vancouver

(*City*), [2006] 1 SCR 227

McLachlin CJC:—

1. Introduction

[1] Over a century ago, in 1886, the provincial Crown granted the Canadian Pacific Railway Company (“CPR”) a corridor of land for the construction of a railway line from False Creek, in the City of Vancouver (“City”), south to Steveston, on Lulu Island (named after Miss Lulu Sweet, a young actress in the first theatrical company to visit British Columbia). It is this corridor of land, now known as the “Arbutus Corridor”, that lies at the heart of this appeal.

[2] In 1902, a railway line was built on the corridor. As the century advanced, traffic declined. From time to time, there was talk of using the corridor for an urban transit line, but nothing came of it and, ultimately, the line was placed elsewhere. In 1999, CPR formally began the process of discontinuing rail operations on the corridor under the *Canada Transportation Act*, S.C. 1996, c. 10.

[3] The Arbutus Corridor has for many years been bounded on both sides and for virtually its entire length by extensive urban development. CPR put forward proposals to develop the corridor for residential and commercial purposes. It also indicated that if the City or any other public body wished to acquire the land, it was willing to sell it at whatever price was determined by agreement or expropriation.

[4] Nothing happened. With increasing vigor, CPR expressed its view that it was intolerable for the City and other governmental bodies to seek to keep the corridor intact without purchasing it. Spirited public debate ensued. The City, as early as 1986, indicated in planning documents and Council resolutions its preference to preserve the corridor for transportation purposes. In the end, the City made it clear that it would not buy the land and adopted the *Arbutus Corridor Official Development Plan By-law*, City of Vancouver, By-law No. 8249, (25 July 2000) (“ODP By-Law”), that designated the corridor as a public thoroughfare for transportation and “greenways”, like heritage walks, nature trails and cyclist paths.

[5] The City’s powers are derived from the *Vancouver Charter*, S.B.C. 1953, c. 55, an Act of the Legislature of British Columbia, which serves the same purpose as a “municipal act” but applies only to the city of Vancouver (see Appendix A). Development plans under s. 561 of the *Vancouver Charter* are essentially statements of intention which do not directly affect land owners’ property rights. However, once development plans are adopted as “official” (“ODPs”) under s. 562, they preclude development contrary to the plans: s. 563.

[6] Building on earlier planning documents, the intent of the ODP By-law was “to provide a context for the future of the [corridor]”. More particularly, s. 1.2 stated: “The Arbutus Corridor has been used for many years for a rail line and this plan accommodates this use, but also provides for a variety of other uses.”

[7] The by-law outlined the uses to which the corridor could be put (s. 2.1):

This plan designates all of the land in the Arbutus Corridor for use only as a public thoroughfare for the purpose only of:

(a) transportation, including without limitations:

- (i) rail;
- (ii) transit; and
- (iii) cyclist paths

but excluding:

- (iv) motor vehicles except on City streets crossing the Arbutus Corridor; and
- (v) any grade-separated rapid transit system elevated, in whole or in part, above the surface of the ground, of which one type is the rapid transit system known as “SkyTrain” currently in use in the Lower Mainland;

(b) greenways, including without limitation:

- (i) pedestrian paths, including without limitation urban walks, environmental demonstration trails, heritage walks and nature trails; and
- (ii) cyclist paths.

[8] The effect of the by-law was to freeze the redevelopment potential of the corridor and to confine CPR to uneconomic uses of the land. CPR regards this effect as unfair and unreasonable. It does not allege that the City acted in bad faith. However, it argues: (1) that the by-law is *ultra vires* City and should be struck down; (2) that the City is obligated to compensate CPR for the land; and (3) that the by-law suffers from procedural irregularities and should be struck down on that account.

[9] The Chambers Judge held the by-law to be *ultra vires* the City, declined a declaration that the City must compensate CPR and found it unnecessary to consider the procedural issues ((2002), 33 M.P.L.R. (3d) 214 (B.C. S.C. [In Chambers])). The British Columbia Court of Appeal rejected all three arguments and allowed the City’s appeal ((2004), 26 B.C.L.R. (4th) 220 (B.C. C.A.)). CPR now appeals to this Court. Despite considerable sympathy for CPR’s position, I conclude that under the *Vancouver Charter*, the City was entitled to refuse

compensation and to pass the by-law, and that the courts have no option but to uphold it. I would therefore dismiss the appeal.

2. Issues

1. Was the ODP By-law beyond the statutory powers of the City?
2. If not, must the City compensate CPR for the land?
3. Should the by-law be set aside for procedural irregularities?

