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Recent Cases

CENTS AND SENSIBILITY: OBTAINING AN ADDITIONAL RENT INCREASE FOR CAPITAL EXPENDITURES

— Lisa Mackie, Alexander Holburn Beaudin + Lang LLP.

As of July 1, 2021, landlords are now permitted to apply to the BC Residential Tenancy Branch for an additional rent increase to offset a "capital expenditure". Given that landlords have been extremely restricted in their rent increase opportunities over the last several years (and entirely banned from increasing the rent between March 30, 2020 and January 1, 2022), the opportunity to offset significant building expenses comes as welcome news. The additional rent increase opportunity originates from early recommendations from the BC Rental Housing Task Force. Its goal was a simple one: to build better homes for renters, while creating more opportunities for landlords to invest in their rental housing.

The Buck Stops Here

Not all building expenditures will open the door for an additional rent increase. A capital expenditure must involve a repair or replacement of a "major system" or "major component" of a rental property. The repair or replacement must also be a result of one or more of the following circumstances:

- Maintaining the rental property to meet health, safety and housing standards;
- Repairing or replacing a failed, malfunctioning, or inoperative building system or component;
- Repairing or replacing a building system or component that has reached the end of its useful life;
- Reducing energy use or greenhouse gas emissions (e.g. installing solar panels; replacing single-pane window with double-paned windows); or
- Improving security at the rental property (e.g. installing CCTV cameras, installing or replacing a FOB system).

Even when a capital expenditure meets this first hurdle, the landlord must still meet other requirements. Fortunately, landlords can look to Policy Guideline #37 for guidance as to what does and does not qualify for an additional rent increase. This policy is accessible directly from the BC Residential Tenancy Branch Website. Under this policy, the Branch has made it clear that:

- The capital expenditure must have been incurred within 18 months of applying to the Branch for an additional rent increase;

- The expenditure must not be expected to re-occur for at least another 5 years;
- The expenditure must not be related to routine, ongoing or annual maintenance;
- If the repair is a result of poor repair/maintenance practices, then a landlord will not qualify for additional rent increase; and
- If the repair can be funded from another source (e.g. insurance, rebates or government grant), then the landlord will not qualify for an additional rent increase.

You Do the Math

If approved, the additional rent increase will be granted according to a formula. The formula factors in the amount of the eligible capital expenditure divided by the number of dwelling units in the building amortized over a period of 120 months. The additional rent increase amount will also be capped at a maximum of 3% per year for three years on top of the permitted annual rent increase amount for those years. To assist landlords with determining how much of an increase they might be able to obtain, the Residential Tenancy Branch has also developed a calculator on its website to help with this arithmetic. The calculator can be accessed here.

Do You Hear Me Now?

The Application for an Additional Rent Increase due to a capital expenditure resembles the same process as other Applications to the Residential Tenancy Branch. That is, on receipt of the Application, the Residential Tenancy Branch will schedule a participatory hearing so that any tenant(s) in opposition to the additional rent increase can participate and oppose. Policy Guideline #37 (which arbitrators will look to when deciding these Applications) suggests the kinds of evidence a landlord should be prepared to present, including but not limited to:

- Before and after photographs of the repair/replacement;
- Copies of permits
- Copies of applicable laws/bylaws/construction standards;
- Expert reports regarding the nature of the repair or replacement;
- Maintenance records; and
- Manufacturer's documents establishing useful life expectancy for the building system or component.

What Next?

For landlords that have incurred a capital expenditure within the last 18 months, or those faced with replacing or repairing a major building system or building component, there is no time like the present to start the rent increase process.

