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Recent Cases

THE "COMMON LAW CONDOMINIUM": A HISTORICAL ANOMALY WITH PRESENT-DAY IMPLICATIONS TO STRATA WIND-UPS

By: Jeremy West.
Watson Goepel LLP.

In British Columbia, condominium ownership is principally governed by a statutory regime found in the *Strata Property Act* ("SPA"). However historically, structures were developed to create land ownership and management rights outside of that legislative scheme.

Cypress Gardens (a 177-unit residential complex located in the City of North Vancouver) is an example of what has been colloquially described as a "common-law condominium." This fairly unique ownership structure was created by filing individual titles for undivided fractional interests in the entire property, with the owners being bound to comply with various covenants, roles, and management structures formalized in a User Agreement registered on title to the property.

The ownership structure for Cypress Gardens has since been prohibited by specific provisions of the *Land Title Act*, RSBC 1996, c. 250, but Cypress Gardens is exempt from that prohibition.

In *CGT Management Corp. v. Mackenzie-Moore*, 2022 BCSC 2195, the Supreme Court of British Columbia considered an application, pursuant to the *Partition of Property Act* (the "PPA"), for an order approving the sale of the entirety of Cypress Gardens to a developer (the "Sale").

Facts

On January 5, 2022, the management company (CGT) of Cypress Gardens entered into a purchase and sale agreement to sell the entirety of Cypress Gardens (the "Sale"). Initially, 122 of the 167 co-owners voted in favour of approving the Sale at an extraordinary general meeting. The "yes" votes represented 73% of those present and 68.9% of the total ownership. However, by the time of the application, 99 of the co-owners (or approximately 56%) formally applied for approval of the Sale.

At the hearing, the owners of the remaining fractional interests opposed that order.

Relevant Statutory Scheme

In considering the application, the court first considered which legislation applied to the Cypress Gardens. Its unique structure meant that Cypress Gardens was not expressly subject to the provisions of the SPA, which incorporates a procedure for the sale of the

entirety of a stratified condominium building where 80% of the owners approve. However, in *CGT Management Corp*, the court confirmed that the PPA provided an appropriate mechanism to achieve the *en bloc* sale of the property.

Section 6 of the PPA provides that where 50% or more of the owners of a property request a sale, the court must—unless it sees good reason to the contrary—order the sale. Here, although the number of owners seeking approval of the Sale was significantly less than had originally voted in favour of it (73%) or would have been required under the SPA (80%), the court found that they represented more than 50% of the owners and the PPA created a presumption in favour of approval. Accordingly, the burden of establishing "good reason" not to approve the Sale transferred to the owners opposing the Sale.

"Good Reason" To Not Approve The Sale

After undertaking a detailed analysis of the legal and factual relationships between the owners, the court found that there was good reason not to approve the Sale and dismissed the application. In making that finding, the court placed particular emphasis on the fact that:

1. In exchange for their exclusive right of use, occupancy, and sale of their fractional interest, the owners had collectively agreed (in a covenant registered on title to the property) that they would not apply to sell each other's interests under the PPA;
2. The physical condition of Cypress Gardens, although concerning, did not warrant ordering the sale of the property;
3. The owners that live at Cypress Gardens (and rely upon its unique amenities and location for family, health, or other personal reasons) would face significant hardships if they were forced to sell; and
4. Even if the condition of the buildings was more dire, and the balance of hardships favoured a forced sale, the process leading to the Sale had not occurred in a transparent manner and was not provident.

Takeaways

Although Cypress Gardens represents a somewhat unique ownership structure, the competing interests of owners is something that regularly arises in the context of condominium or joint ownership arrangements. This is increasingly so in today's market where owners face substantial rises in maintenance costs (as buildings reach the end of their practical life) and density ratios/land prices continue to increase. The wind-up procedures provided for in the SPA do provide a greater level of certainty than can be found in other more unique ownership structures but even in those circumstances, it is important to understand the potential risks of strata, fractional, or joint ownership arrangements.

