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WHAT YOU NEED TO KNOW RE: THE NEW PROHIBITION ON FOREIGN PURCHASES OF REAL ESTATE

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The Government of Canada has enacted the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the "**Act**") which came into effect January 1, 2023. The Act prohibits the "purchase" of any "residential property" directly or indirectly by "non-Canadians.". It is presently only intended to be in effect for the calendar years 2023 and 2024. The *Prohibition on the Purchase of Residential Property by Non-Canadians Regulations* (the "**Regulations**"), released on December 21, 2022, provide additional detail on key elements of the Act.

While the stated intention of the Act is to make homes more affordable for people living in Canada by excluding foreign buyers, the Regulations include certain provisions that may have significant unexpected (and arguably unintended) implications for commercial property transactions.

Implications of the Act

The Act provides that "it is prohibited for a *non-Canadian* to *purchase*, directly, or indirectly, any *residential* property."

The Act defines "non-Canadian" as:

a) an individual who is not a Canadian citizen, permanent resident of Canada or registered as an Indian under the *Indian Act*;

b) a corporation that is not incorporated under the laws of Canada or a Canadian province;

c) a corporation incorporated under the laws of Canada or a Canadian province whose shares are not listed on a recognized Canadian stock exchange and that is *controlled* by a person referred to in paragraph (a) or (b); and

d) a prescribed entity.

The Act defines "residential property" as:

a) a detached house or similar building containing not more than three dwelling units;

b) a part of a building that is a semi-detached house, rowhouse unit, residential condominium unit or other similar premises; and

c) prescribed real property or immovable.

The Act states every non-Canadian that contravenes the Act will be guilty of an offence. Every person or entity that counsels, induces, aids or abets or attempts to counsel, induce, aid or abet a non-Canadian to purchase, directly or indirectly, any residential property knowing that the non-Canadian is prohibited is guilty of an offence and will be subject to a fine of not more than $10,000.

While a contravention of the Act does not render a sale itself invalid, the government may ask a court to order the sale of a residential property purchased in contravention of the Act. In such an event, the non-Canadian purchaser will receive no more than the purchase price of the residential property.

Implications of the Regulations

The Regulations provide guidance on the Act's operation, applicability, and enforcement. They significantly expand the scope of the Act and its potential consequences on commercial transactions. To understand these consequences, the following aspects of the Regulations must be considered: (i) the expanded definition of "residential properties", (ii) control by a non-Canadian, and (iii) the broad definition of "purchase".

(i) Expanded Definition of "Residential Properties"

The Regulations state "residential property" includes all land "that does not contain any habitable dwelling, that is zoned for residential use or mixed use, and that is located within a census agglomeration or a census metropolitan area." On their face, the Regulations could be argued to significantly expand the definition of "residential property" to include all land, whether vacant or not, that is zoned "mixed use" in many population centres in Canada.[1]

(ii) Control by a Non-Canadian

The definition of "control" in the Regulations will cause many entities in commercial real estate transactions to be caught under the prohibition even though they would not regularly be considered a "non-Canadian." The Regulations define "control" to include "direct or indirect ownership of shares or ownership interests of the corporation or entity representing 3% or more of the value of the equity in it or carrying 3% or more of its voting rights", or control in fact of the corporation or entity, whether directly or indirectly, through ownership, agreement or otherwise.

The threshold of a 3% direct or indirect ownership interest by any non-Canadian in an entity that has been formed under Canadian laws is very low, which will cause many Canadian corporations, partnerships and trusts to be captured by the prohibition.

Further, in addition to corporations, the Regulations expand the prohibition to capture partnerships, trusts and other persons who are not individuals or corporations.

Although there is an exception for publicly traded corporations that would otherwise be non-Canadian, the exemption does not cover non-corporations that are publicly traded, such as real estate investment trusts, that are non-Canadian as a result of the definition of control.

(iii) Broad Definition of "Purchase"

The Regulations provide that a "purchase" includes "the acquisition, with or without conditions, of a legal or equitable interest or a real right in a residential property." This broad definition may apply to almost any direct or indirect acquisition, including the acquisition of shares, limited partnership interests, or other interests in an entity that owns "residential property." Unfortunately, the majority of the exemptions provided for in the Regulations do not apply in most commercial contexts. That said, there is an exception where the non-Canadian assumed liability for the residential property under an agreement of purchase and sale prior to January 1, 2023. There is also an exemption for transfers resulting from the enforcement of security by a secured creditor.

[1] This includes major centres such as Vancouver, Toronto and Montreal, but also many smaller centres such as Kelowna, Peterborough, and Sherbrooke are captured under the definition.

Looking Forward

The Act and Regulations will have significant implications on commercial transactions in Canada and will likely prohibit many transactions that were likely not intended to be captured by the legislation. As a result, we understand that a consortium of real estate participants has been established to lobby the federal government for revisions to address these issues. In the meantime, given the broad application and significant implications associated with the new legislation, anyone who may be impacted by it should seek legal advice.

