IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan VR 778,*
2023 BCSC 552

Date: 20230406
Docket: S224419
Registry: Vancouver

The Owners, Strata Plan VR 778
In the Matter of Section 173 of the *Strata Property Act*

Before: The Honourable Justice Shergill

Reasons for Judgment

Counsel for Petitioner:	G. Trotter
Counsel for Respondent R. Azarnia:	N. Aram
Respondents L. Fanning, N. Wei and C. Yang, appearing in person and through their agent:	S. Fan, appearing as agent
Place and Date of Hearing:	Vancouver, B.C. October 31, 2022 November 1, 2 & 4, 2022
Place and Date of Judgment:	Vancouver, B.C. April 6, 2023

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I. OVERVIEW

[1] This petition proceeding ("Petition") was commenced by the Owners, Strata Plan VR 778 (the "Strata Corporation" or the "Petitioner") on May 31, 2022, under s. 173 of the *Strata Property Act*, SBC 1998 c. 43 [*Act*]. Through it, the Strata Corporation asks this Court to approve a resolution (the "Resolution") put forward at the Strata Corporation's March 9, 2022 Annual General Meeting (the "2022 AGM") to raise a special levy of $1,255,000 to replace the Strata building's roof (the "Roof Project").

[2] Four Strata owners filed petition responses opposing the relief sought (collectively "the Respondents"). The respondent Ramin Azarnia ("Azarnia") was represented by his own legal counsel. The respondents Linda Fanning, Ning Wei, and Susan Yang (collectively the "Fanning Respondents"), made submissions through their friend Stephen Fan, who appeared as agent on their behalf. Ms. Fanning, Mr. Fan, and Mr. Azarnia at one time served on the building's strata council.

[3] All parties agree that the roof needs to be replaced. However, the Respondents take issue with various aspects of the Roof Project, including: the budget proposed by the Strata Corporation; the scope of the repairs; whether some of the expenses are the responsibilty of individual strata owners; and the management of the Strata Project by the current strata council (the "Strata Council").

[4] Azarnia also asks this Court, by way of Notice of Appliction filed July 25, 2022 (the "NOA") for various orders relating to the legal fees incurred or to be incurred, by the Strata Corporation. The application is opposed by the Strata Corporation on various grounds, including jurisdiction, and will be discussed more fully towards the end of these Reasons.

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II. ISSUES RAISED IN PETITION

[5] The Petitioner seeks the following relief:

1. A declaration that the special levy identified as "Resolution #2 (3/4 Vote) - Roof Replacement Project Special Levy", in the amount of $1,255,000.00, put forward at the Petitioner's March 9, 2022 Annual General Meeting (the "Resolution") is to raise money for the maintenance or repair of common property or common assets of the Petitioner that is necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise;

2. An order under section 173(4) of the *Act* that the Resolution is approved and that the Petitioner may proceed as if the Resolution had been passed under section 108(2)(a) of the *Act;* and

3. An order for costs payable by any owner or other person opposing the foregoing relief.

[6] The following issues are raised in the Petition:

1. Does the Resolution meet the threshold requirements for an application under s. 173(2)?

2. Is the special levy to raise money for maintenance or repair of common property or common assets?

3. Are the repairs for which the levy is being proposed necessary to ensure safety or prevent significant loss or damage?

4. Did the Resolution achieve majority support?

5. Should the Court exercise its discretion to make an order approving the resolution?

[7] I turn first to the factual background underlying this dispute.

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III. FACTUAL BACKGROUND

[8] The following facts are uncontroverted.

[9] The Strata is a five storey residential building consisting of 35 strata lots. The building is known as “The Briar”, and is located near Arbutus Street and West King Edward Avenue, in Vancouver. Construction of The Briar was completed around 1980.

[10] The Briar roof dates back to the original construction of the building. The roof consists of three portions (collectively referred to as the “complete roof”): the main roof which is the uppermost roof of the building; the mechanical room/elevator roof which covers those two portions of building; and the deck roofs, which serve as decks of the fourth floor and fifth floor strata lots, and as a roof for the units below.

[11] In recent years, the Strata Corporation has had to complete “spot” or “emergency” repairs of the roof.

[12] The Strata Corporation obtained a depreciation report from Dubas Engineering Inc. (“Dubas”) dated December 21, 2016 (the “2016 Dubas Report”), which provided two different cost estimates: a cost of $780,000 for replacement of the main roof ($400,000) and deck roofs ($380,000); and a cost of $930,000 if the project was to also include replacement of skylights ($75,000) and railings ($150,000). Based on the main roof and deck roof replacement estimates in the 2016 Dubas Report, the Strata Council asked the owners of strata lots in The Briar (the “Owners”) to approve a special resolution to raise $800,000 for the Roof Project (the “Roof Fund”). The Strata Council advised the Owners that the resolution was “for the partial replacement of the roof (the main roof) with the intention of phasing the total roof replacement over a two-to-three year period”.[1]

[1] Affidavit #1 of M. Silverwood, Exhibit (Ex.) F, p. 143.

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[13] At each of the AGMs in December 2016,[2] December 2017[3] and December 2018[4], the Owners approved a special levy of $200,000 for the Roof Project to be collected in the following year. A total of $600,000 was raised from the special levies which were collected in each of the years 2017, 2018 and 2019.

[14] At the AGM in December 2019 (the "2019 AGM"), the Owners unanimously approved raising a further special levy of $200,000 in 2020 for the Roof Project. However, the Strata Council at the time decided not to collect the 2020 special levy due to the financial effects of Covid-19.

[15] By the end of 2019, the Strata Corporation had collected $600,000, plus interest, for the Roof Fund.

[16] On October 16, 2020, BC Roof Inspections provided a report to the Strata Corporation, stating "the roofing can be expected to last another 2 to 8 years".[5] They recommended various repairs at a cost of $6,500–$8,500, and another inspection in the summer of 2021.

[17] An AGM was held in December 2020 (the "2020 AGM"), at which time a new Strata Council was elected. A resolution was put forward to approve expenditure of the Roof Fund, as follows:[6]

> WHEREAS the roof of the strata corporation, while certified by roofing consultants to be in fair condition and requires only minor repairs, is within a few years of its estimated average useful life;
>
> Therefore, BE IT RESOLVED…approve the expenditures, to be funded by but not to exceed the Roof Fund, for the replacement of the roof which includes:
>
> i. the Mechanical Room/Elevator Roof;
> ii. the Main Roof;
> iii. 5th Floor Deck Roofs; and
> iv. 4th Floor Deck Roofs.

[2] The resolution was carried; 29 for, 0 against, 4 abstentions.
[3] The resolution was carried; 30 for, 2 against, 1 abstention.
[4] The resolution was carried; 33 for, 0 against, 1 abstention.
[5] Affidavit #1 of M. Silverwood, Ex. K, p. 210.
[6] Affidavit #1 of M. Silverwood, Ex. L, p. 205.

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[18] Rather than a phased replacement of the roof, this resolution sought to replace the complete roof, which included the deck roofs for the fourth and the fifth floors, and the mechanical room/elevator roof. The resolution was defeated with a vote of 10 for, 22 against and 2 abstentions.

[19] On March 16, 2021, the special levy of $200,000 approved at the 2019 AGM was rescinded by a majority vote at a Special General Meeting (the "March 2021 SGM"). At the March 2021 SGM, the Strata Council also proposed to pass another levy in the same amount, but the resolution for the replacement levy only garnered 61% support, and therefore failed.[7]

[20] In early 2021, the Strata Council struck a committee (the "Roofing Committee") to conduct due diligence and to address the Owners' concerns regarding the scope of the Roof Project and associated costs. The Roofing Committee retained a roofing consultant, Garland Canada Inc. ("Garland"), around March 2021, to provide an estimate for the Roof Project.

[21] Dubas provided a revised depreciation report to the Strata Council in April 2021 (the "April 2021 Dubas Report"), in which Dubas increased their estimate of the cost of replacement of the main and deck roofs to $876,000. This report was not disclosed to the Owners prior to the 2022 AGM.

[22] On May 26, 2021, Garland prvoided the first of three reports to the Strata Corporation (the "2021 Garland Reports").

[23] The first report provided by Garland was dated May 26, 2021 (the "First Garland Report")[8]. In this report, Garland gave The Briar roof a "failed" rating, and provided a cost estimate of $450,000–$650,000 for replacement of the main roof, and $450,000–$700,000 to replace the deck roofs. Garland's total esimate for the Roof Project ranged from $900,000–$1,350,000. The First Garland Report was made available to the Owners prior to the 2022 AGM.

[7] The resolution was defeated; 19 for, 12 against, 1 abstention.
[8] Affidavit #1 of T. Hekl, Ex. A; the report is titled the "Briar Tower Roof Asset Report".

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[24] The Strata Corporation held a SGM on July 5, 2021 (the "July 2021 SGM") at which time a resolution was put forward to approve a special levy of $750,000 for the Roof Project. The resolution proposed that the special levy be payable in 2021, in three installments starting August 2021. The scope of the Roof Project in this resolution covered the same items as in the resolution submitted at the 2020 AGM. The resolution stated "…Whereas the Roof Project will require approximately $1,350,000 to complete…".[9] It was defeated; 19 for, 12 against, 2 abstentions.

[25] In October 2021, Dubas provided a "Draft" revised depreciation report to the Strata Council, which erroneously stated that the cost for the Roof Project would be $254,000 (the "October 2021 Dubas Report"). A further revised depreciation report was prepared by Dubas in November 2021 (the "November 2021 Dubas Report"). The November 2021 Dubas Report provided the same total cost of replacement of the main and deck roofs as set out in their April 2021 report, *i.e.*, $876,000. Neither the October or November 2021 Dubas Reports were disclosed to the Owners prior to the 2022 AGM.

[26] In November 2021, Garland provided two "photo reports" dated November 1, 2021, and November 6, 2021 (collectively referred to as the "Garland Photo Reports" or "Second Garland Reports")[10] The November 1 report was entitled "Unit 501 – Temporary Structures"; the November 6 report was entitled "Unit 502 additions". The Photo Reports referenced water damage in and around these structures and additions on the decks of the fifth floor strata units (the "alterations"). The Photo Reports were also not disclosed to the Owners before the 2022 AGM.