RECENT CASES

No Error in Finding Remediation Order Ran with Land and Affected Market Value of Fee Simple Interest

British Columbia Court of Appeal, December 21, 2022

The appellant was the owner and operator of a shipyard in North Vancouver since 1965. Pre-1965, the property was used as a wood treatment facility. The property was contaminated due to the industrial activities that were conducted on it over the decades. In 2010, the director of waste management issued a remediation order under the *Environmental Management Act* (the "EMA") against the appellant and the property's prior owner as "responsible persons". The appellant and prior owner incurred approximately $50 million as a result and would incur further amounts. The appellant took the position that the anticipated cost of remediation should be deducted from the assessed value of the property for property tax purposes for the years 2013 to 2019. The appellant was successful in appealing its property's assessments to the British Columbia Property Review Board (the "Board") and the Board reduced the property's assessed value. The Board found that the remediation order did not benefit the market value of the fee simple interest in the land and only affected the owner's interest.

On appeal, the Supreme Court of British Columbia found that the Board erred in law in finding that the remediation order attached only to the owner's interest in the land. The judge found that the remediation order ran with the land and affected the market value of the fee simple interest by offsetting the burden that resulted from the contamination. The judge referred the issue back to the Board. The appellant appealed.

The appeal was dismissed. Section 19(1) of the *Assessment Act* states that "actual value" is "the market value of the fee simple interest in lands and improvements". Pursuant to case law, "market value [was] not a function of the particular position of particular owners or buyers". Specifically, the appellant's status and facts particular to it as owner were not considered in the assessment of market value. The valuation of a fee simple interest in land involved assessing the value of the legal rights and obligations attached to the land in a hypothetical open market transaction. The value was that of "the entire bundle of legal rights and obligations a hypothetical seller would transfer to a hypothetical buyer."

The Court dismissed the appellant's argument that the issue relevant to value was the remediation order's effect on the use of the land. The Court stated that the relevant issue turned on the effect of the rights and obligations that attached to the fee simple on the value. The remediation order affected these rights and obligations, and therefore formed part of the "bundle of rights and obligations" valued in the hypothetical market sale. The remediation order reduced or eliminated the risk that a potential future owner would be liable for the cost of remediation, and affected what a potential purchaser would be willing to pay to acquire the fee simple interest, as the fee simple interest would have attached to it the liability of the named "responsible person" to pay the cost of remediation.

The lower court's finding that the remediation order ran with the land resulted from an appreciation of how the EMA affected the rights of ownership of contaminated land. In valuing land, a hypothetical purchaser would consider the liability arising from government regulations, pursuant to the EMA. The parties and the Board conceded that a rational and prudent hypothetical purchaser would demand that the known costs of remediation be deducted from the unimpaired value of the property. The Board failed to appreciate that the EMA permitted potential purchasers to be relieved of obligations to pay for the costs of remediation, by imposing these obligations on other, named parties, including past owners or any party responsible for the contamination. In not appreciating this, the Board fell into error, and found that any negotiations as to allocation of the remediation cost obligation would be a personal indemnity arrangement that attached to the owner's interest and would not benefit the land in the hypothetical market transaction. The Court upheld the lower court's finding that the remediation order ran with the land and affected the value of the fee simple interest.

North Vancouver (District) v. Seaspan ULC, 2023 BREG ¶51,185

Tenant Established Building Adjacent to Leased Commercial Lot Was Used for Living Accommodations and *Residential Tenancy Act* Applied

British Columbia Supreme Court, December 21, 2022

The petitioner landlord owned a property in Summerland that was divided into several areas. There was no evidence as to the property's zoning. In 2011, the respondent Rene Bourque considered purchasing the assets of a towing business that was leasing a portion of the landlord's property as its towing yard. The purchase came with a contract for towing work in Summerland. At the time, Mr. Bourque resided in a trailer in a different town. In order to be able to meet the response time requirement for his Summerland calls, Mr. Bourque wished to live and operate his towing business in Summerland. Mr. Bourque claimed that in 2011, Mr. Gorman, who he believed was the owner of the subject property, orally agreed to lease to him the lot used by the prior towing business, a second lot, and a building on the property. Mr. Gorman denied that he agreed that Mr. Bourque could use the building as his residence. The building contained four bedrooms, a bathroom, and a kitchen.

In February 2021, the landlord delivered a notice of termination of lease to Mr. Bourque, purporting to terminate the lease effective March 31, 2021, and requiring vacant possession. Mr. Bourque did not vacate the premises. The landlord applied under the *Commercial Tenancy Act* (the "CTA") for a declaration that the tenancy had been terminated and that the tenant was in wrongful possession, and sought a writ of possession. Mr. Bourque conceded that he leased a portion of the premises, the two lots, for the operation of his towing business, but took the position that another portion of the premises, the building, was leased for residential purposes. He claimed that, as a result, the CTA did not apply, and tenancy issues regarding the building had to be determined under the *Residential Tenancy Act* (the "RTA") before the Residential Tenancy Branch.

