

A LEGAL GAMBLE LOST: *False Creek Residents Association v. Assessor of Area 9*

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IN AUGUST 2013, THE BRITISH Columbia Property Assessment Appeal Board (PAAB) valued 3.83 hectares of south-facing waterfront property in North America's most expensive city at one dollar.¹ This property, known as Area 9, is located on the northeastern shore of False Creek in Vancouver (Figure 1). Acquired by Concord Pacific (Concord) in 1988, the property and neighbouring Expo '86 lands are subject to a community amenity contribution (CAC) agreement with the city of Vancouver and the province of British Columbia that designates some sites, including Area 9, as public parks in return for increased residential density at other sites. The entire northeastern False Creek development is widely regarded as an exemplar of urban planning in one of the most dense and livable neighbourhoods in North America.²

Although the larger development is mostly complete, Area 9 is not yet a community park. Dominated by a sixty-space parking lot and a Concord sales centre, the property is in limbo. Legally committed to its transformation, Concord waits on the city to enter the required negotiations to finalize the park. Frustrated with the delays and unable to take direct legal action on the CAC agreement itself, the False Creek Residents Association (FCRA) sought a review of the assessed value of the property through the provincial property assessment appeal process. As the first PAAB decision to consider the impact of CAC agreements on

* Views expressed in this paper are those of the author alone, and do not represent the position of any bodies or institutions with which she is associated.

¹ *False Creek Residents Association v. Area 9*, 2013 PAABBC 20130188 [*FCRA v. Area 9*]; "Vancouver Most Expensive City to Live in North America: *The Economist*," *Huffington Post*, 6 February 2013, http://www.huffingtonpost.ca/2013/02/06/vancouver-most-expensive-city-to-live-economist_n_2631806.html.

² John Punter, *Vancouver Achievement: Urban Planning and Design* (Vancouver: UBC Press, 2003), 213-14; Elizabeth Macdonald, "Street-Facing Dwelling Units and Livability: The Impacts of Emerging Buildings Types in Vancouver's New High-Density Residential Neighbourhoods," *Journal of Urban Design* 10 (2005): 13, 18, 21; Harold Kalman and Robin Ward, *Exploring Vancouver: The Architectural Guide* (Vancouver: Douglas & McIntyre, 2012), 117.

property value,³ the result of *False Creek Residents Association v. Assessor of Area 9 (FCRA v. Area 9)* was not what the FCRA hoped. Here I consider the two legal forums at play in *FCRA v. Area 9*, the arguments presented in the appeal, the aftermath of the decision, and the role played by residents groups in highlighting sometimes unforeseen implications of local planning choices.⁴

The first legal forum at play in *FCRA v. Area 9* is the contractual CAC commitment that designates Area 9 as a park. Also referred to as “bonusing” agreements, CAC agreements involve an exchange between developers and municipalities wherein developers gain valuable density and municipalities gain developer-funded amenities.⁵ The agreements appeal to developers and municipalities alike and are permitted in a number of jurisdictions.⁶ In British Columbia, CAC agreements are widely used, and Vancouver has embraced them, prohibiting the approval of standard development permits for projects that have CAC potential.⁷ Current city policy states that Vancouver generally aims to achieve a CAC value of \$32.29 for every additional square metre permitted to a developer.⁸ Alternatively, downtown rezonings are negotiated on a case-by-case basis with developers typically committing to a CAC contribution amounting to 70 to 80 percent of the development’s increase in value.⁹

For the north shore of False Creek, historic agreements between the province and the Canadian Pacific Railway (CPR) created a legacy of contamination that continues to shape development in the area. In 1885, the province granted Area 9 to the CPR as part of a 2,621 hectare grant

³ See Kate Webb, “Concord Pacific’s Prime Slice of False Creek Assessed at \$1,” *Metro*, 20 August 2013, <http://metronews.ca/news/vancouver/772221/concord-pacifics-prime-slice-of-false-creek-assessed-at-1/>, citing chair of the PAAB: “she could not think of another time a developer has applied to get the cost of a community amenity such as a park deducted from a property’s value.”

⁴ See also Terry van Dijk and Nickie van der Wulp, “Not in My Open Space: Anatomy of Neighbourhood Activism in Defence of Land Use Conversion,” *Landscape and Urban Planning* 96 (2010): 22, 27–28, discussing their empirical study of fifty-one residents groups facing issues with which they had no legal entitlement to engage.