[27] Dubas provided another revised depreciation report on February 22, 2022 (the "February 2022 Dubas Report"), in which the replacement cost of the main and deck roofs had almost doubled. The newly revised figures were $700,000 for the main roof, and $850,000 for the deck roofs, for a total cost of $1,550,000. This cost

[9] Affidavit #1 of M. Silverwood, Ex. S, p. 267.
[10] Affidavit #1 of T. Hekl, Exs. B and C.

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was close in range to the First Garland Report. The February 2022 Dubas Report was posted to the Strata Corporation's online portal for the Owners to view before the 2022 AGM.

[28] The Strata Corporation held its 2022 AGM on March 9, 2022, at which time the Strata Council put forward the Resolution to raise a special levy of $1,255,000 for completion of the Roof Project. This special levy was based on the $1,350,000 estimate provided in the 2021 Garland Report, plus additional costs for: inflation ($202,500); Garland's consulting fee ($46,575); and costs of replacing patio stones, railings, and skylights ($275,000). With these inclusions, the total cost was estimated to be $1,874,075. The Resolution required 75% of the vote in order to pass; it only recevied 55% of the vote.

[29] Strata Council elections were held at the 2022 AGM, resulting in the following persons being elected to the seven member Strata Council: Mark Silverwood (President), Elizabeth Demner (Vice President), Paulette Myers (Treasurer), Anne McWilliams (Landscaping), Katherine Chan, Felicia Lau, and Annie Chen. The Strata Council formed a litigation committee to deal with the Petition (the "Litigation Committee"). The Litigation Committee was comprised of Mark Silverwood, Elizabeth Demner, and Paulette Myers. These individuals, along with Ms. Myers, support the Strata Corporation's decision to proceed with this Petition; the remaining three members are opposed to that decision.

[30] As at March 31, 2022, the balance of the Roof Fund including interest was $620,409.66. The Strata Corporation has not collected any further levies for the Roof Project, or proposed any further resolutions on this issue since the 2022 AGM.

[31] On May 27, 2022 the Strata Corporation received an expert report from Tomas Hekl, dated May 27, 2022 (the "Hekl Expert Report").[11]

[11] Affidavit #1 of T. Hekl, Exs. A–D.

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[32] This Petition was filed on May 31, 2022. The Fanning Respondents filed their Petition response on July 4, 2022, and Mr. Azarnia filed his Petition response on July 11, 2022.

[33] On September 22, 2022, Mr. Azarnia obtained an expert opinion report from Farhad Hemmati. Mr. Hemmati revised his report on October 3, 2022, and it is this revised report that is relied on in this proceeding (the "Hemmati Expert Report"). The Hemmati Expert Report estimates a cost of $648,000 for the upper roof and $682,400 for the lower roof, plus GST.

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IV. LEGAL FRAMEWORK

[34] Section 72 of the *Act* obliges the Strata Corporation to repair and maintain common property and common assets, as follows:

> 72 (1) Subject to subsection (2), the strata corporation must repair and maintain common property and common assets.
>
> (2) The strata corporation may, by bylaw, make an owner responsible for the repair and maintenance of
>
> (a) limited common property that the owner has a right to use, or
>
> (b) common property other than limited common property only if identified in the regulations and subject to prescribed restrictions.
>
> (3) The strata corporation may, by bylaw, take responsibility for the repair and maintenance of specified portions of a strata lot.

[35] Section 108 of the *Act* permits the Strata Corporation to impose a special levy to raise money from the Owners in order to fulfill its obligations for repairs, as follows:

> 108 (1) The strata corporation may raise money from the owners by means of a special levy.
>
> (2) The strata corporation must calculate each strata lot's share of a special levy
>
> (a) in accordance with section 99, 100 or 195, in which case the levy must be approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or

> (b) in another way that establishes a fair division of expenses for that particular levy, in which case the levy must be approved by a resolution passed by a unanimous vote at an annual or special general meeting.
>
> (3) The resolution to approve a special levy must set out all of the following:
>
> (a) the purpose of the levy;
>
> (b) the total amount of the levy;
>
> (c) the method used to determine each strata lot's share of the levy;
>
> (d) the amount of each strata lot's share of the levy;
>
> (e) the date by which the levy is to be paid or, if the levy is payable in instalments, the dates by which the instalments are to be paid.

[36] Section 173 of the *Act*, under which this Petition is brought, sets out available court remedies where the resolution for a special levy receives less than 3/4 of the votes cast, but more then 1/2 of the votes cast:

> 173 (1) On application by the strata corporation, the Supreme Court may do one or more of the following:
>
> (a) order an owner, tenant or other person to perform a duty the owner, tenant or other person is required to perform under this Act, the bylaws or the rules;
>
> (b) order an owner, tenant or other person to stop contravening this Act, the regulations, the bylaws or the rules;
>
> (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).
>
> (2) If, under section 108 (2) (a),
>
> (a) a resolution is proposed to approve a special levy to raise money for the maintenance or repair of common property or common assets that is necessary to ensure safety or to prevent significant loss or damage, whether physical or otherwise, and
>
> (b) the number of votes cast in favour of the resolution is more than 1/2 of the votes cast on the resolution but less than the 3/4 vote required under section 108 (2) (a),
>
> the strata corporation may apply to the Supreme Court, on such notice as the court may require, for an order under subsection (4) of this section.
>
> (2.1) Section 171 (2) does not apply to an application under subsection (2).

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> (3) An application under subsection (2) must be made within 90 days after the vote referred to in that subsection.
>
> (4) On an application under subsection (2), the court may make an order approving the resolution and, in that event, the strata corporation may proceed as if the resolution had been passed under section 108 (2) (a).

[37] Thus, s. 173(4) of the *Act* empowers the court to approve a resolution for a special levy to raise money for maintenance or repair of common property or common assets, provided that:

a) the resolution has received a simple majority of votes, and

b) the repairs or maintenance are necessary to ensure safety or to prevent significant loss or damage.

[38] The court has broad discretion under s. 173 of the *Act*. In exercising its authority, the court should be guided by "a consideration of the scheme of the legislation, its overall objectives, and the circumstances giving rise to the application": *The Owners, Strata Plan NW 1815 v. Aradi*, 2016 BCSC 105 at para. 60 ("*Aradi"*).

[39] The court must balance the interests of the strata corporation against the interests of the owners or other person against whom the order is sought, within this legislative context: *Aradi* at para. 60.

[40] The function of the court in a s. 173 application is not to oversee or manage repairs. Rather, s. 173 is a tool that can be used to break a deadlock and permit a simple majority of strata owners to resolve to effect the necessary repairs: *Thurlow & Alberni Project Ltd. v. The Owners, Strata Plan VR 2213*, 2022 BCCA 257 at para. 92 ("*Thurlow BCCA*").

[41] In *Thurlow BCCA*, the Court of Appeal provided comprehensive guidance on how an analysis under s. 173(2) of the *Act*, should be conducted.

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[42] The starting point for the analysis should be deference to the decision made by the Strata Council which has received approval of a majority of owners: *Thurlow BCCA* at para. 87, citing with approval, *Strata Plan VIS114 v. John Doe,* 2015 BCSC 13 at para. 68 ("*John Doe*").

[43] Section 173 is a remedial provision, and should be read purposively "with a view toward permitting strata corporations to discharge their statutory obligation to maintain and repair the strata property": *Thurlow BCCA* at para. 92.

[44] Section 173 permits the court to authorize special levies to effect repairs that are necessary. This does not mean that the repairs must be immediately necessary; nor does it mean that the proposed repair must be the minimum needed to address the problem: *Thurlow BCCA* at para. 92.

[45] In hearing a s. 173 application, the court is not required to intensively analyse the scope of the work that the strata corporation proposes to do: *Thurlow BCCA* at para. 92.

V. EVIDENCE

[46] The parties filed 27 affidavits in this Petition hearing, with many affiants providing several affidavits each. It is beyond the scope of these reasons to discuss all of the affidavit evidence in detail. Suffice it to say that I have considered all of the evidence in arriving at my Reasons.

[47] Mr. Silverwood is the President of the Strata Council and member of the Roofing Committee at The Briar. He provided three affidavits. Mr. Silverwood's first affidavit provided evidence on: the steps taken towards the replacement of the roof as well as the issues and concerns arising from different parties; the formation and role of the roofing committee; and the Garland Report estimates. His second affidavit responds to various issues and concerns raised by the Respondents, including: the conflict of interest allegations; communications prior to the July 2021 SGM; cost responsibilities of the fourth and fifth floor owners; and the various Dubas reports. Mr. Silverwood's third affidavit addresses issues raised by affiants Annie Chen and

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Katherine Chan, about the conduct of the 2022 AGM, and information provided to Strata Council members.

[48] Katherine Chan and Annie Chen are current members of the Strata Council, and were elected to that post in the 2022 AGM. Ms. Chan previously served on Strata Council between 2013 and 2016.

[49] Ms. Chan provided four affidavits in this proceeding, in which she expressed concerns about the reliability of estimates for the Roof Project; the challenges with getting the Strata Council to agree to obtain other quotations; and the lack of transparency and consultation by the Litigation Committee and Strata Council Majority, with the full Strata Council regarding the decision to proceed with this Petition. Ms. Chan also provided evidence about the Strata Council's legal fees having exceeded the budgeted amount, and the results of her activities to obtain further quotations for the Roof Project.

[50] Ms. Chen has also provided an affidavit, in which she has expressed concerns about the manner in which Strata Council meetings have been conducted, the manner in which the Litigation Committee was created, and the lack of information and input regarding this litigation. She also expressed concerns about the fairness of collecting money from all the Owners for items that were the responsibility of the fourth or fifth floor Owners.

[51] Mr. Azarnia is an owner of a strata lot within The Briar, and a former Strata council member. Mr. Azarnia provided affidavits giving historical information leading up to the various resolutions presented at the AGMs and highlighting concerns he and other owners shared regarding the roof repair process, including: Mr. Hekl's qualifications; the Dubas depreciation reports; and the financial allocation proposed for the project by the Strata Corporation. He also provided evidence about whether, or when, various reports regarding the state of the Roof or the cost of replacement, were disclosed by the Strata Council to the Owners. Mr. Azarnia also explained the challenges he faced in getting permission from the Strata Council to grant access to the roof for his own expert to provide an estimate.