The petition was allowed in part. The Court did not find Mr. Gorman's evidence to be credible or reliable having regard to his attempts to mislead the Court during his virtual examination. The Court accepted Mr. Bourque's evidence that he discussed with Mr. Gorman his intention to reside in the building, when they entered into the oral lease in 2011. The Court found that Mr. Bourque resided in the building on a full-time basis from 2011 to 2018, residing there continuously, albeit part-time, after 2018.

Section 4(*d*) the RTA states that the RTA does not apply where the lease or use of "living accommodation" includes "living accommodation included with premises that (i) are primarily occupied for business purposes, and (ii) are rented under a single agreement". The Court found that Mr. Bourque's interest in the premises stemmed from the commercial purpose related to his purchase of the towing company. His interest in leasing the budling was motivated by the need to promptly respond to calls in Summerville under his work contract and to have towed vehicles parked in a yard next to his residence for security purposes. As a result, the Court found that the premises were primarily occupied for business purposes, satisfying the first part of section 4(*d*) of the RTA.

The Court found that the two lots and the building did not comprise a single leased premises. The lease agreement contemplated rent for each of the lots and the building as separate. The landlord also treated each of the areas as separate, eventually selling one of the lots and fencing off the building from the second lot. The selling of one of the lots and the resulting reduction in Mr. Bourque's rent supported that the three areas were not considered single premises under one agreement. The Court found that neither the landlord nor Mr. Bourque considered the existence of the lease as dependent or conditional on the lease of all three areas together. The Court concluded that the building was not rented under a "single agreement" with the two lots. Accordingly, the second part of section 4(*d*) was not satisfied, and the exclusion of the "living accommodation" from the application of the RTA did not apply. The Court dismissed the landlord's petition as it pertained to the building. With regard to the two lots, the landlord was entitled to a declaration that the lease was terminated and a writ of possession.

G.W.G. Woodcrafters Ltd. v Bourque (c.o.b. OK Region Towing), 2023 BREG ¶51,186

Contract Interpreted as Requiring Purchaser to Convey Property Back to Vendor Absent Subdivision Approval

British Columbia Supreme Court, December 16, 2022

A property owner (the "original vendor") entered into negotiations to sell a large tract of land that contained her family home to a developer, Powerblock. The original vendor wished to keep title over the part of the land that contained the family home. However, the municipality did not approve the land to be subdivided and section 73 of the *Land Title Act* prohibited the sale of part of a property. Powerblock believed that it could obtain approval to subdivide post-purchase and then transfer the lot containing the family home back to the vendor. In early 2014, the parties used one realtor to draft the contract of purchase and sale (the "contract"). Schedule "E" to the contract provided that the vendor's son could remain in the family home until subdivision was approved. Schedule "E" provided that the vendor could obtain ownership of the parcel with the family home through a notice of intention to exercise the option post-subdivision. Schedule "E" also contained a provision stating that it would expire in July 2019. Powerblock assigned its interest in the contract to the defendant numbered company (the "purchaser") shortly pre-completion of the sale. Schedule "E" was filed as an option at the Land Title Office. The original vendor assigned her interest in the contract to her son (the "vendor").

The purchaser failed to obtain subdivision approval and Schedule "E" was allowed to expire. The vendor brought an action to enforce the contract and Schedule "E", seeking the entire property to be conveyed back to him. The purchaser took the position that Schedule "E" was a standalone contract that had expired, the vendor's option to purchase expired, and the vendor was required to vacate the property.

The action was allowed. The Court found that Schedule "E" was confusing and inconsistent and that the contract and Schedule "E" were not capable of being clearly interpreted on their own. Amongst other things, Schedule "E" stated that it was the entire agreement, but a clause in the contract required a registration of the vendor's right to receive the entire property should Schedule "E" expire, which contemplated an ongoing obligation outside of Schedule "E". The Court found that the parties' agreement could only be interpreted with the assistance of the context of the parties' intentions. It found that the written communications between the original vendor and Powerblock made it clear that their intention at

the time the sale was to have the property approved to be subdivided, and that if the subdivision did not occur, title over the entire property would be conveyed back to the vendor.