Postscript:

Amendments to *Prohibition on the Purchase of Residential Property by Non-Canadians Act* and Regulations

After significant lobbying by the real estate industry, in the stated effort to "enhance the flexibility of newcomers and businesses looking to add to Canada's housing supply", the Honourable Ahmed Hussen, Minister of Housing and Diversity and Inclusion, announced amendments (the "**Amendments**") to the *Prohibition on the Purchase of Residential Property by Non-Canadians Act* (the "**Act**") and the regulations thereunder (the "**Regulations**"). The Amendments take effect on March 27, 2023.

Background

The Act, which took effect on January 1, 2023, prohibits the "purchase" of any "residential property" directly or indirectly by "non-Canadians." It is presently only intended to be in effect for the 2023 and 2024 calendar years. The Regulations, released on December 21, 2022, provided additional detail on key elements of the Act.

As described in our January 19, 2023 Update, *What You Need to Know Re: The New Prohibition on Foreign Purchases of Real Estate*, the Regulations included certain provisions that had significant unexpected (and arguably unintended) implications for commercial property transactions.

Highlights of the Amendments

Among other things, the Amendments provide as follows:

- The Act will not apply to the acquisition of vacant land (including for purposes of residential development). Specifically, the Amendments repeal section 3(2) of the Regulations that previously expanded the definition of "residential property" to include any land that does not contain any habitable dwelling, that is zoned for residential use or mixed use, and that is located within a census agglomeration or a census metropolitan area.
- A new exception will allow non-Canadians to purchase residential property for the purpose of development. Canada Mortgage and Housing Corporation's commentary on the Amendments elaborates on what is and is not "development" for such purposes.
- The exception to the definition of "non-Canadian" applicable to corporations listed on Canadian stock exchanges now extends to all publicly traded entities formed under the laws of Canada or a province (i.e., publicly traded REITs).
- A privately held corporation or other entity formed under the laws of Canada or a province, and "controlled" by a non-Canadian, is deemed to be a non-Canadian for purposes of the Act. Under the Regulations, "control" was defined to include direct or indirect ownership representing 3% or more of equity value or voting rights. The Amendments increase this threshold from 3% to 10%. The government's press release indicates that this aligns with the definition of "specified Canadian Corporation" in the *Underused Housing Tax Act* (Canada).

The regulations enacting the Amendments have not yet been published.

Looking Forward

The Minister's announcement is a welcome development for the Canadian real estate community, including non-Canadians wishing to develop real estate in Canada.

PLAINTIFF FAILS TO PROVE NOTARY PUBLIC'S ERROR WAS THE CAUSE OF LOSSES FROM REAL ESTATE TRANSACTION

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In a professional negligence claim, a plaintiff must establish not only that a defendant breached the applicable standard of care but that the breach was the factual cause of the losses being claimed. Depending on the nature of the claim, a plaintiff may need evidence proving that they would have conducted themselves differently in the circumstances had they received different advice from the defendant.

In ***Engman v. Canfield***, 2023 BCCA 56 (CanLII), the British Columbia Court of Appeal confirmed that causation in a professional negligence claim cannot be established with only speculative evidence about what the plaintiff "would have" done differently.

The case arose from the transfer of a 20-acre property owned by the plaintiff to a third party. The defendant was an experienced notary public. In 2012, the notary witnessed the plaintiff's signature on a British Columbia "Form A" Freehold Transfer. This was the only task the notary performed and he was paid $50 for his services.

When the plaintiff was not paid for the property, she brought a civil action against various defendants, including the (now retired) notary, who was sued for negligence. The claim against the notary finally went to trial nine years later, when the plaintiff was 82 years old.

The trial judge found that the notary owed the plaintiff a duty to act with reasonable care when he witnessed her signature on the form and that he breached the applicable standard of care by not inquiring into the plaintiff's capacity to sign the document, the voluntariness of the transfer, or her understanding of the content and legal effect of the form. The notary was held liable for $465,000 in damages, representing the adjusted fair market value of the property at the time of the 2012 transfer.

The key finding for the trial judge was that the notary did not confirm that the plaintiff had received independent legal advice about the transfer, or that she made an informed decision to proceed without advice. In the trial judge's view, had the notary refused to witness the form, the plaintiff could have arranged to have the agreement for the transaction rescinded. She could have then sold her property to another party at full market value and she would not have sustained the loss claimed.

On appeal, the notary argued the plaintiff failed to prove that she would have acted differently but for his alleged error. The Court of Appeal agreed and found that the inferences drawn by the trial judge were speculative and did not support a finding of factual causation.

The Court of Appeal referred to the Supreme Court of Canada's decision in ***Nelson (City) v. Marchi***, 2021 SCC 41, at paragraph 46, which confirmed that it is "well established that a defendant is not liable in negligence unless their breach caused the plaintiff's loss".

A defendant may argue or call evidence to show that the injury sustained by the plaintiff would have happened in any event: ***Clements v. Clements***, 2012 SCC 32 at para. 11.