RECENT CASES

Court of Appeal Found Tenancy Agreement Existed Where There was Evidence of Oral Agreement for Manufactured Home Park Property

British Columbia Court of Appeal, May 18, 2021

The appellant had lived in a mobile home registered in his name in a manufactured home park for over a decade. Until 2019, the property where the mobile home stood was owned by his brother with whom the appellant claimed to have had an agreement to live at the property rent-free for as long as he wished in exchange for his provision of work and services. In November 2019, the brother died and ownership of the property was transferred to his estate. The brother was survived by three children, including the two respondents, who were the estate executors. In early 2020, the estate advised the appellant that he could not continue to reside at the property without paying rent. In July 2020, the estate

filed a notice of civil claim seeking a writ of possession, damages for trespass, and injunctive relief to enjoin the appellant from returning to the property. In his response, the appellant took the position that he had a tenancy agreement under the *Manufactured Home Park Tenancy Act*, SBC 2002, c. 77 (the "MHPTA"), a standard term of which was that it could not be changed without the written agreement of both the landlord and tenant.

On a summary judgment application, the judge granted judgment against the appellant, finding he was not a tenant and had not produced any evidence that he had an agreement with the deceased to live rent-free on the property and could not establish any legal or equitable interest in the property extending beyond the deceased's lifetime. The appellant appealed.

The appeal was allowed. The Court found that a fair assessment of the evidence clearly raised an unresolved question as to the existence of a possible tenancy relationship, with the appellant as tenant with the right to occupy the property. The judge erred in concluding, without analysis, that no tenancy relationship existed. The estate had demanded rent from the appellant, produced a rent roll, and admitted to an arrangement under which the appellant had the right to reside in his trailer on the property. In addition to the appellant's evidence and that of his son, the deceased's son swore that the appellant had living rights and free rent on the property until the end of his life in exchange for work and services. The Court agreed with the appellant that the application judge might have relied on his non-payment of monetary rent as a basis for concluding that the appellant was not a tenant. Section 1 of the MHPTA defines "rent" as including "value or a right given or agreed to be given, by or on behalf of a tenant to a landlord in return for the right to possess a manufactured home site". The MHPTA further defines "tenancy agreement" as including an oral agreement, express or implied, and "landlord" as including successors in title to an original landlord. Subsection 5(1) precludes landlords and tenants from contracting out of the MHPTA.

The Court found that while section 13 of the MHPTA stated that a tenancy agreement entered into on or after January 1, 2004 had to be prepared in writing, following case law, the fact that the appellant's agreement with the deceased was not in writing was not dispositive of the existence of a tenancy agreement under the MHPTA. The Court concluded that there was a genuine issue to be tried on the existence of a tenancy relationship under the MHPTA. It held that the question was to be first considered by the Residential Tenancies Branch, pursuant to the scheme contemplated by subsection 51(3) of the MHPTA. It referred the matter to the Branch.

Charbonneau Estate v. Charbonneau, 2021 BREG ¶51,105

Easement Agreement Not Valid Where Signatories Were Tenants Granting Rights They Did Not Have

British Columbia Supreme Court, May 14, 2021

The shíshálh First Nation entered into a lease agreement to lease land comprised of Lot 3 and Lot 4 to Mr. and Ms. Homenchuk in 1989 ("Original Lease") for a lease term ending in 2037. The house on Lot 4, which pre-existed the Original Lease, extended onto Lot 3, with the house, deck, and fence encroaching between six and 14 feet (the "Encroachments"). The Original Lease did not mention any encroachment between the two lots or an easement. In 2018, the plaintiffs entered into a contract of purchase and sale of the leasehold interest in Lot 3. Shortly after, the plaintiffs learned of the Encroachments. After the purchase completed, they requested that the defendants, the assignees for Lot 4, remove the Encroachments and the defendants refused. The defendants relied on a 2003 "easement" agreement (the "Easement Agreement") entered into by former leaseholders of the lots. Mr. Olsen had entered into the Easement Agreement with Ms. Bainne, who at the time possessed the leasehold interest for both lots, to obtain an assignment of her lease of Lot 3. The Easement Agreement described Mr. Olsen as the grantor and Ms. Bainne as the grantee of an easement over a portion of Lot 3 allowing for the building encroachment. It provided for a payment of $10 per year by the grantee. The recitals stated that the grantor was the registered owner in fee simple of Lot 3. Assignments of the lease made after Ms. Bainne and Mr. Olsen signed the 2003 Easement Agreement did not refer to the Encroachments or the 2003 Easement Agreement.