The Court noted that the time limit imposed in Schedule "E" had passed, and Schedule "E" did not stipulate what happened if the option was not exercised within the time limit. The Court dismissed the purchaser's submission that title should pass to it pursuant to the principle of merger. The Court noted that merger applied to contract terms relevant to title transfer, not to contractual obligations imposed on a purchaser post-title transfer. The Court interpreted the contract as providing that if the time for obtaining subdivision approval under Schedule "E" expired this would trigger the contract's clause providing that title over the entire property was to be conveyed to the vendor.

The Court stated that, in the alternative, it would invoke the principle of rectification to arrive at the same result, having regard to the clear intentions of the parties. The Court considered that the home had been in the vendor's family for 50 years and the original vendor had specifically crafted the sale to allow the family to keep their home. The vendor established that the property was unique to him, and that specific performance was the appropriate remedy. The purchaser was ordered to transfer clear title of the property to the vendor.

Vanier v. 0994660 B.C. Ltd., 2023 BREG ¶51,187

No Error in Finding Subdivision Approving Officer Did Not Owe Private Law Duty of Care

British Columbia Court of Appeal, January 17, 2023

The appellants were the owners of six lots that were landlocked, having no access by way of a dedicated highway passing through the abutting lots. The abutting lots belonged to developers (the "developer owners"). The appellants claimed that the developer owners applied to subdivide their two lots into three lots and a condition of the subdivision approval from the Province required the developers to enter into an access easement under s. 75 of the *Land Title Act* (the "Act"). The appellants alleged that the developer owners failed to meet this condition, yet the approving officer approved the subdivision application regardless. The appellants brought a claim against the respondent approving officer and the Province of British Columbia, taking the position that the officer breached the applicable standard of care and was therefore negligent and that the Province was vicariously liable.

The respondents' application to strike the negligence claim was allowed after the chambers judge found that the appellants' claims were bound to fail. The chambers judge found that the statutory scheme of the Act precluded the imposition of a private law duty of care on an approving officer acting under Part 7 of the Act. The judge found that *Held v. Sechelt (District)*, 2021 BCCA 350, ("*Held*") was an analogous precedent. The appellants appealed.

The appeal was dismissed. Paragraph 75(1)(*a*) of the Act states that a subdivision plan "must", to the extent of the owner's control, include a "sufficient highway to provide necessary and reasonable access" to adjacent lands. Under s. 86(1), an approving officer could refuse to approve the subdivision plan based on a number of enumerated factors. The Court found no error in the chamber judge's treatment of *Held* as an analogous precedent. *Held* determined that when deciding whether to approve or refuse an application for subdivision, an approving officer did not owe a duty of care to property owners, both within and adjacent to the proposed subdivision. *Held* also determined that there was insufficient proximity to establish a private law duty of care and noted that public authorities generally had powers and duties to act in the public interest rather than to protect private interests of individuals affected by a regulatory scheme. The Court considered whether the statutory scheme disclosed a legislative intention to exclude or confer a private law duty of care and found that the Act made the public interest an overarching consideration under which approving officers exercised their authority. The Court in *Held* concluded that Part 7 of the Act afforded an approving officer with wide discretion to refuse to approve a subdivision where it was against the public interest, and that the Act precluded, "by necessary implication, a private law duty of care".

The appellants did not demonstrate an error in the Court's analysis of *Held*. Their submission that s. 75(1)(*a*) should be excepted from that conclusion was untenable. The argument that s. 75(1)(*a*) created a statutory duty on the approving officer to require a developer to include highway access to adjacent properties isolated the provision from the scheme of Part 7 of the Act, which was contrary to the principles of statutory interpretation. Paragraph 75(1)(*a*) set out a requirement for a subdivision that was not mandatory when considered in context. The requirement was "subject to the

extent of the owner's control" and to the officer's discretion to approve plans in accordance with "the public interest". The appellants' claim had less merit than that of the claimants in *Held*, as the appellants did not claim there was any risk of physical harm to person or property but only that the decision affected the value of their properties. The Court concluded that *Held*'s decision that an approving officer did not owe a private law duty of care when deciding whether to approve or reject an application for subdivision was a broad statement of principle regarding the statutory scheme of Part 7 of the Act that applied to the circumstances and was dispositive of the appeal.