⁵ British Columbia Ministry of Municipal Affairs and Housing, *Density Bonus Provisions of the Municipal Act: A Guide and a Model Bylaw* (1997), 3; Local Government Act, RSBC 1996, c. 323, s. 904; Vancouver Charter, SBC 1953, c. 55, s. 565.1.

⁶ See, for example, Planning Act, R.S.O. 1990, c. P.13, s. 37 (in Ontario, known as Section 37 Agreements); The Planning and Development Act, 2007, S.S. 2007, c. P-13.2, s. 70 (in Saskatchewan, known as Bonus Zoning).

⁷ City of Vancouver, Bylaw No. 3575, *Zoning and Development Bylaw*, s. 3.3.4.

⁸ City of Vancouver, *Community Amenity Contributions – Through Rezoning* (adopted 20 January 1999), 2.1(A), <http://vancouver.ca/files/cov/community-amenity-contributions-through-rezonings-policy.pdf>.

⁹ *Ibid.*, 2.1(B); City of Vancouver, “Rezoning and Community Amenity Contributions: Negotiating for a More Livable City,” 2, <http://vancouver.ca/files/cov/cacbrochure.pdf>.

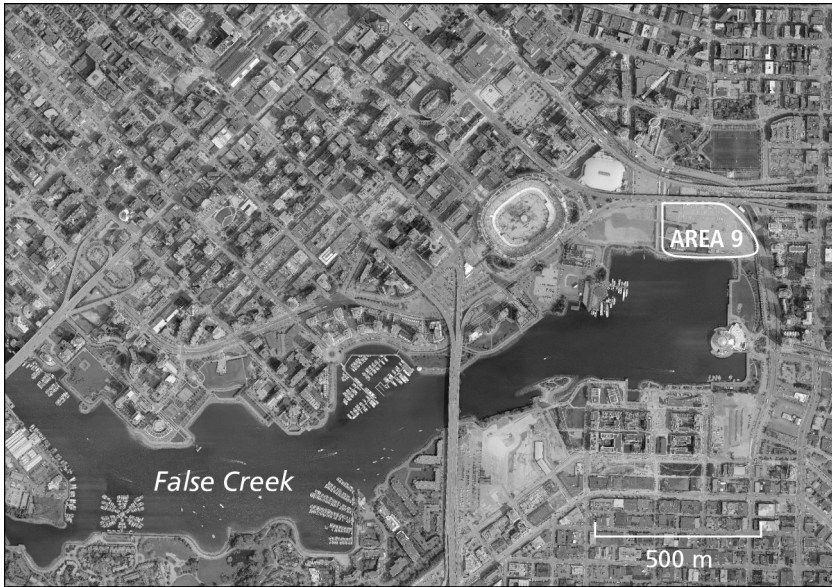


Figure 1. Area 9. Valued at \$1.00, Area 9 is one of the last undeveloped south-facing, waterfront lots in downtown Vancouver. Concord acquired the property in 1988 as part of a larger agreement, which encompassed the lands stretching along False Creek's north shore from Granville St. to Quebec St. *Source:* Contains information licensed under the Open Government Licence – Vancouver.

that enticed the corporation to extend its line beyond Port Moody.¹⁰ The CPR later agreed to develop its yard on the north, rather than south, shore of False Creek in return for a twenty-year tax exemption. City historian Patricia Roy notes that a desire to choose the location of heavy industry and to procure a CPR-built bridge across False Creek may have motivated the deal.¹¹ Over the following decades, False Creek became the industrial core of Vancouver. Log booms, beehive sawmills, industrial smoke stacks, factories, and rail yards dominate early and mid-twentieth-century images of the inlet.¹² As ideals and economy shifted later in the century, the province purchased the north shore for \$30 million and land exchanges valued at another \$30 million, and it remains financially responsible for the soil remediation necessitated by the site's industrial past.¹³

¹⁰ Douglas C. Harris, "A Railway, a City, and the Public Regulation of Private Property" in *Property on Trial*, ed. Eric Tucker, James Muir, and Bruce Ziff (Canada: Irwin Law, 2012), 457–58.

¹¹ Patricia E. Roy, *Vancouver: An Illustrated History* (Toronto: Lorimer, 1980), 29.