The plaintiff's claim for damages against the notary was predicated on the assertion that before witnessing the plaintiff's signature on the form, the notary was duty-bound to confirm with her that she had received legal advice about the transfer or had made an informed decision to proceed without it. To claim damages, the plaintiff was required to prove that had the notary met the required standard of care, the sale and transfer of the property would have been stopped, either in its entirety or on the agreed-upon terms, and that she would have acted in a different manner. In the Court of Appeal's view, she failed to do so.

While the plaintiff testified at the trial, she did not address what she would have done had the notary made the requisite inquiries of her or declined to witness the form. Significantly, the trial judge did not find that the plaintiff was without the cognitive capacity to sign the documentation. Rather, the evidence was that the plaintiff had considerable experience

in assessing the value of properties, as well as experience in attending the offices of lawyers and notaries for the purpose of completing the property sales. In the Court of Appeal's words, "she was not a neophyte in the purchase and sale of land or the legal consequences of transferring property".

Further, there was evidence that the plaintiff's son-in-law, who had brokered the transaction, had suggested that the plaintiff speak with a real estate lawyer about the transfer of the property. This occurred after the Form A had been signed but before it was registered with the Land Title Office. The plaintiff's daughter subsequently looked up the name of a lawyer for her, obtained a contact number, and provided this information to her. However, the plaintiff never took steps to speak to a lawyer about the transaction.

In light of this evidence, there were simply too many "unknowns" to conclude that but for the notary's failure to make specific inquiries of the plaintiff, she ***would have*** done something other than transfer the property thereby avoiding her loss when the buyer failed to meet its payment obligations. This is the test the plaintiff had to meet.

Where factual causation is sought to be established by inference, any such inferences "must be based on proven facts and cannot be simply guesswork or conjecture": ***Borgfjord v. Boizard***, 2016 BCCA 317, at paragraphs 55 and 67. It is only in "rare circumstances" that a court is entitled to draw an inference of causation "from no relevant evidence at all", and that is when a defendant's negligence prevents the plaintiff from positively proving the cause of their injuries: ***B.S.A. Investors Ltd. v. D.S.B.***, 2007 BCCA 94, paragraph 43.

In the Court of Appeal's view, the plaintiff's claim was defeated by the sizeable body of evidence showing that she had the capacity to contract in 2012, was content with the sale of the property at the time, was not interested in seeking legal advice about the inherent risks, and that she did not complain about the transaction to a third party until well after the fact. What was missing in the evidence at trial was a factual nexus between the notary's negligent conduct and the plaintiff's loss. The lack of evidence from the plaintiff on the issue of what she would have done differently if the notary had made certain inquiries of her or declined to witness the form was fatal to the factual causation analysis.

As a result, the appeal was allowed and the negligence action against the notary was dismissed. The decision shows that the evidentiary record must be capable of proving factual causation resulting from the alleged error by the professional, failing which there can be no finding of liability.

RECENT CASES

No Error in Finding Handwritten Lease Was Operative Lease

British Columbia Court of Appeal, September 12, 2022

In March 2012, the appellant tenants and respondent landlord entered into a handwritten agreement for the lease of commercial premises to be used as a sheet metal manufacturing facility. The agreement provided that rent would be $900 per month; the lease term would be three years with one option to renew; and a formal lease with the terms and conditions "as per attached copy", being a template called the "Richmond lease", would be drawn up by the landlord's lawyer. The lawyer drew up a typewritten lease that the tenants found unacceptable. One of the items on which the parties disagreed was a second option to renew. The typewritten lease was never formalized or signed. The parties proceeded under their original handwritten lease, occasionally modifying it verbally. In March 2018, when the initial three-year term and a renewed three-year term expired, the tenants continued to occupy the premises and pay rent. In June 2018, the landlord verbally advised the tenants that it would be adjusting rent to $1,350, with a further increase coming based on an upcoming market appraisal. The tenants provided 12 post-dated cheques. After obtaining the appraisal, the landlord delivered notice that it would require rent of $1,628 as of October 2018. The tenants objected to the increase and asserted a right to renew for a third three-year term. In September 2018, the landlord delivered a notice of termination. The tenants continued to occupy the premises.

The landlord applied for a writ of possession and rent arrears. The tenants commenced an action, seeking a declaration that the typewritten lease with their handwritten modifications was a binding agreement. The application judge denied the tenants' motion to adjourn and consolidate the landlord's application with their action and granted the application, finding the tenants were wrongfully overholding. The tenants appealed.

The appeal was dismissed. The application judge had discretion regarding the ruling on the adjournment. The judge found that no injustice would result from the summary adjudication of the claims related to the lease terms. It was open to the judge to conclude that there was no agreement other than the handwritten agreement, with some oral modifications. There was no error in finding that, considering the long delay, it was just to resolve the dispute without referring the application to the trial list.