3. Analysis

3.1 Was the By-law Beyond the Statutory Powers of the City?

[10] The powers of the City are derived from the *Vancouver Charter*. CPR argues that the ODP By-law exceeds these powers. For the reasons that follow, I cannot accept this argument.

[11] Part XXVII of the *Vancouver Charter* grants extensive powers to the City to determine how land within the city can be used. The three main powers are the power to zone land, the power to plan for land development and the power to issue development permits. (The latter power is of no concern here.) The power to zone land allows the City to establish permissible uses for particular zones, or areas of the City, and is exercised by passing zoning by-laws. The power to plan for development allows the City to set a vision and course for future development, and is exercised by preparing and revising “development plans” and by adopting by by-law development plans as ODPs. Zoning by-laws designate actual permitted uses, while ODPs are directed to preserving land for future non-actualized uses. Both, however, may have the effect of restricting how the designated land may be used. And in the case of both, the *Vancouver Charter* provides that the City is not liable to compensate landowners for loss as a result of these restrictions: s. 569.

[12] CPR makes a number of arguments to support its contention that the ODP By-law in this case was beyond the powers granted the City by the *Vancouver Charter*.

[13] CPR’s main argument is that the by-law exceeds the purpose of an ODP. That purpose, CPR suggests, is to set out policy for future land development. To the extent that the ODP goes further and affects land use, it must provide for the City’s acquisition of the land. This ODP, CPR says, is not “zoning” and has none of the protections associated with zoning. Nor is it “planning” because the effect on the landowner is binding. An ODP, in the submission of CPR, is simply a policy directive that has the effect of freezing development in order to prevent changes and improvements on the land while the City is engaged in the steps necessary to acquire the land. The contention is that the City misused the ODP power in this case since it never had any intention of purchasing the land and never took steps to do so. In short, CPR contends, to pass a valid ODP under ss. 561 and 562 of the *Vancouver Charter*, the City must have a plan to acquire the land. Since the City had no such plan, the ODP By-law is invalid.

[14] CPR buttresses this submission with the argument that the Legislature could not have intended the *Vancouver Charter* to permit the City to effectively expropriate land by use limitations without taking formal title. It points out that this is the first time in 40 years that the City has used its ODP power to effectively designate private land public without acquiring it. This, it says, is a new interpretation of the *Vancouver Charter* that the City has “dreamed up” to achieve its aim of using or freezing the corridor without legally acquiring it.

[15] CPR’s contention that the ODP By-law is invalid in the absence of a plan to acquire the land is not supported by the wording of the *Vancouver Charter*, which (1) confers a broad power on the City to pass ODPs for planning purposes without moving to implement those plans; and (2) specifically contemplates that ODPs may adversely affect land and exempts the City from liability for any such effects.

[16] First, the *Vancouver Charter* confers a broad power on the City to pass ODPs for planning purposes without requiring the City to implement those plans. The *Vancouver Charter* confers power on the City to plan for future development of “land”, “areas” and “sites”, which is precisely what the ODP By-law is intended to do: s. 561(2). An ODP is just what its name suggests — a plan to guide future development, not a fully actualized scheme. Thus, in defining “development plan”, s. 559 states that a plan for the future physical development of any part of the city does not need to be “complete”. It may be a “partial” plan. The steps necessary to bring the plan to fruition do not need to be worked out. This negates the suggestion that passing an ODP requires the City to acquire affected land.

[17] This is confirmed by s. 563(1) of the *Vancouver Charter*, which provides that “[t]he adoption by [City] Council of a development plan *shall not commit* the Council to undertake any of the developments shown on the plan” (emphasis added). More specifically, s. 564(1) states that “[w]here a project is shown upon an ODP, the Council *may* acquire any real property it considers essential to the carrying-out of the project” (emphasis added). In other words, the City may acquire property subject to the ODP, but is not obliged to acquire it.

[18] Second, the *Vancouver Charter* expressly contemplates the possibility that an ODP may adversely affect land and exempts the City from liability for such effects. This negates the argument that ODPs are simply statements of policy and, to the extent that they may affect land use and values, must be accompanied by plans to acquire the affected land. Section 569 deems that the exercise of the City’s power does not constitute a “tak[ing] or injuriou[s] affect[ion]” and that “no compensation shall be payable by the [c]ity or any inspector or official thereof”. The Legislature clearly contemplated that ODPs could have effects like those found in this case, and went on to hold that the City was not liable for the consequences.