Tekamar Mortgage Fund Ltd. v. British Columbia, 2023 BREG ¶51,188

Judge Erred in Finding Hardship Was Established Warranting Cancellation of Certificates of Pending Litigation

British Columbia Court of Appeal, January 25, 2023

The appellant company was in the business of selling, repairing, and cleaning vehicles. The respondents were the former general manager and director of the appellant company, his wife, and his two adult children. The appellant commenced an action against the respondents in late November 2018, alleging that the former general manager had misappropriated funds and converted them to his own use and for the benefit of the other respondents, and that some of the misappropriated funds were used to pay expenses and improvements for their family residence (the "Chilliwack property"). The appellant's claim to an interest in land was grounded in a remedial constructive trust and the appellant sought a declaration that it was entitled to trace its funds to assets purchased and maintained by the respondents, including the Chilliwack property. The appellant registered two certificates of pending litigation ("CPLs") on the Chilliwack property, in 2020 and 2022.

In June 2022, a chambers judge allowed the respondent former general manager's application cancelling the CPLs upon posting of security of $20,000. The judge found that the respondent had established hardship on the basis that he had to refinance the Chilliwack property at an "exorbitant interest rate" of 16 per cent, and this was "directly linked" to the registration of the CPLs. The amount of $20,000 was found to represent "the maximum" of the appellant's interest in land. The appellant appealed.

The appeal was allowed. The Court noted that decisions to cancel a CPL and set the amount of security under section 256 and 257 of the *Land Title Act* were discretionary and attracted deference on appeal. The standard of palpable and overriding error applied to a judge's findings of fact on the question of whether the person seeking to cancel a CPL established that hardship and inconvenience were experienced or likely to be experienced by the CPL's registration. Section 256(1) provided that hardship and inconvenience had to be causally connected solely to the registration of the CPL. Pursuant to case law, the evidence of hardship had to include evidence showing real hardship that was more than "trifling" or "insignificant".

The Court found that the evidence did not establish that the hardship was "directly linked" to the CPLs, as the chambers judge had found. The record showed that the respondents' financial difficulties predated the commencement of the appellant's proceedings. The respondents' evidence was that they purchased the Chilliwack property in 2016 and refinanced it twice in 2018, in May and in early November. The first refinancing was with a mortgage at an interest rate of prime plus 10 per cent, to pay certain family related loans. The second refinancing added a second mortgage of $58,000, at an interest rate of 15 per cent. In December 2020, the respondents also filed consumer proposals under bankruptcy legislation. When the second mortgage matured in November 2021, the respondents sought a renewal and entered into a modification to receive an additional advance of $330,000, payable at an interest rate of 16 per cent. The Court found that the chambers judge failed to consider that long before the registration of the CPLs, the respondents were paying high interest rates, presumably due to their poor financial circumstances.

While the respondents alleged that they were unable to obtain financing through a conventional financial institution due to the CPLs, the only evidence of this was an unsworn statement from a mortgage broker contained in an e-mail. While the e-mail was not in the form of a commitment letter, the chambers judge considered it to be "uncontradicted evidence from a mortgage broker" indicating that significantly more favourable terms could be provided if the CPLs were cancelled. The Court found that the e-mail evidence was vague and unverified, noting that the onus was on the respondents to provide evidence sufficient to establish casually linked hardship. The Court concluded that the judge erred in failing to give weight to relevant considerations in the hardship analysis and erred in finding that the refinancing was directly linked to the CPL.

The Court also found that the judge erred in finding that $20,000 represented the "maximum" of the appellant's interest in the land by relying on particulars rather than pleadings. The judge failed to assess the probability of success of the appellant's claim to the Chilliwack property or to the possible range of damages to which it could be entitled.

Save-A-Lot Holdings Corp. v. Christensen, 2023 BREG ¶51,189

Lease Purporting to Permit Limited Common Property Parking Stalls to Be Assigned Found Invalid