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[52] Kenneth Fox is a member of the Roofing Committee. He lives in a fifth floor unit owned by his spouse. Mr. Fox explained his desire to have the roof replaced. He also averred to water ingress into his unit, as recently as 2020, when some patch up work was done to repair the leak.

[53] Walter Maughan is a fifth floor resident who provided evidence about a kitchen leak that started in his unit in 2020, but which has grown since. He attached photos taken in May 2022, depicting cracks, discoloration and bubbling of the ceiling paint.

[54] Stephen Fan served on Strata Council from 2017 to 2020. He averred to seeing the February 2022 Dubas Report posted on the Strata Corporation's website, with a notation that the report had been revised to adjust the costs estimates with amounts provided by the Strata Council (the "Disclosure"). When he revisited the website in June 2022, he noticed that the Disclosure had been deleted from the February 2022 Dubas Report.

[55] Ning Wei is an Owner and licensed realtor. He averred to receiving minutes from a special general meeting held by a nearby strata complex, for replacement of that strata complex's roof at a cost of $550,000. He also stated his objection to the Owners being required to pay for the cost of the disputed items, as part of the special levy. Mr. Wei also expressed concerns about relocation of the railings which would further encroach on common property on the fifth floor.

A. Dubas Reports

[56] Dubas prepared a total of five reports relating to the Roof Project. Mr. Azarnia and the Petitioner agree that the October 2021 Dubas Report erroneously reported a cost of $254,000.[12] Consequently, I have placed no weight on the cost estimates contained in this report.

[12] Affidavit #2 of R. Azarnia, Ex. F, p. 71; Ex. L, p. 151; Ex. J, p. 114.

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[57] I also conclude that no weight should be placed on the cost estimates contained in the February 2022 Dubas Report, but for different reasons.

[58] There is evidence to support the Respondents' assertion that Dubas artificially increased the total cost of replacement of the main roof and deck roofs in the February 2022 Dubas Report, under pressure from the Strata Council.

[59] On February 10, 2022, the Strata Council sent an email to Dubas, stating the following:

> RE: VR778 The Briar Depreciation Report status / February 2022
>
> Council has review the October 2021 report draft, and advises"
>
> a. The Elevator was replaced 4 years ago, and its expected lifetime should reflect this (report implies this was just done)
> b. Increase the costs for the Roofing components as follows
>
> i. Main Roof $700,000
> ii. Deck Membrane $850,000
> iii. Additional Elements (Inc. railings, patio stones etc.) $350,000
>
> These quotes are based on the actual, present-day quotes received from their Roofing Consultant / Garland Roofing Consultants.
>
> Council also agreed that, once these changes are made, and the amended report is received/approved, their final outstanding invoice will be paid.

[60] Dubas evidently complied with the request, as reflected in the increased costs estimates set out in the February 2022 Dubas Report.

[61] Mr. Silverwood admits that the Strata Council asked Dubas to revise the cost estimates to bring them in line with the Garland Reports. He says this was done so that the report "would contain the most up to date information available to the Strata…".[13]

[62] There is no evidence from Dubas explaining why the changes were made to their report; nor did the Petitioner explain the absence of this evidence. Given the seriousness of the allegations made in relation to the February 2022 Dubas Report, the absence of evidence from Dubas on this issue leads to an inference that Dubas

[13] Affidavit #2 of M. Silverwood, para. 13.

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did not make the changes to its report for *bona fide* reasons. The evidence establishes on a preponderance of probability, that Dubas revised its figures because it felt pressured to do so by the Strata Council.

[63] Consequently, I conclude that the costs estimates provided by Dubas in the February 2022 Dubas Report are unreliable, and no weight should be placed on them.

B. Expert Reports

[64] Two expert opinion reports were tendered at this hearing.

[65] In *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23 ("*White Burgess*") the Supreme Court of Canada set out a two-step analysis for addressing the question of admissibility of expert opinion evidence.

[66] At the first stage, the party seeking to admit the expert evidence must establish the following threshold requirements:

a) The evidence is relevant;

b) The evidence is necessary to the trier of fact;

c) There is no applicable exclusionary rule of evidence; and

d) The expert is properly qualified.

(*White Burgess* at paras. 19, 23)

[67] The second step is a discretionary gatekeeping one requiring the court to balance potential risks and benefits of admitting the evidence to decide if such benefits of admitting the evidence justify the risks: *White Burgess* at para. 24. At this point, the judge takes into account any concerns about the expert's independence and impartiality when weighing the evidence: *White Burgess* at para. 54. The evidence must be sufficiently beneficial to warrant admission despite any potential harm, and to make this determination a judge may consider the "relevance,

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necessity, reliability and absence of bias" of the evidence in question: *White Burgess* at paras. 24, 54.

[68] Neither party has argued that the opinion evidence of Mr. Hekl and Mr. Hemmati is irrelevant. Nevertheless, in exercising my gatekeeper role I must address this issue, for expert evidence that is not relevant to the issues before the court, is *prima facie* inadmissible.

[69] It is important to note that it is not my function in this hearing to substitute my own view for that of the Strata Corporation. Nor is it my job to intensively analyse the scope of the work that the Strata Corporation proposes to do. Rather, the task before me is to determine if this Court should exercise its discretion to make an order approving the Resolution. In conducting that analysis, I must consider if the Strata Corporation's approach was reasonable. In determining the reasonableness of the actions of the Petitioner, this Court can consider professional advice received by the Strata Corporation: *John Doe* at para. 49.

[70] In this case, both expert reports were provided after the Resolution was defeated at the AGM. Nevertheless, they are useful in ascertaining the reasonableness of the Strata Corporation's approach towards the roof repairs. Both Mr. Hekl and Mr. Hemmati opine on matters that are relevant to the issues in this proceeding and are outside the general knowledge of the average person. I conclude that their evidence meets the requirement of relevance and necessity.

[71] I turn now to considering the remaining part of the analysis under *White Burgess*.

1. Hekl Expert Report

[72] Mr. Hekl is a roofing consultant with over 20 years of experience in the industry. He is the primary author of all of the reports tendered by Garland. The Garland Reports are all attached to Mr. Hekl's affidavit as exhibits. In his Expert Report, which is also attached as an exhibit to his affidavit, Mr. Hekl avers that the 2021 Garland Reports "accurately reflect observations and opinions at the

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publication dates".[14] Mr. Hekl also opines that the condition of The Briar Roof had worsened since his 2021 Garland Reports in the following manner: the Roof was holding more water in the waterlogged insulation; the roof deterioration had progressed further; and the exposed roof membrane on the parapets had started to delaminate.[15]

[73] Mr. Hekl explains that a "failed roof rating" is given to roofs exceeding their life-cycle where repairs would garner limited success and be too expensive. In the case of The Briar, Mr. Hekl notes that his recommendation to fully replace the roof membranes (rather than periodically repairing them), was due partly to the age of the roof, and partly to its "inverted roofing assembly".[16] In other words, when pieces of waterlogged insulation that cover the roof are removed, the void gets filled with water which renders it very difficult to locate and repair potential leaks.

[74] Mr. Hekl opines that if the roofing membrane is not replaced, any future water ingress could pose as a health liability – through mold growth – while also compromising the structural, electrical and plumbing integrity of the building. Further, the upper floor patio railings should be replaced and mounted vertically through parapets, both to ensure that the roof membrane is kept waterproof and to avoid the liability of re-installing an old railing through a new roof membrane.

[75] The Respondents argue that the Hekl Expert Report is either inadmissible, or, if admissible, should be given no weight, because: (1) the Petitioner failed to comply with Rule 11-6(8) of the *Supreme Court Civil Rules* [*SCCR*]; (2) Mr. Hekl is in a conflict of interest; and (3) Mr. Hekl misrepresented his professional qualifications.

[76] Rule 16-1(6.1)(a) of the *SCCR* requires an expert report to conform with Rule 11-6(1) in order to be admissible. However, under Rule 16-1(6.1)(b), the court has the discretion to admit an expert report even if it does not conform with the requirements of Rule 11-6(1). While there are some procedural irregularities in

[14] Affidavit #1 of T. Hekl, Ex. D, p. 5.
[15] Affidavit #1 of T. Hekl, Ex. D, p. 5.
[16] Affidavit #1 of T. Hekl, Ex. D, p. 6.

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relation to the Hekl Expert Report and its compliance with Rule 11-6, those are not a bar to the report being admissible in this case.

[77] Rule 11-6(1) provides:

> (1) An expert's report that is to be tendered as evidence at the trial must be signed by the expert, must include the certification required under Rule 11-2 (2) and must set out the following:
>
> (a)the expert's name, address and area of expertise;
>
> (b)the expert's qualifications and employment and educational experience in his or her area of expertise;
>
> (c)the instructions provided to the expert in relation to the proceeding;
>
> (d)the nature of the opinion being sought and the issues in the proceeding to which the opinion relates;
>
> (e)the expert's opinion respecting those issues;
>
> (f)the expert's reasons for his or her opinion, including
>
> (i)a description of the factual assumptions on which the opinion is based,
>
> (ii)a description of any research conducted by the expert that led him or her to form the opinion, and
>
> (iii)a list of every document, if any, relied on by the expert in forming the opinion.

[78] The Fanning Respondents argue that Mr. Hekl's reports do not contain the signature of the author as required in Rule 11-6(1). Although the Hekl Expert Report is signed by Mr. Hekl, the 2021 Garland Reports are not. The requirement for a signature is to authenticate authorship. In this case, the 2021 Garland Reports are attached to Mr. Hekl's sworn affidavit, which is signed by Mr. Hekl. In my view, this is sufficient to meet the requirements of the Rule.

[79] The Fanning Respondents also submit that the Hekl Expert Report lacks a methodological description, outline of limitations, and the author's assumptions. I agree that there are problems with the manner in which Mr. Hekl's opinion is provided. Rather than submitting a comprehensive expert report containing his complete opinion, Mr. Hekl has chosen to rely on previous reports that were prepared in his capacity as a consultant, and then to supplement those opinions with the Hekl Expert Report. While this may be economical for the Petitioner, it is no

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doubt frustrating for the Respondents, who would have preferred that he consolidate his opinion in one report. Nevertheless, this not a good enough reason to exclude any of the opinions contained in the reports attached to his affidavit. While his opinion may not be perfectly articulated, I find that the contents of the various reports meet the basic requirements set out in subsections (d) to (f) of Rule 11-6(1).