¹² See, for example, Derek Hayes, *Historical Atlas of Vancouver and the Lower Fraser Valley* (Vancouver: Douglas & McIntyre, 2005), 167.

¹³ Graeme Wynn and Timothy Oke, *Vancouver and Its Region* (Vancouver: UBC Press, 1992), 165; Punter, *Vancouver Achievement*, 187; Province of British Columbia, City of Vancouver,

Area 9's park status emerged in the 1988 purchase agreement between Concord, the city, and the province. While the agreement itself is confidential, Concord reputedly paid \$320 million for the former Expo '86 lands.¹⁴ The city adopted the tripartite agreement as the False Creek North Official Development Plan (ODP) in 1990, and this ODP sets out the developer's extensive CAC commitments.¹⁵ Among other amenities pledged in return for allowing the construction of 10,154 residential units and 129,698 square metres of commercial space, Concord committed to provide 17.05 hectares of neighbourhood park to be "distributed throughout the area as a focus of each neighbourhood."¹⁶ The plan designates Area 9 as the development's third largest park.¹⁷

In terms of timing, the ODP indicates that development would occur "over many years," and it does not specify when the phases of development will occur or when the parks will be built.¹⁸ In practice, the need for decontamination drives the relative order of parcel development and is at the core of the delays (Figure 2).¹⁹ In particular, contaminated soil from Area 6c, zoned residential and commercial, will be relocated to Area 9's parklands for containment. Since Area 6c includes city-owned lands occupied by aging viaducts, the required municipal approvals to complete Area 9 depend on when the city concludes the extensive land-use planning currently under way for its lands.²⁰

By 2010, Creekside Park (Area 9) was an unfulfilled, twenty-year-old promise to local residents that they would have a park. However, the contractual scheme between developer and city, while aimed at benefiting the community, does not provide community members with a designated role. The FCRA, an organization "dedicated to improving the quality of life for everyone that lives around and visits False Creek," was left searching for legal grounds to challenge the delay.²¹ Residents spoke out at public hearings, but their frustration grew.²²

and Concord Pacific, Remediation Agreement (7 September 1990) Richard Dalon, Deputy Minister of Environment in *FCRA v. Area 9*, Agreed Statement of Facts.

¹⁴ Punter, *Vancouver Achievement*, 193.

¹⁵ City of Vancouver, Bylaw No. 6650, *False Creek North Official Development Plan* (10 April 1990).

¹⁶ *Ibid.*, s. 3-5.3, figs. 4-5.

¹⁷ *Ibid.*, s. 6.12, fig. 6.

¹⁸ *Ibid.*, s. 5.

¹⁹ *Ibid.*, s. 5, fig. 7.

²⁰ *Ibid.*, s. 1.3; see, for example, City of Vancouver, Standing Committee on Transportation and Traffic, *Viaducts and False Creek Flats Planning: Eastern Core Strategy*, 26 July 2011, <http://vancouver.ca/docs/eastern-core/core-strategy-council-report.pdf>, demonstrating the long-term nature of the review currently under way.

²¹ "About the FCRA," False Creek Residents Association, <http://www.falsecreekresidents.org/sample-page/>.

²² Sean Bickerton (former member of FCRA's board of directors), "A Proposal to Green Creekside Park Tomorrow!" 18 February 2011, <http://seanbickerton.com/2011/02/18/a-proposal-to-green->