British Columbia Supreme Court, January 10, 2023

In 2016, the petitioner Abstract Projects Inc. (the "developer") began developing a mixed-use strata in Victoria, with 75 residential and seven commercial strata lots. The building included underground parking stalls, with some being designated as "limited common property for the exclusive use of" residential strata lot owners in the filed strata plan (the "residential parking stalls"). The residential parking stalls were located behind an interior security gate that required a key fob. Parking stalls designated as "limited common property for the exclusive use of" commercial strata lot owners were located in front of the interior security gate. Under a 2019 "Parking Facility Lease" (the "lease"), the developer purported to lease parts of the development's common property comprising all of the parking stalls to the co-petitioner Black and White Parking Co. Ltd. ("B&W") for 99 years. The lease permitted B&W to "partially assign or sublet this Lease and its rights under this Lease to an owner or purchaser of any strata lot within the development or to the Strata Corporation." The lease was dependant on the filing of the strata plan that would create the strata and common property that was to be subdivided by the lease. The strata plan was subsequently filed and the petitioners and the respondent strata corporation entered into an "Agreement-Parking Facility Lease" (the "compliance agreement") under which the strata corporation acknowledged the lease and agreed to comply with it.

The petitioners took the position that the strata corporation failed to comply with the lease. They applied for an order declaring that the lease required the strata corporation to recognize and register lease assignments of residential parking stalls to non-residential strata lot owners or others and sought an order compelling the strata corporation to facilitate use and access to residential parking stalls by non-residential unit owners. The strata corporation took the position was that the lease was void under the *Strata Property Act* (the "SPA") and *Land Title Act* (the "LTA").

The petition was dismissed. After setting out the provisions of the SPA, LTA and case law, the Court found that a pre-stratification lease could not operate after filing the strata plan in such a way as to avoid application of the SPA post-filing the plan. Where common property was designated as limited common property at the time a strata plan was deposited, the designation could only be removed by amending the plan under section 257 of the SPA. The lease therefore constituted a subdivision of common property without compliance with the required application process set out in section 257. While the developer had the choice to file the strata plan without the limited common property designation for the residential parking stalls or to alter the designation by resolution, it had not taken these steps. Accordingly, prospective purchasers that examined the title, strata plan, and resolutions of the strata corporation were not aware that B&W would have the authority to assign leases of residential parking stalls to entities that were not residential strata lot owners. While the petitioners argued that the lease was disclosed to prospective purchasers, the Court found that the disclosure statements that were provided were not clear and did not clearly provide that the lease displaced or abrogated the limited common property exclusive-use designation. The Court noted that the disclosure statements did not "highlight or summarize the most important feature concerning the limited common property parking stalls", namely, B&W's ability to assign the stall to non-owners.

The Court further noted that section 252(3) of the SPA required the registrar of the Land Titles Office to "note on the common property record a charge or other interest that separately charges the common property", requiring a recording of any leases of common property that could have been granted. After filing the strata plan, the lease became a lease of common property exceeding three years. Where dispositions of common property by way of leases exceeded three years, they become subdivisions of land under section 253 of the SPA, and Part 7 of the LTA applied. Subdivided common property ceased to be common property and became land held in the name of the strata corporation or on its behalf but not shown on the strata plan, pursuant to section 253(4) of the SPA. Compliance with Division 4 of Part 7 of the LTA included the requirement of tendering a subdivision plan for approval by an approving officer under section 83 of the LTA. Under section 97(1), a subdivision plan had to be signed by each owner of the land subdivided and those signatures

operated to release a charge or interest that affected common property. There was no evidence that a subdivision plan was submitted to the registry for approval or that the plan was signed by the developer. The Court concluded that the failure to follow requirements under both the LTA and SPA rendered the lease invalid.

Abstract Projects Inc. v. Strata Plan EPS6069, 2023 BREG ¶51,190

Tribunal Erred in Analysis of Claim for Significant Unfair Treatment by Strata Corporation

British Columbia Supreme Court, January 25, 2023

The petitioner owned a residential strata lot in the respondent strata corporation, in an eight-storey mixed-use building in Vancouver. Since taking possession of her unit, the owner noticed water ingress issues. The owner notified the strata corporation, and various steps were taken to address the issue. In 2016, a special levy was approved to do urgent repairs to the unit's balcony and doors. The engineering company that was hired performed repairs in a slow and inefficient manner. In 2017, the strata corporation promised the owner it would cover the costs of her damaged flooring. After further damage in 2017, another engineering company and two roofing contractors were engaged. In 2018, the owner indicated to the strata corporation that she was proceeding with repairs to the flooring herself, having not received any payment from the strata corporation. A 2018 report provided that a $5 million building envelope rehabilitation was required. In 2020, a special levy was approved for $70,000 to repair two balconies, including the petitioner's, but the cost was insufficient to cover the needed repair. Later in 2020, a roofing company advised the strata corporation that work on the petitioner's unit was complete, but water ingress issues continued.