[19] The effect of the ODP By-law in this case is to designate the Arbutus Corridor a public thoroughfare. The power to designate public thoroughfares

was formerly a zoning power. In 1964, it was transferred to the ODP power. At the same time, s. 569 was expanded from protecting the exercise of zoning power to protecting the exercise of “any of the powers contained in this Part”: see *Vancouver Charter Amendment Act, 1964*, S.B.C. 1964, c. 72, ss. 17 and 19. This indicates that the Legislature contemplated that the exercise of the power to create a public thoroughfare under an ODP could adversely affect landowners, and deliberately dealt with that possibility by providing that the City would not be liable for such adverse affects. This is inconsistent with the argument that the Legislature intended the City to acquire any lands affected by an ODP.

[20] I conclude that the provisions of the *Vancouver Charter* do not require the City to either acquire or have a plan to acquire land that is subject to an ODP. The by-law is not invalidated on this ground.

[21] CPR also argues that the by-law is invalid because designation of the corridor for use only as a public thoroughfare effectively designates the corridor as a street. Section 2 of the *Vancouver Charter* defines “street” as including “any ... way normally open to the use of the public”. Section 289 of the *Vancouver Charter* requires a street to be vested in the City. CPR argues that this requires the City to obtain legal title to all land used for streets. Since it has not acquired title to the corridor, its designation for use as a public thoroughfare is invalid, CPR argues.

[22] I cannot accept this argument. Stipulating that a piece of land can be used only as a public thoroughfare in an ODP does not make it a street. It merely freezes the use of the land with a view to preserving it for future development by precluding present uses that might interfere with that development. In this case, for example, residential and commercial development cannot take place on the corridor because that might interfere with it being developed in the future for purposes of public passage. For the time being, however, the corridor remains private land in the hands of CPR. CPR’s argument rests on the premise that City Council must treat the corridor like a street, simply because the by-law allows use of the land for public passage. However, the City points out that the *Vancouver Charter*’s definition of “street” expressly excludes “a private right-of-way on private property”, which describes the corridor precisely.

[23] In a variation on this argument, CPR argues that the by-law purports to regulate motor vehicle traffic on the corridor, which can only be done on streets: s. 317. However, the by-law does not regulate traffic. It simply designates the corridor for use as a public thoroughfare that excludes motor vehicles. Motor vehicles are regulated only on street crossings, which are either vested in the City or for which the City holds an easement: s. 289.

[24] Finally, CPR argues that the by-law is invalid because its effect is not to designate land but to regulate it. Regulation, it argues, is not appropriate for an ODP. Again, there is no merit in this argument. The by-law does not regulate the use of land, but merely designates the corridor for use as a public thoroughfare. That designation makes applicable s. 563(3) of the *Vancouver*

Charter, which limits the use that can be made of the corridor so designated. The limit arises from powers the Legislature gave to the City and the provisions of the *Vancouver Charter* enacted by the Legislature. Its effects cannot be said to be contrary to what the Legislature intended.

[25] I conclude that CPR's contention that the by-law is invalid because it goes beyond the City's powers under the *Vancouver Charter* cannot be accepted.

3.2 Compensation

[26] CPR argues there is a presumption that the Legislature intended any taking of property to be compensated. It argues that the ODP By-law, by limiting its use, constitutes an effective taking of its land. It cannot use the land for any economically viable purpose. It cannot, it says, even run a railway because the by-law precludes maintenance of its track. In these circumstances, the City has effectively "taken" its land and must compensate it, CPR urges.

[27] Like the Court of Appeal, I am not satisfied that the by-law prevents track maintenance or the operation of a railway on the corridor. Indeed, CPR has no desire to operate a railway there. Its real complaint is that the by-law prevents it from developing or using the corridor for economically profitable purposes. This amounts, it argues, to a *de facto* taking of its land, requiring compensation.

[28] CPR argues that at common law, a government act that deprives a landowner of all reasonable use of its land constitutes a *de facto* taking and imposes an obligation on the government to compensate the landowner.

[29] For a *de facto* taking requiring compensation at common law, two requirements must be met: (1) an acquisition of a beneficial interest in the property or flowing from it, and (2) removal of all reasonable uses of the property (see *Mariner Real Estate Ltd. v. Nova Scotia (Attorney General)* (1999), 177 D.L.R. (4th) 696 (N.S. C.A.), at p. 716; *Manitoba Fisheries Ltd. v. R.* (1978), [1979] 1 S.C.R. 101 (S.C.C.); and *British Columbia v. Tener*, [1985] 1 S.C.R. 533 (S.C.C.)).