The plaintiffs brought an action for removal of the encroaching structure and damages for trespass. They took the position that the 2003 Easement Agreement was not enforceable, as tenants could not create a binding easement over land in perpetuity.

The action was allowed. The Court found that there were several defects with the 2003 Easement Agreement. The Easement Agreement involved parties granting rights they did not have, as the grant was stated to run in perpetuity,

contrary to the principle of *nemo dat quod non habet*. While the defendants were seeking to have the Court read down the indefinite term in the Easement Agreement to some other term, they had not pleaded mutual or unilateral mistake, and Mr. Olsen did not provide evidence on intention. The Easement Agreement also improperly described the signatories as owners in fee simple. The evidence, further, did not establish that easement was ever approved by the shíshálh First Nation, whereas the Original Lease stated that a leaseholder could encumber the lease only if they obtained prior written approval. The 2003 Easement Agreement was also not followed by the parties, as the evidence indicated that no annual payments of $10 were made. Even if there was a valid and enforceable easement, it could not pass from leaseholder to leaseholder, as the assignment agreement expressly stated that the Original Lease was in full force and effect and had not been modified.

The Court ordered an injunction restraining the defendants from trespassing upon the plaintiffs' leasehold interest and from encroaching a portion of their house, deck, and fence. The defendants were ordered to remove the Encroachments by August 31, 2021.The plaintiff's knowledge of the Encroachments at the time of purchase was considered by the Court in its assessment of the quantum of damages. It awarded $5,000 as damages for trespass.

Gambling v. Dykes, 2021 BREG ¶51,106

Tenants Established Shed and Crawlspace Were Within Scope of Rented Property

British Columbia Supreme Court, June 11, 2021

Starting April 2020, the petitioner tenants rented a property from the respondent landlord, paying rent of $3,800 per month. The parties entered into a standard-form tenancy agreement. The property was a large, fully furnished home located in a gated community. The property had a yard and detached garage, as well as a detached shed and a crawlspace under the home that was entered through a door in the hallway of the home. The landlord's position was that the crawlspace and shed were not included in the monthly rent and had been retained for the landlord's own storage. The landlord's position was that the tenants had been orally informed prior to the move-in that they would not have access to the crawlspace and shed, and the move-in inspection report and tenancy agreement did not mention these two spaces. The tenants took the position that they understood that the monthly rent included exclusive use and access to all areas of the property. They applied to the Residential Tenancy Branch ("RTB") seeking a determination that they were entitled to use the shed and crawlspace.

In August 2020, the RTB dismissed the application, finding it was not satisfied that the tenants had provided sufficient evidence to support that the landlord had included these areas as part of the tenancy. The tenants brought a petition for judicial review of the RTB decision.

The petition was allowed. The Court considered whether the RTB's decision was patently unreasonable. It found that the RTB made an error in concluding that the agreement was not sufficient to discharge the tenants' burden of proof to establish that the landlord had included the shed and crawlspace as part of the rental unit. The tenants had entered into the agreement to rent the property, which was described by its residential address, in its entirety. The entire property at the relevant residential address constituted the rental unit. The agreement did not contain any terms that would have excluded the shed or crawlspace and was on its face sufficient to establish that there were no relevant exclusions from the property. It was not necessary for the agreement to list the shed and crawlspace explicitly as part of the rental unit, just as it was not necessary for it to list the detached garage, the lawn, and the garden as included.

While there was disputed evidence as to whether the landlord's employees had verbally advised the tenants that the crawlspace and shed were excluded, it was open to the RTB to make findings on the evidence and determine what the employees had said. The RTB had declined to do so. Further, it would have been patently unreasonable to consider statements made after the agreement was signed, as these could not alter or modify the extent of the rental unit agreed to in the agreement. The subsequent move-in inspection report, and its "somewhat ambiguous markings" in relation to the basement also could not alter the scope of the parties' agreement. The Court set aside the RTB decision and made a declaration that the shed and crawlspace were part of the rental unit.