In 2021, the petitioner brought a dispute notice against the strata corporation before the Civil Resolution Tribunal (the "Tribunal"), seeking damages for the strata corporation's alleged negligence and significantly unfair treatment of her and reimbursements for flooring repair costs. The Tribunal dismissed the claim. The petitioner applied to the Court for judicial review.

The petition was allowed in part. Under section 56.7(2)(*a*) of the *Civil Resolution Tribunal Act* (the "CRTA") the Court was required to apply a standard of patent unreasonableness to the petitioner's challenge to the Tribunal's findings of fact, findings of law, and exercises of discretion within areas that the Tribunal was considered to be expert. Under section 56.7(2)(*b*), the standard of fairness was to be applied to the petitioner's challenge to the procedure employed by the Tribunal. The Court found that none of the impugned aspects of the Tribunal's decision raised rule of law concerns that would justify disregarding the CRTA's statutorily mandated standards of review and substituting a correctness standard instead. The Court also did not find that the "general questions of legal importance" basis for requiring correctness review was applicable. The Tribunal's determination that the petitioner's flooring cost reimbursement claim was time-barred was not a general question of central importance to the legal system as a whole. The Court concluded that this issue would be reviewed on a patent unreasonableness standard as well.

The Court did not find the Tribunal's dismissal of the negligence claim to be patently unreasonable. The Tribunal applied the applicable principles, including considering the strata corporation's assessment of the options for addressing the petitioner's concerns and the manner in which it used the special levy to fund repairs. The evidence justified a conclusion that the Tribunal's actions, while not perfect, were objectively reasonable. The Court agreed with the Tribunal that the applicable two-year limitation period precluded the petitioner's claim for costs in relation to her floor repairs and further found that the petitioner did not make out a claim for procedural unfairness based on the Tribunal allegedly allowing the strata corporation to make lengthier statements.

The Court found that the Tribunal's dismissal of the petitioner's claim regarding significantly unfair treatment was patently unreasonable. The Tribunal based its finding on its earlier conclusion that the strata corporation's repair and maintenance decisions were reasonable. Section 123(2) of the CRTA, which mirrored section 164(1) of the *Strata Property Act* (the "SPA"), states that the Tribunal may make an order directed at the strata corporation "if the order is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights." The Court of Appeal's decision in *Dollan v. The Owners, Strata Plan BCS 1589*, 2012 BCCA 44, ("*Dollan*") was the leading case on section 164 of the SPA and its interpretive principles applied equally to section 123(2) of the CRTA. *Dollan* required the Tribunal to consider: (a) examined objectively, did the evidence support the asserted reasonable expectation of the applicant; and (b) did the evidence establish that the reasonable expectation of the applicant was violated by an action that was significantly

unfair. "Significant unfairness" in section 123(2) included "oppressive" conduct, being conduct that was "burdensome, harsh, wrongful, lacking in probity or fair dealing, or ha[d] been done in bad faith" and also "unfairly prejudicial" conduct, being "conduct that [was] unjust or inequitable." As the Tribunal had not turned its mind to either of these questions, it was irrational to dismiss the petitioner's significant unfairness claim solely on the basis that her negligence claim had already been rejected. The Court remitted the decision to the Tribunal for a reconsideration of the claim for a remedy under section 123(2) of the CRTA.

Dolnik v. Strata Plan LMS 1350, 2023 BREG ¶51,191

Petition to Set Aside Property Assessment Review Panel Decision Was Barred by *Assessment Act*'s s. 11 Notice Delivery Provision

British Columbia Supreme Court, February 8, 2023

The petitioner was a real estate developer that leased and occupied three properties from the respondent City of Delta, pursuant to a 2018 lease. The lease provided that the petitioner was responsible for payment of all taxes in relation to the property. By end of December 2019, the respondent Assessor of Area No. 11 – Richmond/Delta (the "assessor") completed an assessment of the properties for property tax purposes, finding that the value was "nil" for 2020, on the basis that they were municipal property. The assessor subsequently learned that the lands were leased by the petitioner, and therefore not subject to municipal tax exemptions, and the assessor notified the co-respondent Property Assessment Review Panel (the "PARP") of the error. The assessor's evidence was that on approximately January 30, 2020, the assessor mailed a notice of the February 11, 2020, PARP hearing to the petitioner in relation to the first property. On approximately February 27, 2020, the assessor mailed a notice of the March 10, 2020, PARP hearings in relation to the second and third properties. After reviewing the assessment, the PARP issued decisions that increased the petitioner's 2020 property taxes from nil to $252,280. The petitioner took the position that it did not receive notice of the PARP hearings. As a result, it was deprived of the opportunity to be heard before the PARP and appeal the PARP decisions prior to the legislated deadline of April 30.