It was open to the judge to find that there was no meeting of the minds with respect to the terms of the draft typewritten lease and that the "Richmond lease" was only intended to serve as a template for the agreement that would replace the handwritten agreement. The wording of the handwritten lease could not be interpreted as stating that the parties agreed to adopt any part of the "Richmond lease" that was inconsistent with the handwritten agreement. The application judge further found that the landlord had not agreed to the tenants' handwritten modifications to the typewritten lease. The judge's findings were entitled to deference.

There was no error in finding that the landlord had complied with the termination notice provisions in the *Commercial Tenancy* Act required for obtaining a writ of possession. While the landlord's initial notice stated that the tenants would have to vacate the premises if they did not agree to pay the increased rent, the application judge noted that the landlord's later correspondence, from January 2019, advised the tenants that the lease had expired and required that they vacate the premises. There was no basis for finding the judge erred in the compliance analysis.

Eng v. Boniventure Properties Ltd., 2023 BREG ¶51,177

Judge Erred in Granting Easement Over Limited Common Property on Basis of Proprietary Estoppel

British Columbia Court of Appeal, October 5, 2022

The appellants were owners of strata lot 1 and the personal respondent was the owner of strata lot 3 in a three-lot strata development. The appellants purchased their lot in 2014 and the respondent purchased her lot in 2004. The second floor of the building contained an exterior deck, and a stairway descended from the deck to the backyard, which was a convenient way of reaching the garage and garbage and recycling area. Strata lots 1 and 3 opened onto the deck. On the strata plan, the deck was designated as limited common property for the exclusive use of strata lot 1. The prior owner of strata lot 1, Judy Zaichkowsky, who had ceased ownership in 2010, had permitted the respondent to use the deck for access to the stairs, and had promised she would never bar her access. After they became the owners of lot 1, the appellants prohibited the respondent from using the deck to access the stairs.

The respondent brought an application for an order granting her an easement over the deck, relying on the doctrine of proprietary estoppel. The appellants applied for an injunction prohibiting the respondent from entering the deck. The chambers judge granted the respondent an easement over the deck. The appellants appealed, taking the position that the judge erred in finding the elements of proprietary estoppel had been made out and that the order was inconsistent with the *Land Title Act* (the "LTA") and *Strata Property Act* (the "SPA").

The appeal was allowed. The Court found that there was ambiguity in the respondent's claim, as it was unclear if she was seeking to confirm an existing, unregistered easement or create a new easement as an equitable remedy. The evidence did not suggest that Ms. Zaichkowsky's assurance constituted an easement, but rather that it was an assurance that she would allow the respondent passage. The Court found that the promise was in the nature of a licence, not an interest in land. Ms. Zaichkowsky, as the lot 1 owner, had a "substantial degree of control" over limited common property designated for her unit, allowing her to let others cross the deck. She did not, however, have property rights that allowed her to grant an easement over the deck. The Court further noted that under section 79 and 80 of the SPA, strict procedures for the creation of legal interests and rights in strata property existed, requiring a three-quarter vote of the strata owners in favour of a grant of easement. The statutory requirements for an easement were not met and no easement was ever created.

If an easement had been created by proprietary estoppel, section 29(2) of the LTA would apply to preclude the finding that the easement applied against the new owners of lot 1. Under section 29(2), where a person took a transfer of land from a registered owner, they were not "affected by ... an unregistered interest affecting the land or charge", other than in certain circumstances. Accordingly, the chambers judge could not recognize an existing unregistered easement that would affect the successor owners of lot 1.

The Court found that the chamber judge's granting of an easement on the basis of proprietary estoppel conflicted with SPA provisions on the disposition of common property. The Court further found that the elements of proprietary estoppel were not made out. The scope of the promise was unclear. There was no basis for finding that the promise applied to all future owners of lot 3. If the promise could be interpreted as promising that, it could not be said that reliance on it was reasonable. Unlike a typical action based in proprietary estoppel, the respondent was not asking Ms. Zaichkowsky to make good on her promise. In "exceptional cases," an action could be brought against successors in title, but only if they were privies of the original promisor. The Court declared that title to strata lot 3 did not carry with it the right to cross the deck to reach the stairway. Granting an injunction was not necessary, having regard to the declaratory order.

Stratton v. Richter, 2023 BREG ¶51,178

Judge Had No Jurisdiction to Discharge Mortgage on Basis that It Had Been Fraudulently Obtained

British Columbia Court of Appeal, September 29, 2022

In September 2021, the respondent property owner received a letter from a lawyer representing the appellant numbered company, advising her that she was in default of a mortgage registered against her property and demanding payment of the owing balance of $417,905 or the appellant would bring foreclosure proceedings. The respondent discovered that a power of attorney ("POA") had been registered in the Land Title Office in January 2020, purporting to bear her signature, witnessed by a notary, and giving her son-in-law power to deal with her property on her behalf. The appellant had registered a mortgage and assignment of rents against the property in the Land Title Office one day later, with the mortgage and assignment being purportedly signed by the son-in-law, under the POA, and witnessed by a lawyer. The respondent requested that the appellant remove the POA and charges from title to the property and the appellant refused.