Flynn v. Pemberton Holmes, 2021 BREG ¶51,107

Strata's Actions in Remedying Damaged Common Elements Were Reasonable

British Columbia Supreme Court, June 16, 2021

The respondent strata contained 101 units as well as common property that included overpasses, bridges, and walkways constructed in part using wooden beams. The petitioner purchased one of the strata's units in 2016. The strata had noticed early signs of damage to the wooden beams by at least 2013. In April 2013, it received confirmation from an engineering firm that issues with the fascia and aluminum flashing over the wooden beams needed to be addressed. The strata followed recommendations to retain another engineering firm, which recommended certain remediation work. The strata hired a company to perform the work over the summer of 2013. In 2016 and 2017, the strata decided to replace two of the wooden beams. It had ongoing concerns about the long-term durability of the beams and in 2018, it retained a structural engineering firm ("RCJ") to assess the issue. RCJ recommended replacement of all wooden beams and modification of walkways and overpasses. At a special meeting, the majority of the owners approved a special levy of $3.5 million to finance the remediation and repairs and a lawsuit against the original contractors, engineers, and others. The petitioner voted against the levy.

The petitioner filed a dispute notice with the Civil Resolution Tribunal ("CRT"), claiming damages and taking the position that the strata breached its duty to maintain and repair common property in a timely manner prior to his purchase. The damages claimed were equal to the petitioner's share of the levy, at $33,237. In April 2020, the CRT dismissed the petitioner's claim, finding the strata met its duty of care. The petitioner applied for judicial review of the CRT decision.

The petition was dismissed. The standard of review for decisions made by the CRT under the *Strata Property Act*, SBC 1998, c. 43 (the "SPA"), was correctness, pursuant to section 58 of the *Administrative Tribunals Act*, SBC 2004, c. 45. The strata had a statutory duty to repair and maintain common property under sections 3, 72(1), and (2) of the SPA. The standard against which the strata's actions were to be measured in assessing its duty under section 72 was objective reasonableness. The steps required to be taken were dictated by the circumstances at the time, and there was no requirement that the repairs be performed immediately or perfectly. The Court noted that strata councils were made up of lay volunteers that could make mistakes and that were not expected to have expertise in the subject matter of their decisions.

The Court did not find that the CRT erred in concluding that the strata had taken reasonable actions. The evidence did not establish that the strata breached its duty to deal with the issue. The council minutes showed that the strata was alive to and was monitoring the beam issue from 2013 to 2016. It was unaware of the full extent of the problem until the RJC report. The evidence did not show that the strata ignored recommendations or washed its hands of responsibility for the issue. The fact that the strata's plan of action did not resolve the issue and significant repairs were needed four or five years later did not mean it was negligent. The Court further noted that the petitioner failed to provide evidence on the applicable standard of care.

Even if negligence was established, the Court found that the petitioner did not provide evidence to establish a causal connection between the standard of care and damage suffered. There was no evidence on if and/or how the repair issue was factored into the price the petitioner paid for his unit. The Court concluded that the CRT was correct in dismissing the dispute.

Slosar v. The Owners, Strata Plan KAS 2846, 2021 BREG ¶51,108

Relief from Forfeiture Appropriate Where Tenant Was Long-Term and Rent Non-Payment Was Due to Pandemic

British Columbia Supreme Court, June 17, 2021

The respondent tenant leased premises in the petitioner landlord's shopping mall and operated a Hudson's Bay store there since 1996. Clause 4.02 of the lease stated that rent was to be paid "without any abatement, set-off or deduction whatsoever except as specifically provided for in this Lease". The lease also contained an "unavoidable delay" clause, excusing a party from non-performance of certain lease obligations during a period of "unavoidable delay". From March to May 2020, the tenant closed its store due to the COVID-19 pandemic. In April 2020, the tenant ceased paying rent citing the pandemic. Starting April 2020, the landlord delivered monthly notices of default under the lease. In September

2020, the tenant wrote to the landlord alleging the landlord was in default of the lease for failing to maintain the shopping centre in accordance with "first class regional shopping centre" standards, as required under the lease, and sought an abatement of rent. In November 2020, the landlord issued a notice to quit and a notice to terminate.