[80] I also do not find merit to the objection that Mr. Hekl's curriculum vitae ("CV") was never produced. It is not necessary for an expert witness to provide a CV, provided that the qualifications of the proposed expert are readily discernable from the body of the report. In this case, there is sufficient description of Mr. Hekl's qualifications contained within the body of Expert Report, which meet the requirement under subsections (1)(a) and (b) of Rule 11-6.

[81] Finally, I dismiss the notion advanced by Mr. Azarnia that delay in providing Mr. Hekl's qualifications and his complete expert file should result in his opinion being excluded. First, I note that a failure to comply with Rule 11-6(8), does not have the same impact as a breach of Rule 11-6(1). Further, the requested information was ultimately provided and there is no evidence of prejudice flowing from the delay.

[82] Having regard to all of the above, I am satisfied that Mr. Hekl's reports meet the requirements of Rule 11-6, and in any event, if they do not, there is sufficient basis for me to exercise my discretion under Rule 16-1(6.1)(b).

[83] I turn now to the issue of conflict of interest. Mr. Azarnia argues that Mr. Hekl is in a conflict of interest because he has an ongoing business relationship with the Strata Corporation. Specifically, he was hired as a roofing consultant by the Strata Corporation, prepared three reports in that capacity before the litigation started, and the Strata Corporation intends to continue to use him as a consultant to manage the Roof Project.

[84] An expert has a duty to be impartial and be willing to provide the court with objective evidence: see Rule 11-2 of the *SCCR*. Once the expert attests to this effect, the burden shifts to the party opposing the admissibility of the expert report

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"to show that there is a realistic concern that the expert's evidence should not be received because the expert is unable and/or unwilling to comply with that duty": *White Burgess* at para. 48.

[85] Mr. Hekl has attested to his duty to assist the Court and to not be an advocate for any party, and he has certified that he gave his opinion in conformity with this duty. The burden therefore shifts to the Respondents to prove he has failed to fulfill this duty: *White Burgess* at para 48. In my view, they have met it.

[86] The mere fact that Mr. Hekl has an ongoing business relationship with the Strata Corporation is not enough to disqualify him. In *White Burgess*, the Court set out some of the considerations for determining when a business or financial interest may cause concern:

> [49] For example, it is the nature and extent of the interest or connection with the litigation or a party thereto which matters, not the mere fact of the interest or connection; the existence of some interest or a relationship does not automatically render the evidence of the proposed expert inadmissible. In most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so. On the other hand, a direct financial interest in the outcome of the litigation will be of more concern. The same can be said in the case of a very close familial relationship with one of the parties or situations in which the proposed expert will probably incur professional liability if his or her opinion is not accepted by the court.
>
> [emphasis added.]

[87] In this case, there is uncontroverted evidence that Garland stands to benefit from the Roof Project through the charging of a consulting fee of 3% of the total roofing contract price.[17] This information raises a legitimate concern that Mr. Hekl is in a conflict of interest.

[88] Another and more serious concern, relates to representations made by Mr. Hekl about his qualifications. There is uncontroverted evidence that Mr. Hekl misrepresented his expert qualifications to the Strata Corporation, and to the Court,

[17] Affidavit #4 of R. Azarnia, Ex. A, transcript of cross-examination of M. Silverwood, Q. 352-355.

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by holding himself out to have a current designation as a Registered Roof Observer (RRO).

[89] Though the Petitioner concedes that Mr. Hekl misrepresented his professional qualification to the Strata Corporation in a March 2021 proposal and through various e-mails, the Petitioner denies that Mr. Hekl misrepresented his qualifications to the Court. In my view, the admission that Mr. Hekl misrepresented his qualifications to the Strata Corporation is serious enough on its own to bring Mr. Hekl's credibility into question. This concern is amplified when one considers statements made in his affidavits.

[90] In the Hekl Expert Report, which is attached to Mr. Hekl's affidavit dated May 27, 2022, Mr. Hekl stated the following:[18]

> Education and Training
>
> I graduated from the Technical College in the Czech Republic in 1987 with a degree in power engineering. Since joining Garland Canada, part of my job is to attend continuing education seminars and courses. In 2009 I achieved the designation of Registered Roofing Observer (RRO) from IBEC (International Institute of Building Enclosure Consultants, formerly RCI Inc.).

[91] While Mr. Hekl did not directly state in his expert report or affidavit that he currently carried the designation as an RRO, he left the distinct impression that the RRO designation was current.

[92] In fact, Mr. Hekl's designation as an RRO had lapsed in 2011. This information was only provided to the Court after Mr. Hekl was challenged by Mr. Azarnia on this qualification. Mr. Hekl swore a second affidavit on August 4, 2022, stating as follows:[19]

> 5. I held an RRO (Registered Roof Observer) designation from 2009 until I opted to let it lapse in about 2011. I did not claim a RRO designation in any of the reports attached to my First Affidavit.

[18] Affidavit #1 of T. Hekl, Ex. D, p. 92.
[19] Affidavit #2 of T. Hekl, para. 5.

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[93] Mr. Hekl was less than forthright when he said that he did not claim an RRO designation in any of his reports attached to his First Affidavit. While technically true, this statement does not meet the candor expected of an expert. Mr. Hekl fails to disclose the fact that he had claimed to have an RRO designation in his communications with the Strata Corporation.

[94] While there is no requirement that a roofing consultant have a designation as an RRO, the fact that a proposed expert misrepresents that they have such a designation is a serious matter, which goes to the heart of the expert's duty to the court. This conduct is inconsistent with the expert's duty under Rule 11-2 of the *SCCR* to assist the Court, and constitutes a breach of the obligation of honesty.

[95] Having regard to the totality of the evidence, I find that Mr. Hekl knowingly misrepresented his qualification to the parties and to the Court. These actions have seriously undermined this Court's ability to rely on his opinion, particularly when considered with the fact that Garland has a direct financial interest in the outcome of the litigation.

[96] I conclude that there is a realistic concern that Mr. Hekl is unable or unwilling to comply with his duty to be impartial and to provide the court with objective evidence.

[97] Although there are grounds to exclude Mr. Hekl's Expert Report in the first step of the *White Burgess* analysis, even if it was admissible at this first stage, it fails on the second one. As noted earlier, the second step requires this Court to exercise its discretionary gatekeeping role by balancing the potential risks and benefits of admitting the evidence. Though the Garland Reports and the Hekl Expert Report provide evidence that is relevant, their necessity is diminished by the fact that Mr. Hemmati has largely agreed with many of the opinions expressed by Mr. Hekl. In this case, the potential benefits of receiving Mr. Hekl's opinion into evidence, are far outweighed by the risks of accepting evidence that is tainted by concerns of conflict of interest and dishonesty on the part of the proposed expert.

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[98] Consequently, the opinion evidence provided by Mr. Hekl should not be received, except insofar as it is endorsed by the Respondent's expert, Mr. Hemmati.

2. Hemmati Expert Report

[99] Mr. Hemmati was retained as an expert by Mr. Azarnia. He is an RRO, senior project engineer, and has 11 years experience in the industry.

[100] In his expert report, Mr. Hemmati opines about the opinions expressed by Mr. Hekl in the Hekl Expert Report, as well as the 2021 Garland Reports. Mr. Hemmati states that he found the First Garland Report to be "sufficient in scope and within the ballpark estimate wise".[20] Mr. Hemmati further opines that the system/short scope proposed in the First Garland Report "appears to be sufficient" and provides some qualifying comments about some items.

[101] Mr. Hemmati also provides an opinion about some of the items that the Respondents have argued could be addressed in a more economical fashion to reduce costs. For example, he notes that some of the upper floor railings were unstable and need to be replaced, though there may be options to either keep the railings in their original locations through re-structuring, install them on existing exterior parapets, or remove and reinstall the railings during the roof replacement. This latter option would require certification that the railings were up to building code requirements.

[102] Mr. Hemmati also opines on the main roof and lower roof floor assessments as well as the roof replacement cost estimate. Regarding the former, he states that certain materials for roof repair may not be needed, and others could potentially be re-used. Regarding the latter, Mr. Hemmati is of the view that a number of items which had been presented as "Option Prices", would in fact be necessary when the roof replacement occurs, including: one new aluminum sliding door; sloping the parapet for coping at the main roof and patio roof; budgets relating to mechanical

[20] Affidavit #2 of F. Hemmati, Ex. A, p. 6.

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equipment; and insulation for the patio and main roof (depending on the energy requirements of the City of Vancouver).

[103] No objections are raised with respect to the threshold admissibility of the Hemmati Report. Nor do I find any reason for the Hemmati Report to be excluded. I am satisfied that Mr. Hemmati is qualified to provide his opinion, and there is no exclusionary rule prohibiting its admission. Further, when conducting the balancing exercise, I find that the benefits of admitting Mr. Hemmati's report (to provide evidence that is necessary and relevant), are far outweighed by any potential risks.

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VI. ANALYSIS

[104] I turn first to addressing whether the Resolution meets the basic requirements of the *Act*.

A. The Resolution

[105] The Court of Appeal in *Thurlow BCCA* explained the preliminary requirements that must be met on an application under s. 173(2) of the *Act*:

> [86] The same is true, in my view, when s. 173(2) is invoked. Before an application for court approval can be brought, the Strata Corporation must have proposed a resolution to approve a special levy. The levy must be intended to raise money for the maintenance or repair of common property, or common assets the Strata Corporation considers to be necessary to ensure safety or to prevent significant loss or damage. The *Act* requires the resolution to specify, among other particulars, the purpose of the levy; its total amount; and the date by which the levy is to be paid or, if the levy is payable in instalments, the dates by which the instalments are to be paid: at s. 108(3). Because the *Act* gives the court the power to approve a special resolution, rather than the power to draft the resolution, it leaves in the hands of the Strata Corporation the responsibility for formulation of the resolution and discretion to determine the timing and scope of repairs. It would be unworkable to leave such matters in the hands of the courts.

