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BARRISTERS & SOLICITORS

JUNE 11, 2013

CLIENT BULLETIN

GRIT, GRAVEL & QUARRYING

In *Peachland (District) v. Peachland Self Storage Ltd.*, 2013 BCCA 273, the British Columbia Court of Appeal dealt directly with the nature and purpose of the Ministerial approval requirement in Section 9 of the *Community Charter* relating to the approval of bylaws prohibiting soil removal. Under the *Community Charter*, a municipality can "regulate" soil removal but it cannot "prohibit" soil removal without approval of the Minister of Mines.

This case dealt with the issue whether a bylaw limiting soil removal to 200 cubic metres per annum per parcel prohibited soil removal for the purpose of s.9. The gravel operation *at issue* had received a Mines Permit from the Province allowing 100,000 cubic metres per year for each of eight consecutive years.

The Court noted that it is difficult to draw the line between a bylaw that is regulatory and one that is prohibitory, but ultimately concluded that in the context of s.9 a soil removal bylaw is prohibitory if it puts the volumetric limit so low that industrial-scale extraction is impossible.

The Court acknowledged the municipality's warning about using such a test to distinguish between regulation and a prohibition:

> "If the test for prohibition is commercial viability, then the Court will be compelled in many instances to examine the factors that make any activity commercially viable; including, market factors, natural productivity of a quarry, access to markets, efficiency, labour costs, and other relevant matters. In some seasonal markets and economies, a volumetric restriction may be a prohibition in January, and in September may not be a prohibition."

However, the Court of Appeal accepted in this case that the practical reality was clear:

> "Fortunately the case before us does not entail the sort of fine distinctions and concepts that the appellant (municipality) warns against. It is apparent that the 2007 Bylaw places the limit on soil removal so low that no industrial-scale extraction is possible."

Two important principles emerge from the Court's analysis:

1. In cases where the "practical reality" is not as clear, as it was in this particular case, a volumetric restriction on soil removal that is said to be prohibitory will require the holder of a Mines Permit to lead evidence proving that the quarry is not commercially viable. It is clear that a volumetric reference in a Mine's Permit is not a peremptory entitlement.

2. The Court expressly addresses and suggests a limit to the purpose of S. 9(3) Ministerial Approval in soil removal situations.

> "Given that the reference to the 'Provincial interest" in S. 9(3) of the *Community Charter* must refer to an interest in the sort of industrial-scale extraction that is important to the Provincial economy."
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> [underlining added]

The purpose for Section 9(3) found by the Court may result in some cases of prohibition of soil removal that would not necessitate Ministerial approval where the purpose is not one that impacts industrial-scale extraction.

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