The landlord brought a petition seeking a declaration that the lease was terminated and the tenant was wrongfully holding possession of the premises, and sought writ of possession under sections 18 and 21 of the *Commercial Tenancy Act*, RSBC 1996, c. 57. The tenant brought an action alleging breach of lease, seeking, *inter alia*, relief from forfeiture, orders under section 24 of the *Law and Equity Act*, RSBC 1996, c. 253, abating rent, and a declaration that the tenant was not required to pay rent until the breaches were cured.

In December 2020, the tenant brought an application seeking an interim and interlocutory injunction prohibiting the landlord from terminating the lease or re-entering the premises. In the alternative, it sought relief from forfeiture under section 24 of the *Law and Equity Act*. The parties entered into a consent order pursuant to which the tenant paid the landlord 50 per cent of owed rent and deposited the remainder in its counsel's trust account.

The application was allowed in part. The Court found that it did not matter whether the landlord was in breach of the contractual obligation to provide a "high quality" shopping centre. Pursuant to case law, notwithstanding a breach of the lease by the landlord, a tenant must continue to pay rent, unless the lease provides otherwise or something is done by the landlord that amounts to an eviction of the tenant. Clause 4.02 clearly provided that rent was payable without any abatement unless otherwise provided in the lease. The Court did not accept that the "unavoidable delay" clause applied. The clause began with the phrase "Whenever in this Lease it is provided that any act or things to be done or performed is subject to Unavoidable Delay", meaning it was limited to parts of the lease that expressly stated they were subject to "unavoidable delay." The rent payment clause and the clause requiring the tenant to remedy a default within 30 days did not refer to unavoidable delay. As the clause was inapplicable, the Court was not required to determine whether the pandemic was an "unavoidable delay". The tenant did not discharge its onus of establishing that the landlord should not be granted a writ of possession.

Turning to the claim for relief from forfeiture, the Court considered that the tenant had deliberately failed to pay rent for a period of time. The Court, however, also considered that the tenant had leased the premises for almost 25 years, had a substantial investment in them, and there were no other premises in the area for the store to move. The loss suffered by the landlord was not large, as it was paid 50 per cent of the rent and was secured for the remaining 50 per cent. The pandemic had inflicted unprecedented and devastating economic losses on the tenant and the Court was required to ameliorate its consequences where possible, in an equitable and fair manner. The Court concluded that relief from forfeiture was appropriate, however, only on terms that the tenant pay all rent arrears and all ongoing rent to the landlord.

Cherry Lane Shopping Centre Holdings v. Hudson's Bay Company ULC Compagnie De La Baie D'Hudson Sri, 2021 BREG ¶51,109

Developer Did Not Establish That Surveyor Made Error in Final Strata Plan

British Columbia Supreme Court, June 11, 2021

The petitioner was the developer of a strata development. The respondent numbered company was the purchaser of unit 22 in the development. Under the *Real Estate Development Marketing Act*, SBC 2004, c. 41.12, the developer was required to file and to provide purchasers with a disclosure statement containing a draft strata plan ("DSP") showing the proposed strata lots and their areas. The parties' contract of purchase and sale provided for a price adjustment if the area of the constructed strata unit differed from that shown on the DSP by more than 5 per cent. The land surveying firm hired by the developer included the area of an internal staircase that joined the grand floor and mezzanine of unit 22 and of unit 21 when depicting the area of unit 22 in the DSP. In preparing the final strata plan ("FSP"), however, it excluded the internal staircase areas of these units. As a result, the FSP showed the area of unit 22 to be approximately 6 per cent smaller than depicted in the DSP. The purchaser took the position that it was entitled to a price reduction and brought an action against the developer for breach of contract and unjust enrichment, with a trial date set for July 2021.

The developer brought a petition under section 14.12 of the *Strata Property Regulation*, BC Reg. 43/2000 (the "Regulation"), to correct an alleged error in the FSP and for the registrar at the Land Title Office to accept an amended FSP that depicted the area of unit 22 as including the internal staircase area. The affidavit evidence of the surveyor was

that he prepared the DSP based on architectural drawings and the FSP based on a field survey of the building as it was being constructed, at which time the internal stairs for units 21 and 22 had not yet been constructed.