[106] At the 2022 AGM, a number of resolutions were put forward before the strata members. Resolution #2, which is the subject matter of this Petition proceeding, was

proposed to approve a special levy for the “roof replacement project”. The Resolution specified the following:

a) The Strata Corporation wished to proceed with the roof replacement project mentioned in the 2016 Dubas Report and the First Garland Report.

b) The Roof Project will require approximately $1,875,000 to complete.

c) In the 2016, 2017, and 2018 AGMs, the Strata Corporation approved raising a total of $600,000 by way of special levies.

d) The Strata recommends an additional $1,255,000 be raised by way of a special levy to fund the Roof Project, which is expanded to include: the mechanical room/elevator room roof; the main roof; fifth floor deck roofs; fourth floor deck roofs; consulting fees; patio stones[21]; new railings; and skylights removal/replacement.

e) The levy is to be paid as a one-time special levy of the owners of the Strata Corporation, and used in conjunction with the Roof Levy Funds previously approved and collected, to pay for the Roof Project.

f) The special levy will be assessed to each owner by proportionate share of unit entitlement.

g) The special levy shall become due and payable in full immediately on passing of this resolution, and any owner who sells, conveys or transfers their title (including re-mortgage) shall pay the full amount outstanding.

h) “As a matter of financial convenience only”, owners may pay their special levy in three equal monthly installment payments on April 1, 2022, June 1, 2022, and August 1, 2022.

[21] The parties have also referred to the patio stones as paver stones or patio pavers. These terms are used interchangeably, and are intended to cover the same item that is referred to in the Resolution.

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i) Despite permitting the installment payment, the Resolution states that the "special levy is not considered an 'installment" levy as contemplated by s. 108(3)(e) of the *SPA*.

[107] Attached to the Resolution was a "Proposed Roof Levy" setting out the levy amount for each Strata lot, as well as the amount of each installment payment.

[108] The Resolution satisfies all of the requirements of s. 108(3) of the *Act*. It sets out the purpose of the levy; the total amount of the levy; the method used to determine each strata lot's share of the levy; the amount owed by each strata lot owner; and the date by which the levy is to be paid.

B. Purpose of the Special Levy

[109] The second issue to be addressed is whether the special levy is intended to raise money for maintenance or repair of common property or common assets.

[110] There is no dispute that the special levy is intended to cover the costs of the following items: mechanical room/elevator room roof; the main roof; fourth floor deck roofs; fifth floor deck roofs; consulting fees; patio stones; new railings; and skylights removal/replacement.

[111] Although the Fanning Respondents argue that the following items should not be covered in the special levy, there is no evidence that they have been included: a) heat pumps and mechanical equipment (which they say were installed for a specific suite); and b) removal and disposal of temporary structures such as alterations or additions made by an owner without authorization.

[112] Included in the levy figure of $1,250,000, is $170,000 for replacement of patio stones, $90,000 for replacement of safety railings located above the roof membrane, and $15,000 for skylights (the "disputed items").

[113] The Respondents argue that the special levy is intended to cover repairs for a combination of common property, limited common property, and private property. Specifically, the Respondents take issue with the levy covering the fourth floor and

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fifth floor deck roofs, patio stones, railings, and skylights. They submit that these items fall within limited common property or private property and are therefore not permissible under s. 173(2)(a) of the *Act*.

[114] The *Act* defines common property and limited common property, in the following manner:

> "common property" means
>
> (a) that part of the land and buildings shown on a strata plan that is not part of a strata lot, and
>
> (b) pipes, wires, cables, chutes, ducts and other facilities for the passage or provision of water, sewage, drainage, gas, oil, electricity, telephone, radio, television, garbage, heating and cooling systems, or other similar services, if they are located
>
> (i) within a floor, wall or ceiling that forms a boundary
>
> (A)between a strata lot and another strata lot,
>
> (B)between a strata lot and the common property, or
>
> (C)between a strata lot or common property and another parcel of land, or
>
> (ii) wholly or partially within a strata lot, if they are capable of being and intended to be used in connection with the enjoyment of another strata lot or the common property;
>
> …
>
> "limited common property" means common property designated for the exclusive use of the owners of one or more strata lots;

[115] The Strata Corporation concedes that the skylights constitute private property, and their costs should ultimately be borne by the owners of the units on which the skylights are located. Though the Strata Corporation initially took the position that the patio stones and railing costs should be borne by the Strata Corporation, it now agrees that by virtue of the Strata Bylaws, these items also ought to be paid for by the fourth and fifth floor owners as they fall into the category of limited common property or private property.

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[116] Nevertheless, the Strata Corporation takes the position that the special levy must include the disputed items, for the following reasons:

a) Under the *Act*, limited common property falls under the category of common property.

b) The roof (which is common property) cannot be replaced unless the patio stones and safety railings are removed. This is because the roofing membrane is located underneath the patio stones and safety railings.

c) The skylights are also implicated in the Roof Project, because the roofing membrane has to be installed up and over the skylight curbs. This can only be done if the skylights are removed.

d) The Strata Corporation has not been able to reach agreement with the owners who exercise rights over the limited common property and the private property, and who the Strata Council believes are liable for the costs of the disputed items (the "Beneficial Owners"). Consequently, the Strata Corporation needs to raise the levy to cover these costs so that the roofing project can be completed.

[117] The Strata Corporation's position that the disputed items must be addressed in order to repair the Roof, is supported by the evidence and by common sense.

[118] Though I have rejected Mr. Hekl's Expert Report, many of the conclusions in the Garland Reports were endorsed by Mr. Hemmati. Specifically, Mr. Hemmati found the 2021 Garland Report to be "sufficient in scope", and does not challenge the idea that the roof assembly on The Briar has "failed" and needs to be replaced as soon as possible. This includes the roofing membrane above the fifth floor units and on the patios outside the fourth and fifth floor units. Mr. Hemmati also does not take issue with the proposition that in order to complete the re-roofing of The Briar, the railings, patio stones, and skylights would have to be removed, and replaced due to their age and condition.

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[119] Section 173(2)(a) of the *Act* requires that the special levy be used for raising money to maintain or repair common property or common assets. There is good reason for this requirement. It would be unfair and unjust if Strata lot owners were required to pay for the repairs of items that did not belong to them or that they were not able to use.

[120] The roof is undoubtably common property, as is the roof membrane. The challenge for the Strata Corporation is that the roofing membrane is located underneath the patio stones and safety railings, which form part of the patios of the fourth and fifth floor owners. Further, the roofing membrane has to be installed up and over the skylight curbs in order to ensure efficacy. Consequently, the Roof Project cannot be completed unless the disputed items are removed.

[121] Unfortunately, the Strata Council has not been able to convince the Beneficial Owners to pay for the cost of these disputed items. Nor have 75% of the Owners agreed to approve the special levy. The Strata Corporation thus finds itself in a catch 22. This is precisely the type of situation that s. 173 of the *Act* is intended to address. The purpose of the legislative scheme is to ensure that the Strata Corporation can meet its obligations to repair and maintain common property. In this case, that cannot occur unless the disputed items are also addressed.

[122] In coming to this conclusion, I find the Respondents' interpretation of s. 173(2)(a) of the *Act* is too narrow. The Respondents' focus is on the individual items that fall under the Roof Project repairs, rather than recognizing that their removal is necessary in order to repair the common property. While the Respondents have legitimate concerns about requiring all Owners to fund the costs of items that ought to be borne by the Beneficial Owners, these concerns are best addressed in the analysis dealing with the exercise of the Court's discretion.

[123] Having regard to the legislative scheme, its overall objectives, and the circumstances giving rise to this case, I conclude that the Resolution falls within the scope of s. 173(2)(a). This is because the disputed items are required to be completed in order for the Strata Corporation to fulfill its statutory duty. They are

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inherently connected to the repair of the roof, which is the sole purpose of the special levy that is the subject of the Resolution.

[124] Given this conclusion, I do not need to address the Strata's argument that limited common property falls within the scope of common property for the purposes of s. 173(2)(a) of the *Act*.

C. Necessity of Repairs

[125] I turn now to addressing whether the repairs for which the levy is being proposed, are necessary to ensure safety or prevent significant loss or damage. For the following reasons, I conclude that they are.

[126] There are three aspects to the argument regarding necessity: the need to replace the roof membrane; the appropriateness of the scope of the project; and the cost of the project.

[127] I reject the notion advanced by Mr. Azarnia that the Strata Corporation must obtain an engineering opinion in order to establish necessity. While engineering reports were accepted by the courts in other cases, that does not mean that only engineers are capable of opining on such matters. When the evidence is considered as a whole, I find that there is more than ample evidence to support the Strata Corporation's view that there is a risk of significant loss or damage if the roof is not replaced in the manner proposed in the Resolution.

[128] For example:

a) The 2016 report from Dubas Engineering which noted that "The roof is at the end of its service life and should be fully replaced".[22]

b) A report from Ted Reef, RRO of BC Roof Inspections, dated March 15, 2017, to the Strata Corporation stating "the roof membrane was found to be in fair condition at all locations checked, but the caulking at most

[22] Affidavit #1 of M. Silverwood, Ex. E, p. 101.

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locations has deteriorated and needs to be re-applied…With corrections now and ongoing maintenance, the roof membrane can be expected to last another 1 to 10 years".[23] Six years have now passed since that report was issued.

c) A report from Matthew Blackstock, RRO of BC Roof Inspections provided a further report dated October 16, 2020, to the Strata Corporation stating "the roof membrane was found in fair condition at all locations checked, but deterioration was found to be occurring around the base of galvanized vent details, membrane seals at scuppers, and where it is exposed above the rock ballast. The caulking at most locations is in fair condition but some areas will need to be re-applied. At this time ongoing roof maintenance and repairs will be required. The roofing can be expected to last another 2 to 8 years".[24] That report was issued 2.5 years ago.

d) The February 2022 Dubas Report which states that ""The roof membrane is aged and in need of replacement".[25]

[129] The need for repairs is also not challenged by Mr. Hemmati, the Respondent's expert. Indeed, Mr. Azarnia concedes at para. 11 of his NOA that the roof membrane needs to be replaced. However, Mr. Azarnia disputes that "there is risk of significant loss or damage such that the resolution must be approved as presented".[26]

[130] There is direct, sworn evidence from upper floor owners or residents, of water ingress into their strata lots and significant reduction in the insulation effectiveness of the roof due to a water-logged insulation layer. The affidavit material also includes copies of water ingress reports and invoices paid by the Strata Corporation for patch repairs on the failing Roof Membrane, and increases in the Strata Corporation's water damage deductible from $10,000 to $25,000. There is evidence that Owners

[23] Affidavit #1 of M. Silverwood, Ex. G, pg. 165.
[24] Affidavit #1 of M. Silverwood, Ex. K, pg. 201.
[25] Affidavit #1 of M. Silverwood, Ex. O, pg. 19.
[26] Written Submissions of Petition Respondent at para. 33.