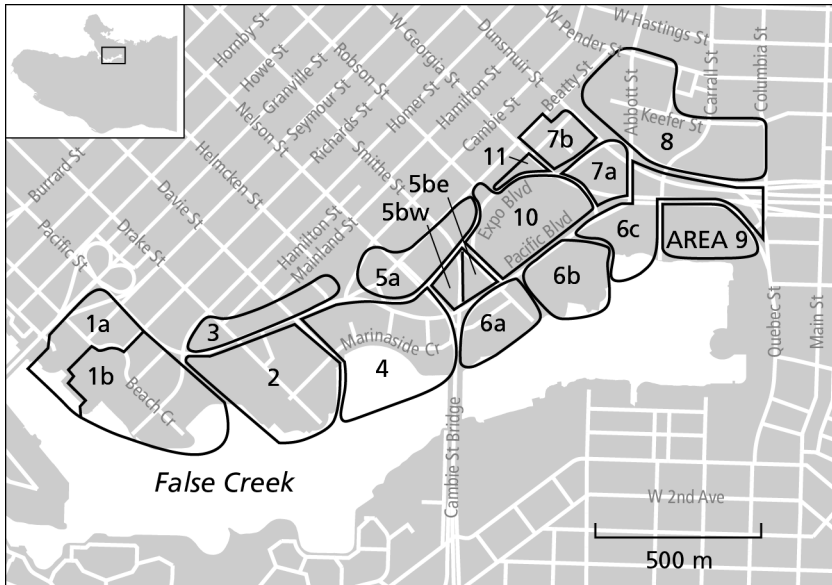


Figure 2. False Creek North ODP Sub-areas. The development of parks is phased so as to permit decontamination of residential sites. Per the ODP, Area 9 is to proceed with area 6A or 6C, whichever proceeds last. Area 6A has been developed. The northern triangular portion of area 6C, which extends between areas 8 and 9, is owned by the City and is currently occupied by aging viaducts. *Source:* City of Vancouver, By-law No 6650, False Creek North Official Development Plan at 24. Redrawn by Eric Leinberger

The second legal forum at play in the *FCRA v. Area 9* narrative is British Columbia's property assessment law. When the FCRA learned that the developer had been assessed taxes on a nominal property value of less than one dollar per square foot (\$400,000 in total or approximately \$10 per square metre), far below the \$175-per-square-foot (\$1,883 per square metre) assessment on other parks in the development, it seized on the legal opening presented by the province's administrative property assessment appeal process. Throughout the proceedings that followed, the FCRA attempted to draw a clear line between the legal property assessment forum chosen and its politicized desire for a park. Despite this, the PAAB noted that the FCRA's position in a preliminary disclosure application "suggest[ed] a motive in bringing this appeal beyond ensuring that the assessment of the Park Site is at actual value or equitable."²³

creekside-park-tomorrow/#sthash.WzsqIsnm.dpbs.

²³ *False Creek Residents Association v. Assessor of Area No. 9*, 2012 PAABBC 20121307, para. 21.

The British Columbia Assessment Authority (the Assessor) is an independent provincial Crown corporation tasked with assessing properties in the province in accordance with the Assessment Act (AA).²⁴ Two principles drive the overall assessment of property value: actual value and a concern for equitable treatment of similar lands.²⁵ The first principle directs a decision maker to consider the property in the context of “the highest and best potential use for which the land is suitable” regardless of whether it is put to that use.²⁶ The second principle – equity – speaks to the common law presumption, reinforced in the AA, that similar properties should be assessed similarly.²⁷ The AA allows a person who disagrees with the Assessor’s assessed value to bring an appeal to the PAAB.²⁸ The PAAB may then select any assessment method as long as there is evidence to support it.²⁹ Since PAAB members are appointed on the basis of merit, they are given a high level of deference, and their selection generally cannot be appealed.³⁰

In 2010, the FCRA appealed the Assessor’s \$400,000 valuation of Area 9, arguing that it was too low. The matter proceeded before accredited appraiser and PAAB member Allan Beatty by way of written argument. The FCRA advanced three alternative methods of valuation for Area 9 and took the position that valuation should recognize that the property is embedded within a broader CAC context. The Assessor detached Area 9 from its CAC context and argued that the cost of completing the park should be deducted from the site’s individual value. Concord did not make submissions to the final hearing, and the city was not a party to the dispute. On 9 August 2013, Mr. Beatty returned the first PAAB decision to consider the impact of CAC commitments on property value.³¹ He adopted the income approach to valuation advanced by the FCRA, deducted the costs of completion as argued by the Assessor, and ultimately decided that Area 9 has a nominal value of one dollar.³²

²⁴ Assessment Act, RSBC 1996, c. 20, ss. 1(1), 2; “About BC Assessment,” BC Assessment, <http://www.bcassessment.ca/about/Pages/Default.aspx>.

²⁵ *Vancouver Assessor, Area No. 9 v. Bramalea Ltd.* (1990), 52 B.C.L.R. (2d) 218, paras. 9–19 [Bramalea].