The respondent brought an application under sections 243 and 244 of the *Land Title Act* (the "Act"), seeking an order cancelling the POA, discharging the mortgage, and cancelling the assignment of rents. The applicant and son-in-law deposed that they had not signed the documents and that they were fraudulently endorsed by an unknown third party. The application was granted. The appellant appealed.

The appeal was allowed. Under section 243(1) of the Act, when the mortgagor or owner of the equity of redemption became entitled to pay off or had paid off a mortgage and the mortgagee was absent from British Columbia or could not be found, and there was no one authorized in British Columbia by POA to receive payment of the mortgage money and execute a discharge of the mortgage, the mortgagor or owner of the equity of redemption could bring a without-notice application for the mortgage to be discharged. Under section 244(1) where a mortgagee refused or neglected to give the mortgagor or owner the equity of redemption a discharge, the owner could apply to court in the same manner as provided in section 243.

The Court found that the application judge erred in assuming jurisdiction under section 234 and 244 of the Act. The Court was not provided with case law where these provisions were used to discharge an allegedly fraudulent mortgage, and the existing case law dealt only with mortgages whose validity was not challenged. The Court found that section 243 only applied in circumstances according to its plain meaning, specifically, where a mortgagee could not be located or was absent and a mortgagor or owner of the equity of redemption was entitled to a discharge. Section 244 applied to mortgagees who wrongfully refused to provide a discharge. The plain meaning of these sections indicated that they had no application where a mortgagor wished to discharge a mortgage and cancel related documents on the basis that they had been fraudulently obtained. As the judge had no jurisdiction under section 234 and 244, the decision was set aside.

The Court further found that the judge erred in finding that the evidence of the respondent and her son-in-law as to the authenticity of their signatures was unchallenged. Section 43 of the Act states, "The signature of the officer witnessing the execution of an instrument by an individual is a certification by the officer that (a) the individual appeared before and acknowledged to the officer that he or she is the person named in the instrument as transferor, and (b) the signature witnessed by the officer is the signature of the individual who made the acknowledgement." The POA and mortgage documents exhibited to the appellant's affidavit were signed by an "officer" as witnessed pursuant to section 43 and 45 of the Act. The notary's and lawyer's signatures therefore provided *prima facie* proof of the authenticity of the respondent's and her son-in-law's signatures.

1233543 B.C. Ltd. v. Cao, 2023 BREG ¶51,179

Court Refused to Approve Wind-Up Resolution Where Purchaser Commenced Lawsuit Against Strata

British Columbia Supreme Court, September 29, 2022

The petitioner strata corporation's property consisted of six two-storey residential buildings built in 1982. At a special general meeting in June 2022, 25 of 28 owners, constituting 89 per cent, voted to wind up the strata plan and appoint a liquidator to sell the property to a developer, the respondent Anthem Properties Group Ltd. ("Anthem"). On the basis of an 80 per cent approval, required under the s. 277(1) of the *Strata Property* Act (the "Act") for a voluntary winding-up and liquidation, each owner was forecast to receive $1.085 million upon the sale, subject to claims of charge-holders. In July 2022, Anthem took the position that its contract of purchase and sale was terminated, as a condition was not met. In August 2022, Anthem commenced an action seeking the return of its deposit. The action was ongoing.

Twenty-two of the owners applied to the Court to confirm the resolution to wind up that was passed in June 2022, pursuant to section 278.1(4) of the Act. Three of the owners who had supported the resolution did not join the application, resulting in the application being supported by 78.6 per cent of the owners. The opposing owners cited uncertainty brought on by the Anthem lawsuit.

The application was dismissed. Under section 278.1(5) of the Act, in deciding whether to confirm the wind-up resolution, the Court was required to consider the best interests of the owners and the probability and extent of significant unfairness to the owners and significant confusion and uncertainty in the affairs of the strata corporation, or of the owners, if the wind-up resolution were either confirmed or not confirmed. Pursuant to case law, the test of significant unfairness and significant confusion and uncertainty set a high bar.

The Court found it was uncertain when and if the winding up would take place, how it would be effected, and with what results. The Court noted that the order would confirm the appointment of and vest the property in the liquidator only at the point when the strata council decided to file the order in the Land Title Office ("LTO"). This potential delay in the vesting exacerbated the uncertainty for owners. Further, the basis for the wind-up proposal was a cost estimate and interest schedule that was now unrealistic, having regard to the Anthem lawsuit. If the owners succeeded in the litigation, they would recover significantly less than $1.085 million and their recovery would be delayed. If the owners lost, their recovery would be entirely uncertain. There was further unfairness in the strata lots becoming unsaleable if the order were granted, as the lots could at any time cease to exist, upon filing of the order with the LTO. As a result, the owners could be "stuck" with the units until the property's fate would be decided, which could take years.