The petition was dismissed. The developer was required to establish that the FSP contained an "error" under section 14.12 of the Regulation, being, "Any erroneous measurement or error, defect or omission in a registered strata plan." The developer was required to prove that it was incorrect to exclude the internal stairs when calculating the area of unit 22, with the error occurring because either the surveyor made a surveying error when preparing the FSP or the surveyor failed to follow the developer's legitimate intentions with respect to the FSP. The expert evidence was that a surveyor was not required to depict an internal stair on the strata plan and that the surveyor in the instant case made no error in excluding the stairs in the FSP. The surveyor who prepared the surveys plans did not depose that he committed an error.

The Court distinguished *Chow v. The Owners, Strata Plan NW 3243*, 2017 BREG ¶59,183 (BCCA) and 2018 BREG ¶59,247 (BCSC), which held that an "error" under section 14.12 could include a situation where the surveyor failed to carry out the developer's objective intention with respect to a specific feature. The feature, however, would have to be one that the surveyor was required to take direction from the developer on, pursuant to its professional guidelines. In this case, there was no evidence that the surveyor's exclusion of the staircase was contrary to any regulatory requirement. The Court also rejected the argument that the developer's intentions were conveyed in the DSP and marketing material that included the stairs in the square footage of unit 22. The Court noted that these documents qualified that the area was approximate, preliminary, and subject to change. The developer failed to establish an error in the FSP under section 14.12 of the Regulation.

Bogner Kerrisdale Developments v. 1224095 BC, 2021 BREG ¶51,110

Easement Interpreted as Providing Grantee Both Access and Utility Rights

British Columbia Supreme Court, July 8, 2021

The plaintiff and defendant owned adjacent properties, purchased in 2016 and 2017, respectively. The defendant's property abutted the foreshore of Okanagen Lake. An easement granted in favour of the plaintiff's predecessor in title in 1968 stated that it granted the right "to install and maintain an underground water pipe line from Okanagan Lake to the Grantees land ... and to erect a pumphouse underground and stairway XXXXXXXXXXX PROVIDED that no other permanent buildings or structures shall be erected thereon by either of the parties hereto, and to go, return, pass and repass with or without vehicles, in, along or over that part of the [grantor's property] as shown outlined in red". The words obscured by the Xs were "to the beach area." The easement ran across the defendant's property to the foreshore. The easement covered an area of 13 acres and ran parallel to another easement granted by the same original grantor in 1964 to neighbours on the other side of the road. The 1964 easement enabled the grantee to run a water line over grantor's property from the lake to the road. Unlike the neighbour's easement, which was six feet wide throughout, the easement at issue varied in width, from extremely narrow close to the road to 38 feet-wide at the end point at the lakeshore.

The parties brought cross applications for the determination of the proper interpretation of the easement and whether it granted the plaintiff the right to use the easement to access the lake for recreational purposes. The defendant took the position that the easement only entitled the plaintiff to install and maintain a water pipeline and pump house on his property.

The plaintiff's application was allowed and the defendant's application was dismissed. The Court found that, looking to the use of the conjunction "and" in the operative sentence of the easement, only one interpretation was possible on its face, namely, that the grantor granted the grantee the rights: (1) to install and maintain an underground water pipe line; and (2) to erect a pump house underground and a stairway, provided that no other permanent structures were erected; and (3) to go, return, pass, and repass with or without a vehicle along or over the easement area. The Court dismissed the defendant's argument that the clause "and to go, return, pass and repass with or without vehicles" was not to be read as conferring a general right of access, but as providing only for access necessary to install and maintain the water pipeline and pump house. Three different rights were enumerated and there was no grammatical basis for concluding that some rights were subordinate to others. There was, further, no limiting language attached to the grant of rights to

"go, return, pass or repass", and the parties had used restrictive language elsewhere if a right of use was to be limited, such as in the statement "PROVIDED that no other permanent buildings or structures shall be erected thereon".