²⁶ *Jericho Tennis Club v. Vancouver Assessor, Area No. 9* (1991), 55 B.C.L.R. (2d) 332, paras. 16–17; Assessment Act, s. 19(3).

²⁷ *Bramalea Ltd.*, paras. 15, 36.

²⁸ Assessment Act, ss. 32, 50(1).

²⁹ *Prince George Assessor, Area No. 26 v. Cal Investments Ltd.* (1994), 44 B.C.A.C. 182, para. 44.

³⁰ *Ibid.*; Assessment Act, ss. 43(1), 65 (selection is deemed to be a question of fact and appeals are limited to questions of law).

³¹ Webb, “Concord Pacific’s Prime Slice.”

³² *FCRA v. Area 9*, paras. 58–60.

Arguments on both main issues in the decision – valuation and the effect of cost of completion on that valuation – reveal the FCRA’s attempt to provide legal and principled support for an embedded approach to valuation in the CAC context. On the first issue, the FCRA first proposed that Area 9 should be assessed at \$19 million according to a market value approach that compared the property to the assessed value of the other completed ODP parks and another nearby incomplete park.³³ The FCRA’s second proposal valued the site at \$17 million based on a lease rate equivalent approach that extrapolated on an incomplete deal between Concord and the city that would have added 0.8 hectares to Area 9’s parkland to fulfill a CAC payment owing at another site.³⁴ Finally, the FCRA proposed a value of \$13 million according to a capitalized income approach founded on a presumption that value relates to revenue generated by the property.³⁵

Mr. Beatty rejected the first and second proposals based on findings that the suggested parks were not acceptable comparators and that the precise nature of the CAC exchange contemplated was too uncertain.³⁶ He then accepted the capitalized income approach, made modifications to account for disputed rates, and decided that the value of the property was \$12 million.³⁷

At issue then was whether deductions to account for the cost of completion would be appropriate. In particular, the Assessor defended the initial \$400,000 assessment based on the \$17 million Concord would incur to convert Area 9 to a park and seawall rather than by reference to market data as to the value of the site.³⁸ On this point, the FCRA submitted four justifications for omitting the deductions where a property is embedded in a CAC scheme. First, the FCRA submitted that municipal covenants in this context are better understood as a form of security for the city, like a mortgage, rather than as a deductible financial charge.³⁹ Second, it argued that it is inappropriate to deduct an estimated cost of completion since the covenants could yet be changed at the discretion of the city.⁴⁰ Third, it urged that, if burdens running with the site were to be considered, the

³³ *Ibid.*, para. 53 (see also Appellant Submissions [9 April 2013], paras. 11-14).

³⁴ *FCRA v. Area 9*, para. 26 (see also Appellant Submissions [9 April 2013], paras. 9-10); “Summary and Recommendation: Rezoning: 10 Terry Fox Way (Concord Area 5b West),” Public Hearing, 17 February 2011, 7, <http://former.vancouver.ca/ctyclerk/ccclerk//20110217/documents/pha44summary.pdf>.

³⁵ *FCRA v. Area 9*, para. 24 (see also Appellant Submissions [9 April 2013], paras. 2-7).

³⁶ *FCRA v. Area 9*, paras. 51-52, 54-55.

³⁷ *Ibid.*, paras. 39-47.

³⁸ *Ibid.*, para. 31 (see also Respondent Submissions [14 May 2013], Annex C).

³⁹ *FCRA v. Area 9*, Appellant Rebuttal Submissions (6 June 2013), paras. 2, 4.

⁴⁰ *Ibid.*, para. 17.

valuation should also take account of the large financial benefit provided by the province's contaminated lands agreement.⁴¹ Finally, it questioned the appropriateness of attaching the costs to the value of *this* lot of land: "the costs associated with building the park and completing the foreshore are simply the cost of doing business in developing and marketing over 10,000 residential condominiums."⁴²

Mr. Beatty's decision did not speak directly to each of these arguments but, in result, rejected the approach urged by the FCRA. He stressed that, where detrimental conditions run with the land, they "must be considered in determining the market value of the property."⁴³ He therefore deducted the \$17 million completion cost from the property's \$12 million value to arrive at a nominal valuation of \$1.⁴⁴