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have become increasingly vocal at general meetings about the urgency of the Roof replacement, and some have threatened to sue the Strata Corporation if it fails to do so promptly. There is also evidence of the negative monetary impact of inflation and its implications on delays in completing the Roof repairs.

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[131] I do not agree with the Respondents that there is a lack of evidence of water damage or ingress since 2020. This evidence has been provided by Mr. Maughan, who has attached photographs depicting bubbling and cracks in the ceiling paint of his fifth floor apartment. In any event, even if I was to agree that such evidence is lacking, this does not mean that there is no risk of significant loss or damage. In this respect, I find that the Respondents are confusing "imminent risk" with significant risk. Lack of water ingress since 2020 indicates that the patch work done on the roof has temporarily worked. However, that does not detract from the argument that repairs to the roof are necessary.

[132] At para. 88 of *Thurlow BCCA* the Court cited with approval, the following passage from Justice Pearlman's decision in *The Owners, Strata Plan LMS 1383*, 2015 BCSC 1816:

> [58] In my view, giving s. 173(2) its plain meaning and taking into account the purpose of s. 173, which is to provide the means for strata corporations in appropriate cases to be able to proceed with necessary repairs and maintenance to common property in circumstances where they obtain majority support but not a three-quarter vote, I find that the appropriate test of what constitutes "significant" damage or loss is whether the damage or loss is extensive or important enough to merit attention.
>
> [59] The strata corporation has relied on the advice it has received from the engineers. It is entitled to do so. Bearing in mind all of the engineering evidence, including the evidence of Levelton, I find that the repairs and maintenance proposed by the strata corporation through the resolution are repairs and maintenance necessary to prevent significant loss or damage to the common property.

[133] I agree with the Strata Corporation that the damage or loss in this case is extensive and important enough to merit attention. Whether the roof membrane has failed, is failing, or is about to fail, the end result for the purposes of s. 173 of the *Act* is the same – the roof needs to be repaired to prevent significant loss or damage.

[134] I turn now to the scope of the Roof Project, and whether it is necessary. As I noted elsewhere, there is sufficient evidence to support the Strata Corporation's position that the entire roof membrane needs replacing. Of necessity, this includes the removal and replacement of the disputed items.

[135] The final argument in relation to the question of necessity, is the amount of the levy sought. I have already addressed the Respondents' argument that the levy should not include the disputed items. In addition, the Respondents say that the amount of the levy is too high as it is based on an overestimate of the cost for the roof project.

[136] I reject the notion advanced by the Fanning Respondents, that the correct estimate should be between about $500,000 to about $1,000,000, based on what was paid by a neighbouring building. First, I note that the figures referenced were all based on inadmissible hearsay. No direct evidence was provided as to the actual costs paid by the neighbouring building. Second, even if the hearsay evidence as to the cost incurred by the neighbouring buildings was admissible, there is not enough evidence before me to conclude that the scope of the Roof Project is comparable to what was undertaken in the nearby buildings. I have no basis upon which I can conclude that these figures could provide a reliable estimate for what the cost should be for the Roof Project.

[137] Dubas' April and November 2021 estimates of $876,000 are significantly different than the numbers on which the special levy is based. Though this gap is reduced when one factors in Dubas' estimate of at least $225,000 for the cost of skylights and railings – and the cost of inflation – the gap remains large.

[138] Nevertheless, there is some support for the special levy amount requested by the Strata Corporation. As noted elsewhere in these reasons, Mr. Hemmati opines that the budget estimate provided by Garland "appears to be sufficient in scope and within the ballpark estimate wise".[27]

[27] Affidavit #2 of F. Hemmati, Ex. A, p. 6.

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[139] Mr. Hemmati's own estimate is $1,330,400 plus GST for the upper and lower roofs. Mr. Hemmati takes no issue with Garland's application of 15% to account for inflation. The upper range of Garland's 2022 estimate, after inflation, comes to $1,478,570. Similar to Hemmati's estimate, GST would need to be added to Garland's numbers. This results in a difference of $148,170 between the Hemmati estimate and Garland's estimate. Given the scope of the Roof Project, this variation in estimates is not large.

[140] Similarly, Garland's estimates of $90,000 for railings and $170,000 for patio stones is only $25,800 higher than Hemmati's estimate of $73,800 for railings and $160,400 for patio stones (plus GST).

[141] The remaining elements in the special levy are the removal and replacement of skylights ($15,000) and consulting fees ($46,575). I find both those figures reasonable.

[142] It is clear from *Thurlow BCCA* that the proposed special levy does not need to be the minimum amount needed to address the threatened loss or damage. A strata corporation is not limited to doing only patch-up work or choosing the cheapest possible option available. Where a replacement proposal, approved by a majority of council and of the ownership, is reasonable and based on professional advice, the court will not interfere with it.

[143] In this case, the proposal was based on professional advice from Mr. Hekl. The Strata Corporation was entitled to rely on this advice. Even though Mr. Hekl's advice was tainted by a potential conflict of interest, and misrepresentations made by Mr. Hekl to the Strata Corporation regarding his qualifications, the fact remains that Mr. Hemmati considers Mr. Hekl's estimate to be within reason.

[144] In coming to this conclusion, I reject the notion that the Strata Council needs to obtain binding quotations before seeking approval of the special levy. There are cost and contractual implications for obtaining binding quotations. There is evidence that free estimates can be provided by roofing companies, but these are estimates

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only and are not binding. While it is important for the Strata Corporation to eventually obtain a binding quotation before proceeding with the roof repairs, it is not necessary to obtain it at this early stage. The Strata Corporation is entitled to rely on the advice of its consultants to determine when the binding quotation should be obtained.

D. Simple Majority

[145] There is no dispute that the Resolution received 55% of the votes cast. Therefore, it meets the requirement under 173(2)(b) of the *Act* that "the number of votes cast in favour of the resolution is more than 1/2 of the votes cast on the resolution but less than the 3/4 vote required under section 108 (2)(a)".

[146] Arguments about procedural irregularities that might have impacted the vote, are addressed in the following section.

E. Exercise of Discretion

[147] The court's discretion is only to be exercised in appropriate circumstances and in accordance with the overall objectives in the *Act*: *John Doe* at para. 135.

[148] At para. 100 of *Thurlow BCCA*, the Court of Appeal set out the following factors which should be considered when exercising the court's discretion to approve the special resolution:

a) whether the Strata Corporation acted in good faith;

b) whether there were procedural irregularities in the manner in which the resolution was proposed and passed by a majority of the votes cast at its special or annual general meeting;

c) whether the Strata Corporation acted reasonably on the strength of professional advice in seeking to impose the special levy; and

d) whether court approval of the resolution would unfairly prejudice the owners in the minority.

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[149] In *Slosar v. Strata Plan KAS 2846*, 2021 BCSC 1174 (also about a Strata Corporation's compliance with its duty to repair and maintain common property under s. 72 of the *Act*) the Court held that:

> [66] The standard against which the Strata's actions are to be measured in assessing its duty under s. 72 of the SPA is objective reasonableness, which requires, among other things, balancing interests to achieve the greatest good for the greatest number given budget constraints. Contrary to the petitioner's arguments, there is no requirement that repairs be performed immediately or perfectly … Steps required to be taken are dictated by the circumstances at the time. The standard is not perfection nor is it to be judged with the benefit of hindsight.
>
> [67] It must be remembered that Strata councils are made up of lay volunteers and that mistakes and missteps will doubtlessly occur from time-to-time. Council members are not to be expected to have expertise in the subject matter of their decisions. Accordingly, latitude is justified when a strata council's conduct is being scrutinized…

[150] The Respondents have the burden to establish that the Strata Council engaged in improper conduct that was both serious, and likely to have affected the results of the vote. As the vote was 16 in favour, and 13 opposed (with 2 abstentions), the Respondents must convince the Court that the Strata Council seriously misconducted itself in a manner which could have resulted in a change of two or more votes in the Respondents' favour at the 2022 AGM.

[151] While I am satisfied that the Strata Council acted reasonably on the strength of professional advice in seeking to impose the special levy, I find that there were significant problems with the way in which the Strata Council went about securing the simple majority vote.

[152] There is credible and reliable evidence to support the Respondents' argument that the Strata Council did not act in good faith. I have already commented on the Strata Council's role in having Dubas revise its estimates. The significance of this on the outcome of the vote becomes evident when one considers the information that the Strata Council was selectively providing the Owners.

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[153] Prior to the 2022 AGM seeking approval of the special levy for the Roof Project, the Strata Corporation had disclosed the following information to the Owners:

a) Dubas had provided a cost estimate in 2016 of $780,000 for the Roof Project, or $930,000 if the project was to also include replacement of skylights and railings;

b) Dubas had provided an updated cost estimate of $700,000 for the main roof, and $850,000 for the deck roofs, for a total cost of $1,550,000. In addition, Dubas estimated another $350,000 for additional items such as railings and patio stones. These estimates were contained in the February 2022 Dubas Report, which Owners could access through the online portal. However, only those Owners who had accessed the revised report when it was initially posted to the portal would have seen the Disclosure that the cost estimate was adjusted based on figures provided by the Strata Council. This Disclosure was later deleted from the report made available to the Owners prior to the 2022 AGM;

c) Garland had provided an estimate of $1,350,000; and

d) Garland had estimated additional costs of $202,500 for inflation; $46,575 for Mr. Hekl's consulting fee; and $275,000 for replacement of patio stones, railings and skylights.