The Court found that it was not possible to know if the requisite 80 per cent approval vote would have been obtained if the owners knew what they now knew, and it was unlikely. The factors favouring an order were that the size of the majority supporting it was close to 80 per cent, and if the order were refused, the opportunity to sell the property at the price in the current contract of purchase and sale would likely be lost. The Court found, however, that the probability and extent of the unfairness, confusion, and uncertainty overrode the favourable considerations. It declined to confirm the winding-up resolution.

The Owners, Strata Plan NWS 1982 v. Anthem Properties Ltd., 2023 BREG ¶51,180

Court Confirmed Wind-Up Resolution that Was Not in Commercial Strata Owners' Best Interests

British Columbia Supreme Court, October 19, 2022

The petitioner was the strata corporation of a mixed-use strata development comprised of 52 residential strata lots located in a 12-storey tower, eight townhouse units, and three non-residential strata lots that were located at the ground floor of the tower. The building components suffered from numerous deficiencies, and repairs were estimated at over $6 million. The strata council was unable to raise the requisite funds from owners and explored the alternative of winding up and selling the property to a developer. In January 2021, it entered into a contract of purchase and sale to sell the strata corporation's land and buildings to the respondent Intracorp Vanness Limited Partnership ("Intracorp"). In July 2021, the strata corporation passed a series of resolutions to sell by 52 votes in favour and 11.5 votes opposed, which included the 3.5 votes of the respondent commercial strata lot owners, for a total of 81.9 per cent of all owners in favour. The respondent Crowe MacKay & Company Ltd. ("CMC") was approved as liquidator.

The strata corporation brought an application pursuant to section 278.1 of the *Strata Property Act* (the "Act") to confirm the wind-up resolution, appointment of CMC and sale to Intracorp. The commercial owners opposed the petition, taking the position that the sale was not in the best interests of all owners and was significantly unfair to them. It was uncontentious that the commercial owners would receive approximately 80 per cent of the assessed value for the commercial units while the residential unit owners would receive approximately 145 per cent of their 2018 assessed value, pursuant to the Schedule of Interest upon Destruction ("SID") filed with the Land Title Office in 1993, when the strata plan was established.

The application was allowed. Under section 278.1(5) of the Act, in considering whether to order approval of the resolution, courts were to consider the best interests of the owners and the probability and extent of any significant unfairness to one or more owners or significant confusion and uncertainty in the affairs of the strata corporation if the wind-up resolution were to be confirmed or not confirmed. The commercial owners had the burden of establishing the factors that would justify the Court's refusal to confirm the wind-up resolution.

The Court did not find that the special general meeting was not validly held. All owners were in attendance either by way of personal attendance or designated proxy and voted on the resolution. While the meeting notice package stated that there was a 50-person limit on gatherings due to COVID-19, strongly encouraged owners to participate and vote by proxy, and cautioned that if more than 50 owners attended in-person, the meeting would not be able to proceed, the Court did not find that it crossed the line of what was not permissible under the Act. The notice did not require owners to participate by proxy. The Court also dismissed the argument that an order approving the liquidator was beyond the relief that the Court could grant at this stage. Pursuant to Court of Appeal case law, the legislative steps for a wind-up with the assistance of a liquidator did not require a strict, specific order of steps.

The Court accepted that the winding-up and sale were disadvantageous to the commercial owners and that the evidence supported that the resolution was not in their best interests. The strata corporation, however, did not have an obligation to ensure that the commercial owners' interests were equally served by the wind-up. The resolutions addressed "long-standing and future-reaching building deficiency issues" that were in the strata corporation's best interests to resolve. The evidence supported that there were serious repair needs for the property and current funds raised by special levy were insufficient to complete them.

The commercial owners did not prove bad faith by the strata council. They did not establish that the strata corporation had been leveraging a failure to complete repairs to force a sale and wind-up. The commercial owners themselves had consistently opposed all special levies for repairs. The Court noted that from the outset of their ownership, the commercial owners were aware of the SID, and the strata corporation had no control over the manner in which sale proceeds were shared. The Court further stated that in another case, "such a significant discrepancy in financial recovery for one group of owners" could be grounds for a refusal to confirm the resolution, but the history of significant building failures and financial inability to repair were factors that warranted confirmation of the resolutions.

The Owners, Strata Plan LMS 992 (Re), 2023 BREG ¶51,181

Funds Payable Under Guarantee Were Not "Further Advance" Under *Property Law Act*