In broadest terms, *FCRA v. Area 9* held that lands owned subject to an amenity agreement may be valued at a nominal amount, a decision that has both political and legal implications. Politically, the FCRA's challenge failed and Area 9 is no closer to completion; however, the legal challenge propelled the group's political position on a local issue across the city and forced a reply from the municipality and developer alike.⁴⁵ The local media resounded with the association's criticism that "the PAAB seems to have forgotten the basic premise of the CAC agreement."⁴⁶ The FCRA's counsel warned that the decision "leaves the door wide open for other developers ... [to] milk the system," but the group lacked the funds necessary for an appeal.⁴⁷

Legally, the decision was partially a product of the FCRA's chosen legal tool. While accessible, PAAB procedures also aim for efficiency.⁴⁸ The resulting process favours brief written submissions over oral submissions and so provides little opportunity for a responsive dialogue regarding the impact of CAC schemes on property value. For instance, Mr. Beatty

⁴¹ *Ibid.*, para. 8.

⁴² *Ibid.*, para. 26.

⁴³ *FCRA v. Area 9*, para. 36.

⁴⁴ *Ibid.*, paras. 36-37, 59.

⁴⁵ See, for example, Mayor Gregor Robertson interviewed by Ron Bencze, "Critics Concerned over Concord Property Tax Payments," *GlobalTV*, May 2010, <http://www.falsecreekresidents.org/2010/05/>; Webb, "Concord Pacific's Prime Slice."

⁴⁶ Fern Jeffries interviewed by Kyle Donaldson, "False Creek Residents Upset at Land Devaluation," *City TV*, n.d., <http://www.youtube.com/watch?v=Csg9rQLLKms>.

⁴⁷ Webb, "Concord Pacific's Prime Slice," (citing Tim Louis); Frank Luba, "False Creek Residents Shocked When 'Low' Assessment of \$400,000 Reduced to \$1 on Chunk of Expo Lands," *Province*, 21 August 2013, <http://www.theprovince.com/news/False+Creek+resident+s+shocked+when+assessment+reduced+chunk+Expo+lands/8813037/story.html>.

⁴⁸ British Columbia, Legislative Assembly, *Hansard*, 36th Parl., 3rd Sess., No. 8 (2 June 1998), 8259 (Kwan).

repeatedly referenced a lack of evidence on such seemingly significant points as the factual similarities between Area 9 and other parks.⁴⁹

Beyond the procedure, the decision indicates that the property assessment process may be flawed. At its core, the AA aims to assess the value of individual properties based on their individual uses and liabilities.⁵⁰ It provides no direction as to how assessment principles should be applied to individual properties that are embedded in a broader CAC scheme. In particular, *FCRA v. Area 9* demonstrates that the cost of amenity completion could amount to a significant reduction in tax liability for developers across the province, and political commentators anticipate loud calls for the province to “step in and close a major loophole in its assessment system.”⁵¹ For municipalities, the suit has added an apparently unforeseen financial consideration to the common decision to use CACs as a development tool.

In conclusion, *FCRA v. Area 9* is a case about a brownfields site that is now home to thousands. A significant number of those residents owe their homes to an agreement between the city and a developer, and they are impatient to see the deal completed. They took a gamble, challenged what they considered to be an unfair property valuation, and lost; the law declined to take a nuanced approach to reconciling its method of property valuation with an increasingly complex developmental tool.

Despite this recent story of defeat, the local dispute did not end with the *FCRA v. Area 9* decision. In May 2014, the FCRA filed a petition with the BC Supreme Court challenging the city’s decision to permit Concord’s ongoing commercial and sales activities on Area 9.⁵² The petition will involve a different legal forum; however, this broader narrative highlights the fact that development inescapably occurs at the intersection of legal, political, and local spheres and that residents groups push the boundaries of all three.

⁴⁹ See, for example, *FCRA v. Area 9*, paras. 39-40, 54-55.

⁵⁰ Assessment Act, s. 19.

⁵¹ Daniel Fontaine, “Small Vancouver Businesses Pay the Price for Tax Breaks,” *24 Hours Vancouver*, 28 August 2013, <http://vancouver.24hrs.ca/2013/08/28/small-vancouver-businesses-pay-the-price-for-tax-breaks>.

⁵² “FCRA Petitions the Supreme Court of British Columbia,” False Creek Residents Association, <http://www.falsecreekresidents.org/2014/05/22/fcra-petitions-the-supreme-court-of-british-columbia/>.