[154] The Owners were unaware that Dubas had been asked by the Strata Council to artificially double its original estimate to bring Dubas' report in line with Garland's estimate, which resulted in the creation of the February 2022 Dubas Report. The Owners also did not know that Dubas had provided a revised estimate in April 2021 and November 2021, estimating a total replacement cost of $876,000 for the main and deck roofs. These Dubas reports were not posted on the portal, and were only disclosed by the Strata Council after the commencement of this litigation. In so

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doing, the Strata Council deliberately withheld relevant and important information from the Owners.

[155] I find that the Strata Council was acting in bad faith by: asking Dubas to manipulate its numbers to bring them in line with the Garland estimates; selectively providing the Owners with only those reports that were consistent with the Strata Council's position on the cost of the Roof Project; and by failing to disclose to the Owners that Dubas' revised project cost was based on figures provided by the Strata Council. The only reasonable inference is that by taking these actions, the Strata Council was attempting to bolster its position and sway the Owners to vote in support of the Resolution.

[156] In my view, it is not necessary for the Respondents to have affidavit evidence from the Owners that they would have voted differently had the Strata Council not taken these steps. It can be inferred that had the Strata Council not committed these improper actions, it could reasonably have resulted in a change of two or more votes at the 2022 AGM, thus bringing the Resolution below the simple majority required for an order under s. 173 of the *Act*.

[157] There are other concerning actions of the Strata Corporation. In advance of the 2021 AGM, the Strata Council sent communications to the Owners threatening that they would be liable for "legal costs" if anyone voted "NO" to the Resolution. These communications were improper and could reasonably be foreseen to have a potential impact on how an owner might vote. Mr. Silverwood's explanation in his affidavit that he was "frustrated" when he sent these communications, does not justify the use of such intimidation tactics. Further, although these communications occurred one year prior to the 2022 AGM, they would have left an impression on the minds of many of the Owners. There is no evidence that the Strata Council made efforts to allay concerns that any Owners may have had arising from these threats.

[158] There is also a legitimate concern that misleading or inaccurate information was presented to the Owners regarding patio infrastructure and railings. The Owners were told that movement of patio railings to a different location was a mandatory

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requirement under the Building Code, whereas the evidence indicates that this was optional.

[159] There is also evidence that at least one member of the roofing committee was in a conflict of interest. Brad Van Dam owned a unit on the fourth floor which stood to benefit from any work done on the disputed items. Mr. Silverwood admits that Mr. Van Dam served on Strata Council from about 2020, until the time of the 2022 AGM. Although he did not stand for re-election at the 2022 AGM, it is clear that Mr. Van Dam would have attended Strata Council meetings prior to the 2022 AGM, where the roof replacement project was voted on.

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[160] Section 32 of the *Act* requires a council member who has a direct or indirect interest in a matter that is the subject of consideration by the strata council, to disclose that interest, abstain from voting on that matter, and recuse themselves from the meeting, as follows:

> Disclosure of conflict of interest
>
> 32 A council member who has a direct or indirect interest in
>
> (a)a contract or transaction with the strata corporation, or
>
> (b)a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member,
>
> must
>
> (c) disclose fully and promptly to the council the nature and extent of the interest,
>
> (d) abstain from voting on the contract, transaction or matter, and
>
> (e) leave the council meeting
>
> (i) while the contract, transaction or matter is discussed, unless asked by council to be present to provide information, and
>
> (ii) while the council votes on the contract, transaction or matter.

[161] Thus, while that person is entitled to vote on the Resolution, they are required to recuse themselves during Strata Council meetings when such matters creating a

conflict of interest are raised. There is no indication that Mr. Van Dam complied with the mandatory requirements in ss. 32(d) or (e) of the *Act*.

[162] I turn finally to the argument of unfair prejudice. The Respondents argue that the Resolution will require all Owners to pay costs for the repair and maintenance of items that constitute private property or limited common property or assets. The Strata Corporation does not deny this. However, it submits that there is no prejudice, as the amount of the overcharge is relatively small, and the Owners will be able to ultimately recover the costs from the Beneficial Owners.

[163] The Strata Corporation wishes to proceed with the roof repairs before resolving who should pay for the items that it agrees are limited common property and private property. It submits that given the resistance by the Beneficial Owners to pay for these costs, and delays that will arise if this issue needs to be adjudicated first, the most reasonable approach is to collect the special levy from all Owners and then charge back the proportionate share to the Beneficial Owners once this issue is resolved. The Respondents take issue with this position, arguing that this levy unfairly requires non-liable Owners to finance the upper floor owners, when the issue of who is responsible for these costs should be resolved at the outset. Further, the Respondents submit that there is no guarantee that the Strata Corporation would be able to recover those monies from the Beneficial Owners, which will leave the non-liable Owners out of pocket or having to fund further legal costs to try to collect money from the Beneficial Owners.

[164] The proposed levy would have individual Owners paying anywhere from $18,500 to $75,000 per strata lot. The median number is $46,250 per Owner.[28] This is a substantial amount of money, particularly since the Owners are expected to come up with these funds within the span of four months. When one considers the portion of the special levy which is comprised of the disputed items, the burden that the Owners are asked to bear is significantly unfair. The disputed items total $275,000 out of a total special levy of $1,255,000. That represents 22% of the total

[28] Affidavit #2 of R. Azarnia, Ex. R.

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amount of the special levy. This is in contrast to the 1% figure asserted by the Petitioner's counsel, which was based only on the cost of the skylights. As noted elsewhere, the Petitioner has conceded that the patio stones and railings should also be paid for by the Beneficial Owners, in addition to the skylights.

[165] By asking the Owners to fund up front the cost of these disputed items in order to have the Roof repaired, the Petitioner seeks to impose a significantly unfair burden on the Owners. While I accept that there is a need to move expeditiously with respect to the roof repairs, expediency should not trump fairness.

[166] I turn finally to the argument raised by the Respondents about the placement of railings. They submit that movement of the railings from their current location effectively changes the use and surface area of common property and limited common property. Specifically, the Fanning Respondents argue that Owners do not have the right to unilaterally confiscate common property for their own use, and that Owners of the fifth floor strata lots have already encroached onto common property.

[167] It is submitted that the Resolution will further expand onto this common property, thus contravening s. 257 of the *Act.*

[168] Section 71 of the *Act* deals with changes to the use of common property, as follows:

> Change in use of common property
>
> 71 Subject to the regulations, the strata corporation must not make a significant change in the use or appearance of common property or land that is a common asset unless
>
> (a) the change is approved by a resolution passed by a 3/4 vote at an annual or special general meeting, or
>
> (b) there are reasonable grounds to believe that immediate change is necessary to ensure safety or prevent significant loss or damage.

[169] Section 257 of the *Act* provides:

> 257 To amend a strata plan to designate limited common property, or to amend a strata plan to remove a designation of limited common property made by the owner developer at the time the strata plan was deposited or by amendment of the strata plan, the strata plan must be amended as follows:

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> a. a resolution approving the amendment must be passed by a unanimous vote at an annual or special general meeting;

[170] It is difficult to ascertain at this juncture whether there is any merit to the s. 257 argument, as I do not have enough evidence about the proposed location of the railings and the implications of that on common property. However, given the potential implications, this concern needs to be addressed in order to ensure that the rights of the Owners are not further prejudiced.

F. Conclusion

[171] When the interests of the minority Owners are weighed, along with the irregularities in the process thus far, and the bad faith actions of the Strata Corporation, the balancing exercise weighs against approving the Resolution.

[172] I conclude that the circumstances in this case do not support the exercise of my discretion to approve the Resolution.

[173] The Petition is dismissed.

G. Additional Comments

[174] The parties have expended a great deal of resources in the course of this litigation. Given the outcome, and the acrimony displayed in the process thus far, it is likely that they will continue to battle, unless common sense prevails and they make genuine efforts to resolve the matters that divide them, amicably. To that end, I offer the following comments, which I hope will assist the parties in finding a way forward that meets the needs of all the Owners.

[175] All of the Owners share common goals. They want to ensure that The Briar roof is replaced at the lowest cost possible, before it deteriorates further and causes irreparable damage and loss. They also want to know that the cost of repairs will be shared fairly and equitably, based on each Owner’s legal obligations.

[176] To that end, it is reasonable to expect that the Strata Council will take immediate steps to resolve the issue of who is responsible for the disputed items,

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prior to submitting another Resolution to the Owners for approval. This requires cooperation of the Beneficial Owners, who also share the common goal of wanting the Roof Project to be completed as quickly as possible. The parties have identified various steps that can be taken to do this – such as negotiation with the Beneficial Owners, mediation, or taking the matter to the Civil Resolution Tribunal ("CRT"). Those steps should be taken quickly given the state of the roof.

[177] The Strata Council will also need to ensure that the placement of the railings is in compliance with the *Act*. Specifically, if the Strata Council considers that the railings must be placed in such a way that s. 71 of the *Act* is implicated, then the Strata Council should take steps to obtain the requisite agreement of the Owners.

[178] Of crucial importance is that the Strata Council be forthright with the Owners, and provide them with full disclosure so that they can make informed decisions about these important matters affecting all residents of The Briar. Under no circumstances is it acceptable for the Strata Council, or members of the Roofing Committee or Legal Committee, to withhold information from the Owners that could have an impact on how they vote on a resolution.

[179] It may be that further contentious matters arise in relation to this and other issues. I urge the parties to not let their emotions get the best of them, and to ensure that at all times, they keep their focus on what matters the most – fostering an environment where they can live peacefully, safely, and securely, in harmony with their neighbours.

VII. NOTICE OF APPLICATION REGARDING LEGAL EXPENSES

[180] I now turn to Mr. Azarnia' Notice of Application.

[181] On July 25, 2022, Mr. Azarnia filed his NOA asking for various orders, including:

1. The Petition be converted to an action and referred to the trial list.
2. The Petition pleadings stand as a notice of civil claim and responses to civil claim with application of the Supreme Court Civil Rules.