The petitioner applied for orders in the nature of *certiorari* to set aside the PARP decisions and amendments made by the assessor to the 2020 assessment roll. In the alternative, the petitioner sought a declaration that the PARP 2020 decision and resulting amendments made by the assessor to the roll were null and void. The petitioner argued that either BC Assessment failed to mail the notices or that the post office failed to make the delivery.

The petition was dismissed. The issue of whether the notices were provided to the petitioner involved questions of procedural fairness assessed on a standard of fairness. The Court considered whether the assessor delivered the notices of hearing and decision notices in accordance with the *Assessment Act* (the "Act"). The Act did not require the assessor to prove delivery of the notices, as the presumption of delivery applied. Pursuant to case law, the assessor had to show that the communication was actually sent, or "went on its way", and that it chose a reliable and efficient means of communication. The petitioner had the onus of showing that delivery was not effected, without fault, neglect, or avoidance of delivery on its part. To meet its onus, the petitioner had to provide "some reasonable explanation" for why notice was not received. The Court found that presumption of delivery was also rebuttable if the intended recipient could show the delivery was not effected by showing that the giving of notice was frustrated by some act or event beyond that person's control.

The Court found that the assessor demonstrated that it put the notices in the mail, that they were correctly addressed to the petitioner, and that the system it had was a reliable and efficient means to communicate. Audits demonstrated that due diligence had been taken to ensure that the notices were sent out and the evidence supported that two copies of each notice were mailed out, one to the City of Delta and one to the petitioner. The Court concluded that the assessor complied with the Act.

The Court found that the petitioner's evidence supported that delivery was frustrated by some circumstance outside of its control, thus rebutting the presumption of delivery. The petitioner's evidence indicated that it had a careful system in place where the administrator at the office monitored receipt of incoming mail, including all BC Assessment mail. All notices were tracked and retained by use of dedicated annual binders. The petitioner's evidence was that pre-2020 and in 2021 there had not been an issue with receipt of assessment mail. The Court noted that the one significant difference about 2020 was that at the time the notices were sent, the COVID-19 pandemic had started and the usual monitoring

systems for mail receipt at the petitioner's office changed, with the office being closed from March to June 2020 and the administrator's tasks being performed by another person. The Court found that the "unique changes" caused by the pandemic "weighed against the systems the petitioner had in place to account for its mail" and found the notices were not delivered to the petitioner, through no fault, negligence, or avoidance of its own.

However, s. 11(1)(*a*)(iii) of the Act states that a revised assessment roll is binding despite an assessor's failure to deliver the notices. Accordingly, the Court found that granting the relief sought by the petitioner would unduly interfere with the legislative scheme, having regard to the clear intention of finality in s. 11. The Court concluded that s. 11 was a bar to the petition.

Century Industries Ltd. v. British Columbia (Assessor of Area #11 - Richmond/Delta), 2023 BREG ¶51,192

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For LexisNexis Canada Inc.

Paul B. Wronski
Content Development Associate
905-415-5892
paulb.wronski@lexisnexis.ca

Customer Support
1-800-387-0899
service@lexisnexis.ca
Customer Service is available from 7 a.m. to 11 p.m. (ET) Monday to Friday, and from 9 a.m. to 11 p.m. (ET) on Weekends.

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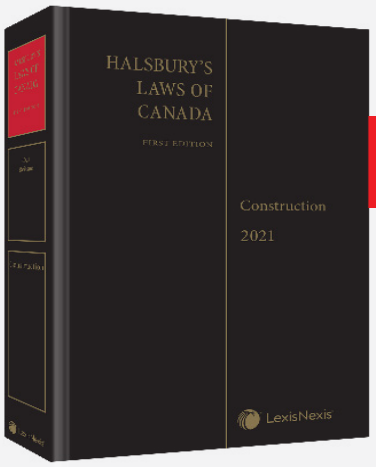

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