[30] In my view, neither requirement of this test is made out here.

[31] First, CPR has not succeeded in showing that the City has acquired a beneficial interest related to the land. To satisfy this branch of the test, it is not necessary to establish a forced transfer of property. Acquisition of beneficial interest related to the property suffices. Thus, in *Manitoba Fisheries*, the government was required to compensate a landowner for loss of good will. See also *Tener*.

[32] CPR argues that, by passing the ODP By-law, the City acquired a *de facto* park, relying on the observation of Southin J.A. that "the by-law in issue now can have no purpose but to enable the inhabitants to use the corridor for walking and cycling, which some do (trespassers all), without paying for that use" (para. 117). Southin J.A. went on to say: "The shareholders of ... CPR ought not to be expected to make a charitable gift to the inhabitants" (para. 118).

Yet, as Southin J.A. acknowledged, those who now casually use the corridor are trespassers. The City has gained nothing more than some assurance that the land will be used or developed in accordance with its vision, without even precluding the historical or current use of the land. This is not the sort of benefit that can be construed as a “tak[ing]”.

[33] Second, the by-law does not remove all reasonable uses of the property. This requirement must be assessed “not only in relation to the land’s potential highest and best use, but having regard to the nature of the land and the range of reasonable uses to which it has actually been put”: see *Mariner Real Estate*, at p. 717. The by-law does not prevent CPR from using its land to operate a railway, the only use to which the land has ever been put during the history of the City. Nor, contrary to CPR’s contention, does the by-law prevent maintenance of the railway track. Section 559’s definition of “development” is modified by the words “unless the context otherwise requires”. Finally, the by-law does not preclude CPR from leasing the land for use in conformity with the by-law and from developing public/private partnerships. The by-law acknowledges the special nature of the land as the only such intact corridor existing in Vancouver, and expands upon the only use the land has known in recent history.

[34] CPR also argues that the British Columbia *Expropriation Act*, R.S.B.C. 1996, c. 125, requires the City to compensate CPR (Appendix B). Section 1 of the Act defines “expropria[tion]” as “the taking of land by an expropriating authority under an enactment without the consent of the owner”, and goes on to define “expropriating authority” as “a person . . . empowered under an enactment to expropriate land”. Section 2(1) of the Act provides that “[i]f an expropriating authority proposes to expropriate land, th[e] Act applies to the expropriation, and, if there is an inconsistency between any of the provisions of th[e] Act and any other enactment respecting the expropriation, the provisions of [the *Expropriation Act*] apply”. The *Expropriation Act* requires compensation for land expropriated, while the *Vancouver Charter* states the City is not obliged to compensate for adverse effects to land caused by an ODP. CPR argues that this constitutes an inconsistency and that, under s. 2 of the *Expropriation Act*, the requirement of compensation in that Act must prevail.

[35] This argument rests on the premise that there is an inconsistency between the *Expropriation Act* and the *Vancouver Charter* as applied to the facts in this case. It assumes that the land is “expropriate[d]” or “taken” and that the two statutes impose different obligations in this event - compensation in one case, no compensation in the other. In fact, however, the provisions of the *Vancouver Charter* prevent a conflict from ever arising. Section 569 of the *Vancouver Charter* provides that property affected by a by-law “shall be deemed as against the city not to have been taken”. The *Expropriation Act* applies only where there has been a “tak[ing]” or “expropria[tion]”. Since by statute there is no taking or expropriation here, there is no inconsistency with the *Expropriation Act* and s. 2(1) cannot apply.

[36] I add this. Even if the facts of this case could be seen to support an inference

of *de facto* taking at common law, that inference has been conclusively negated by s. 569 of the *Vancouver Charter*. The Province has the power to alter the common law. Here, by providing that the effects of the ODP By-law cannot amount to a “tak[ing]”, it has rendered inapplicable the common law *de facto* taking remedy upon which CPR relies.

[...]

Conclusion

[37] While one may sympathize with CPR’s position, none of its arguments withstand scrutiny. The City did not exceed the powers granted it by the *Vancouver Charter*. Neither the *Vancouver Charter* nor principles of common law require it to compensate CPR for the ODP By-law’s effects on its land. Finally, the City’s conduct in enacting the by-law complied with the requirements of fair process.

[38] I would therefore dismiss the appeal with costs.

[39] *Appeal dismissed.*