The surrounding circumstances further supported the plaintiff's interpretation of the easement. Considering the width of the easement at the lakeshore, it was highly unlikely that the parties intended it to be for the purposes of a water line. It was more likely that the width was meant to grant beach access for recreational purposes. While both parties drew different interpretations from the fact that "to the beach area" was deleted, pursuant to case law, the Court was precluded from considering struck-out words from a contract to determine the meaning of remaining words. Having considered the easement in its entirety, the Court concluded that it expressly conferred both access and utility rights to the grantee.

Murphy v. Huber Estate, 2021 BREG ¶51,111

Judge Had No Authority Under *Strata Property Act* to Require Council to Hold Special General Meeting

British Columbia Court of Appeal, May 13, 2021

The respondent strata corporation consisted of 14 units and was established in 1997. At a general meeting in 2011, the appellant Rene Gauthier was elected president, the appellant Odin Zavier was elected vice-president, and the respondent Thane Lanz was elected secretary of the strata council (the "Original Council"). In 2013, a dispute arose over alleged improper withdrawals from various accounts, and in September 2013, the individual respondents held an "emergency annual general meeting" and elected a new strata council with Mr. Zavier as president (the "Zavier Council"). Since 2013, the two competing councils continued to purport to be managing the strata corporation, held meetings, and carried out business as strata council. In 2013, the appellants commenced an action purporting that the Zavier Council was illegal. In 2019, the respondents applied for a declaration that the Original Council was invalid and the appellants applied for a declaration that the Zavier Council was invalid. After filing the applications, the councils each called annual general meetings in 2019.

The application judge found that the current effective strata council included the three persons elected at the December 2019 meeting called by the Original Council, which were Mr. Gauthier, his father, and Mr. Elez. The judge found that the Zavier Council had not been properly elected when first formed and ordered the council headed by Mr. Gauthier to call a special general meeting within 30 days for the purpose of electing a new council, and required an annual general meeting to be held by June 1, 2021. The judge found he had authority to make the orders pursuant to section 165 of the *Strata Property Act*, SBC 1998, c. 43 (the "Act"). The annual general meeting was held in March 2021.

The appellants appealed, taking the position that the judge erred in failing to declare all of the Zavier Council's past actions null and void and in ordering a special general meeting to elect a new council.

The appeal was allowed in part. The Court found that in declining to make a declaration condemning all actions of the Zavier Council, the judge had found that the only governance matters still in dispute related to accounting issues that were resolvable by a newly elected council. The judge also found that striking the past actions of the Zavier Council could cause "unintended consequences", as that council had held itself out to third parties as the true strata council for years. The appellants did not point to any action by the Zavier Council, other than the accounting issues, that would have a present impact. The judge made no errors in his appreciation of the governance issues before him. Further, the appellants' delay in seeking relief by way of their application weighed against the "sweeping declaration" they sought on appeal.

The Court found that the judge did not have section 165 available to him when ordering the special general meeting. Subsection 165(*a*) required that an order made by the judge be for the strata corporation to perform a duty it was required to perform under the Act, and there was no provision in the Act imposing a duty to call a special general meeting. Subsection 165(*c*) allowed the judge to make ancillary orders to give effect to an order made under subsection 165(*a*). The Court found, however, that subsection 165(*a*) did not allow for a primary order in this case. While the judge identified the Gauthier council's failure to call a 2020 annual general meeting as a failing, the Gauthier council did not have a duty to call the meeting until a date after the judge's reasons were released. Subsection 40(2) of the Act required that an annual general meeting be held no later than two months after the strata corporation's fiscal year end. While an

annual general meeting was therefore required by January 1, 2021, the state of emergency amendments under the *Strata Property Regulation*, BC Reg. 43/2000, due to the COVID-19 pandemic extended the deadline by two months, to March 1, 2021, which was a date after the judge's order. Accordingly, section 165 did not provide the authority for the order made.

As the judge had identified a council as having been properly elected, it was not open to him to require that council to then call a special general meeting to elect a new council. The Court set aside the portions of the order referring to the requirement to call a special general meeting to elect a new council.

SWS Marketing v. Zavier, 2021 BREG ¶51,112

BRITISH COLUMBIA REAL ESTATE LAW DEVELOPMENTS

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