British Columbia Supreme Court, October 18, 2022

In 2014, the petitioner credit union loaned funds to the respondent mortgagor Ton Anh Bui, secured by a mortgage registered against title to Mr. Bui's residential property. In 2018, the credit union loaned $97,000 to the respondent HD3 Networks Inc. ("HD3"), with Mr. Bui as guarantor. In 2019, Mr. Bui approached the respondent Reliable Mortgages ("RM") for a second mortgage on his property. RM requested that the credit union provide an information statement setting out all funds required for a release of the first mortgage. The credit union responded with a one-page "Mortgage Discharge Statement" ("MDS"), stating, "Total Amount Required on 04 Mar 2019: $362,204.80". At the top, the MDS stated: "Note: This payout is for information only and [the credit union] will not be held liable for any errors or omissions once it is determined that the mortgage will be paid out you will need to send a new request. ALL INFORMATION ON THIS STATEMENT IS SUBJECT TO CHANGE". The MDS did not reference Mr. Bui's guarantee of the loan to HD3. RM advanced $352,500 to Mr. Bui and registered the second mortgage in March 2019. RM also sent a "section 28 notice" under the *Property Law Act* (the "Act") to the credit union, stating, "This notice may also prevent you from obtaining priority over

the [RM] mortgage for any further advances under your mortgage or for any increase, or other amendment that will increase the principal balance owing under your mortgage without the prior consent of [RM]". In January 2020, HD3 defaulted on its $97,000 loan to the credit union and the credit union made a demand under the guarantee.

The credit union applied for a declaration that the $97,000 Mr. Bui owed it under the guarantee was a "further advance" pursuant to section 28 of the Act. RM argued that by sending the MDS, the credit union was estopped from obtaining priority protection for the $97,000.

The application was dismissed. Section 28 states that further advances made by a mortgagee contemplated by and in accordance with its mortgage rank in priority to subsequently registered mortgages if "(a) the subsequent registered mortgagees ... agree in writing to the priority of the further advances; (b) at the time the further advances are made, he or she has not received notice in writing of the registration of the subsequent mortgage ... from its owner or holder; (c) at the time the further advances are made, the subsequent mortgage ... has not been registered; or (d) the mortgage requires him or her to make the further advances." The Court stated that the purpose of section 28 was protecting lenders who had already made a promise to lend money under a mortgage at some future point in time.

The parties' circumstances did not fall within those of section 28. The first mortgage did not require the credit union to advance $97,000 to Mr. Bui either at the time it was registered in 2014 or when the RM mortgage was registered in 2019. Mr. Bui's legal obligation to pay the $97,000 did not arise until January 2020, when the credit union called on the guarantee. Pursuant to case law, where a guarantor supported a guarantee with a mortgage, the creditor only enjoyed, at best, a contingent interest in the mortgaged property. The credit union could not rely on section 28 to gain priority for the $97,000.

It was unnecessary to address the estoppel argument. However, the Court found that estoppel would not apply with regard to the "Note" provided at the top of the MDS. The warning language did not suffice to prevent RM from relying on the clear and particularized statement in the body of the MDS, setting out the total of $362,204.80. It was reasonable for RM to rely on the MDS, and objectively, the MDS was sent out with the expectation that it would be relied upon.

Vancouver City Savings Credit Union v. Bui, 2023 BREG ¶51,182

Bylaw Amendment Permitting Strata Corporation to Deny Construction Applications Was Significantly Unfair

British Columbia Supreme Court, December 12, 2022

The petitioners entered into a contract of purchase and sale in April 2017 for strata lot 5 in a five-lot residential strata development. The completion date was August 15, 2017. While the remaining four lots had been developed, lot 5's only improvement was an old swimming pool. In June 2017, after becoming aware that there had been a sale of lot 5, the respondent strata corporation delivered a Form B Information Certificate to the petitioners' solicitor. In early July 2017, the strata council passed a motion to draft construction bylaws. The strata council set August 26, 2017, as the annual general meeting ("AGM") date and notified the then-owner of lot 5 and the petitioners' conveyancing solicitor's assistant by e-mail. On August 14, the strata council sent an updated package to the conveyancing solicitor's assistant by e-mail, which included the AGM notice. The petitioners were unaware of and did not attend the AGM. The four other owners voted 3-1 in favour of the amendment to the bylaws, meeting the three-quarter vote for passage. The bylaw provided that all construction or demolition would require pre-approval from the strata corporation. Further, the strata council could require various documents and assurances and would take into account "any matter that it consider[ed] relevant" in making its approval decision. By early November 2017, the petitioners provided the strata council with the requisite documents for their approval application, including a certificate of liability insurance, builder's license certificate, and the house plan. The strata council responded that it would require a lawyer and other professionals to assess the application, at the petitioners' cost, and demanded a $10,000 pre-payment. The petitioners refused.

The petitioners applied for a declaration that that the bylaw amendment was invalid.

The application was granted. The Court first considered whether the strata corporation had given proper two-weeks' notice of the AGM to all owners, pursuant to section 45(1) of the *Strata Property Act*. The Act defined "owner" as persons shown in the Land Title Office as being the registered owner. While the strata corporation had sent notice to the then-owner of lot 5, that owner was no longer the owner by the time of the AGM and could not vote. As the petitioners

were the owners at the time of the AGM, they were entitled to notice. The Court found that the strata corporation's attempts to give notice were not reasonable in the circumstances. The strata corporation was aware that lot 5 was for sale, and, at the time, the bylaw amendments would only affect the new owners, as all other lots were already built upon. Accordingly, the owners who "had the most at stake" were the petitioners. The Court did not find that the strata council's e-mail to the petitioner's solicitor provided proper notice, as it did not contain the essential elements of the agenda, as required under section 45(3) of the Act. It was a reasonable inference that the strata corporation was attempting to change the bylaws in light of the sale. As there was no proper notice of the AGM, the vote taken with respect to the bylaw amendment was invalid.

The Court also found that the bylaw was "significantly unfair" under section 164(1) of the Act. The bylaw granted unlimited power to the corporation to disallow construction, at its discretion. This resulted in oppressive or unfairly prejudicial conduct. As the corporation required professionals to assess the application, it had given itself powers and responsibilities that it was ill-equipped or unwilling to execute. The demand for payment for the professionals was oppressive, unreasonable, and unfair. The petitioners had already engaged professionals to comply with the bylaw, and the construction would be subject to municipal inspections. These were sufficient measures to ensure safety, and there was no rational explanation for the "excessive demands" the petitioners faced. The appropriate remedy was to declare the bylaw invalid. The Court refused to grant punitive damages against the strata corporation.

Hall v. The Owners, Strata Plan EPS 2116, 2023 BREG ¶51,183

Residential Tenancy Branch's Finding of "Transitional Housing" Exemption Upheld

British Columbia Supreme Court, December 13, 2022

The respondent Elizabeth Fry Society of Greater Vancouver ("EF") operated a social housing facility called Mazarine Lodge. Mazarine Lodge was operated under an operating agreement with the British Columbia Housing Management Commission ("BC Housing") and was subsidized by the province. The facility was part of the government's program to respond to homelessness. The petitioner was a senior with disabilities in receipt of disability income assistance. She moved into Mazarine Lodge and signed a "Mazarine Lodge Program Agreement" (the "Lodge agreement") that contemplated the establishment of program goals and the provision of program services. The Lodge agreement stated that: the petitioner agreed to pay a monthly program fee; the accommodation was not covered by the *Residential Tenancy Act* (the "Act"); and the accommodation was "supportive housing and services ... to move onto independent living as soon as possible". The petitioner was unhappy with EF's rules, including restrictions on guests, and brought a complaint before the Residential Tenancy Branch (the "RTB"), claiming the rules breached the Act.

The RTB dismissed the complaint, finding that the petitioner's accommodation was exempt from the Act, as it was "living accommodation provided for ... transitional housing" under section 4(*f*). The RTB found that the three requirements for "transitional housing", as defined in section 1 of the *Residential Tenancy Regulation* (the "Regulation"), were met. The living accommodations were provided: (1) on a temporary basis; (2) by a person or organization that received funding from the government for the purpose of providing that accommodation; and (3) together with programs intended to assist tenants to become better able to live independently. The petitioner brought an application to set aside the RTB decision.

The application was dismissed. The Court found no error in the RTB's finding of "temporary basis". The RTB had considered that residents' stays at the lodge were determined on a case-by-case basis, with an average stay being 10.5 months, that the petitioner did not intend to stay at the lodge indefinitely and the terms of the Lodge agreement, including payment of "fees", not "rent". The RTB had found that the Lodge agreement referred to transition to independent living as soon as possible, which evidenced temporary and transitional periods of accommodation. Further, EF's own tenure under its operating agreement with BC Housing was limited.

The Court dismissed the argument that the RTB had failed to grapple with section 5 of the Act, which provides that landlords and tenants could not avoid or contract out of the Act. While section 5 made the Lodge agreement's provision excluding the Act not determinative, the Lodge agreement itself could still be considered for determining the accommodation type. The RTB's interpretation was not inconsistent with the Act's and Regulation's purposes, as section 4(*f*) specifically provided for the exception, evidently to facilitate the provision of emergency shelters and transitional housing.

The Court found no error with the second and third determination, namely, that EF received funding from the government for the purpose of providing the accommodation and that it was accommodation provided with programs intended to assist tenants to become better able to live independently. The operating agreement contemplated the operation of a facility for persons who were at risk of homelessness with an objective that most would be in independent housing after 24 months. It was not necessary for the programs to be formally outlined in an agreement, and it sufficed that EF provided evidence as to the existence of the programs. The Court concluded that the RTB's findings and conclusion on "transitional housing" were supported by the evidence and legislation.

McNeil v. Elizabeth Fry Society of Greater Vancouver, 2023 BREG ¶51,184

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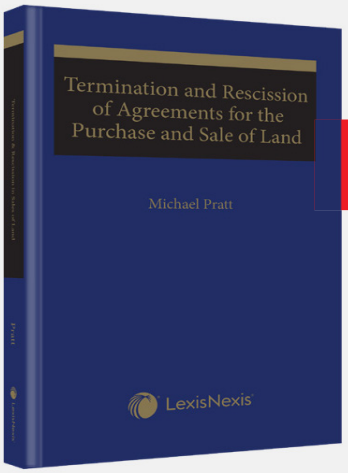

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