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3. Alternatively:
    a. Cross-examination of various Petitioner's witnesses
    b. Leave for Azarnia to file and serve expert affidavit evidence;
    c. Disclosure of various Petitioner's documents and information, including:
        i. Mr. Hekl's complete files;
        ii. Correspondence between the Petitioner and Dubas regarding the various Dubas reports;
        iii. All drafts of the 2021 and 2022 Dubas reports;
        iv. Petitioner's counsel's complete files; and
        v. Copies of all quotes and estimates received by Hekl, Garland, or the Strata Corporation.
    d. Production of all documents relating to Petitioner's legal expenses in connection with this proceeding, an order that the Peititioner take steps to seek approval for legal expenses exceeding the authorized amount by holding a vote of the Owners, and an order that the Petitioner not take any steps in the proceeding or incur any further legal expenses until funding has been approved by the Owners,
    e. Leave to file and serve further affidavits.
    f. Leave for Azarnia to conduct examinations for discovery of the Petitioner's witnesses.
4. Access to the roof and decks for inspection by Azarnia or his consultants/expert, on certain conditions.
5. If Azarnia's expert's estimate is equal to or less than the Petitioner's expert's estimate, an order that the Petitioner hold a special AGM to present the competing estimates obtained by Azarnia, on certain conditions.
6. The Petition hearing or trial be set for a time after the SGM.
7. Adjournment of the September 2022 hearing; and
8. Costs for the application.

[182] The NOA was heard by Master Bilawich on August 17, 2022. The petition hearing was adjourned to October 31–November 1, 2022. Master Bilawich granted Mr. Azarnia's request to file and serve expert evidence prior to the Petition hearing, and granted his expert access to the roof and patios on the condition that the expert report be completed within three weeks of access. The balance of the relief sought was adjourned generally.

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[183] Although a number of orders remain outstanding from the NOA, only the following relief is sought at this hearing by Mr. Azarnia:

> 3(d) The Petitioner shall provide to the Applicant and owners all documents relating to the Petitioner's legal expenses in connection with this proceeding from January 2021 to date and, if the legal expenses in 2022 exceed the amount authorized in the 2022 budget, the Petitioner shall take steps immediately to obtain the owners' approval of legal expenses by way of a ¾ resolution pursuant to s. 96 the *Strata Property Act,* and The Petitioner shall not take any steps in this proceeding and shall not incur any further legal expenses that are of a non-recurring nature until such time as funding for legal expenses has been approved by the owners.

[184] In seeking these orders under para. 3(d) of the NOA, Mr. Azarnia relies on ss. 164 – 165 of the *Act*, and s. 39 of the *Law and Equity Act*, R.S.B.C., c. 253.

[185] The Petitioner opposes the orders sought, on various grounds, including that: this Court does not have jurisdiction to grant the order; the legal invoices are protected by solicitor-client privilege; and that there is no legal or factual basis to grant the orders sought.

[186] I turn first to the question of jurisdiction.

[187] The Strata Corporation argues that this Court does not have jurisdiction because: (a) ss. 164 and 165 of the *Act* do not authorize the orders sought unless the applicant has brought its own petition; and (b) the issues raised lie within the special expertise of the CRT.

[188] Sections 164 and 165, fall within Part 10 of the *Act*, under the heading “Legal Proceedings and Dispute Resolution”. Division 1 covers lawsuits brought against the Strata Corporation. Division 2 covers lawsuits brought by the Strata Corporation. This petition proceeding was brought by the Strata Corporation, and commenced under Division 2.

[189] As noted elsewhere, s. 173(1) of the *Act*, authorizes the Strata Corporation to bring an “application” to seek various forms of relief.

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[190] Sections 164 and 165 of the *Act* similarly require an owner to bring an "application" to seek relief against the Strata Corporation, as follows:

> Preventing or remedying unfair acts
>
> 164 (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a)action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
>
> (b)exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of subsection (1), the court may
>
> (a)direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
>
> (b)vary a transaction or resolution, and
>
> (c)regulate the conduct of the strata corporation's future affairs.
>
> Other court remedies
>
> 165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:
>
> (a)order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
>
> (b)order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
>
> (c)make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[191] Rule 2-1(2) of the *SCCR* relates to choosing the correct form of proceeding. It mandates that every form of proceeding must be started by filing a notice of civil claim, unless an enactment or the *SCCR* provide otherwise. Petition proceedings are provided for under subsection (2), as follows:

> (2) To start a proceeding in the following circumstances, a person must file a petition, or, if Rule 17-1 applies, a requisition:
>
> …
>
> (b) the proceeding is brought in respect of an application that is authorized by an enactment to be made to the court;
>
> …

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[192] The relief sought by Mr. Azarnia is a form of relief authorized by an enactment, and thus, must be brought by way of petition, unless Rule 17-1 applies, in which case it can be sought through the filing of a requisition.

[193] Rule 17-1 sets out the limited circumstances in which proceedings may be commenced by requisition. Subsection (1) provides:

1. A proceeding referred to in Rule 2-1(2) may be brought under this rule if
    a. all persons affected by the orders sought within the proceeding consent, or
    b. the proceeding is one of which notice need not be given.

[194] Rule 17-1 does not apply in this case as the requirements under (1) are not met.

[195] In *Santos v. The Owners, Strata Plan LMS 1509*, 2016 BCSC 1775, Justice Morellato noted the distinctive forms of relief provided for in ss. 165 and 174 held as follows:

> [56] It is noteworthy that both s. 165 and s. 174 are remedial in effect and are situated within Part 10 of the Act, which deals with "Legal Proceedings and Dispute Resolution". Both provisions provide the Court with a discretionary power to provide remedies on an application to the Court. These sections provide distinctive remedies to address different disputes affecting a strata corporation.
>
> [emphasis added.]

[196] These comments were endorsed by the Court in *Thurlow BCCA* at para. 92.

[197] The NOA seeks numerous orders, some of which are in the form of interlocutory relief, and properly brought by way of notice of application in the within Petition. The orders granted by Master Bilawich on August 17, 2022, fit within this category.

[198] For ease of discussion, the relief sought under para. 3(d) of the NOA, is broken down into the following:

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a) An order for production of all documents relating to the Petitioner's legal expenses in connection with this proceeding from January 2021 to date;

b) An order under s. 96 of the *Act* that the Petitioner take steps immediately to obtain the Owners' approval of legal expenses by way of a 3/4 vote at a general meeting, if the legal expenses in 2022 exceed the amount authorized in the 2022 budget; and

c) An order that the Petitioner be prohibited from incurring any further legal expenses that are of a non-recurring nature until such time as funding for legal expenses has been approved by the owners.

[199] The orders sought in paragraphs (a), (b), and (c) are interconnected. The document production sought in paragraph (a) regarding legal expenses, is intended to support the order sought under paragraph (b) for an order that the Strata Corporation comply with s. 96 of the *Act*. Similarly, the order sought in (c) is intended to ensure that no further legal fees are expended until the vote contemplated in (b) is held.

[200] In my view, these orders clearly fall outside of the scope of the Petition. The Petition seeks relief under s. 173(4) of the *Act* for this Court to approve a resolution that has failed to garner 3/4 vote support of the Owners. This is distinctly different than the orders sought by Mr. Azarnia, which raise issues related to the appropriateness of the Strata Corporation paying for legal fees out of the contingency reserve fund without proper authorization from the Owners.

[201] The requirement that a party commence their own action if they wish to seek substantive relief, is well established. See for example *W. Mullner Trucking Ltd. & Others v. Baer Enterprises Ltd.& Others*, 2005 BCSC 62 (“*Mullner*”) where the Court held as follows:

> [35] What lies at the root of proper pleadings, however, is a system that is designed to ensure that parties receive proper notice of claims made against them prior to adjudication by the court, and that all parties be afforded an opportunity to respond to and plead to any such claim.

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> …
>
> [38] The problem, as I perceive it, is that these claims are not and cannot constitute defences to the claims advanced by the plaintiffs, but rather, are substantive and discrete causes of action being advanced by the applicant within what purports to be a defence.
>
> …
>
> [41] On a substantive level, in my view, a defendant cannot seek substantive relief in a statement of defence without incorporating that relief within a counterclaim or a third party notice.
>
> …
>
> [43] The applicant seeks all of this relief on the basis of its filing a statement of defence to an unrelated series of claims, never having commenced its own action or invoked one of the other methods of initiating its own substantive claim. I say the applicant filed a defence to an unrelated series of claims because that is precisely what has occurred. The Minister of National Revenue does not seek to attack any of the lien claims filed, but rather, only seeks to claim the money paid into court by claiming priority. This is not and cannot constitute a defence to the plaintiffs' claims.

[202] Though the *Mullner* case was within the context of a notice of civil claim rather than a petition, the underlying principle is the same.

[203] The *Thurlow* decision is distinguishable on this issue from the facts of the case at bar. In *The Owners, Strata Plan VR 2213 (Re),* 2021 BCSC 905 ("*Thurlow BCSC*") Justice Forth addressed a similar issue related to document production. The respondents had brought an application within the Petition proceeding for production of various documents, including legal fees incurred by the Strata Corporation. Justice Forth noted that:

> [162]…Document production is strongly guided by the pleadings and governed by the *Supreme Court Civil Rules*. If an action is brought under s. 164 of the Act, that action would determine the parameters of the document production. Section 169 of the Act provides direction on what information and documents are producible.

[204] Justice Forth, having dismissed the petition, also dismissed the application for production of documents, with the exception of the documents relating to legal fees expended relating to the s. 173 petition. Those documents were ordered to be produced. In so doing Justice Forth noted that the applicant also sought these under

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ss. 35 – 36 of the *Act* which relates to the Strata Corporation's obligation to produce its records on request.

[205] In *Thurlow BCCA* the Court of Appeal allowed the petition, and remitted the document production applications for consideration with the petition. By doing so, the Court of Appeal did not comment on whether or not the application for production of documents was properly brought within the petition. That matter was left for the determination of the judge hearing the petition.

[206] It is important to note that in *Thurlow BCSC*, the petitioner does not appear to have argued that the respondent was required to bring its own application if it wanted to seek the order for production of the documents related to legal fees. Nor was this particular issue raised on appeal. Thus, while *Thurlow BCSC* provides helpful guidance on whether the records in relation to legal fees should be disclosed (see paras. 229–248) it is silent on the issue raised before me.

[207] The requirement that the relief sought in an application be connected to the underlying petition, was also noted by the Court in *The Owners, Strata Plan NWS3075 v. Stevens*, 2018 BCSC 1784. The Strata brought an application seeking an order to recover reasonable legal expenses. The Court inquired if specific sections of the *Act* allowed for such an application. In finding that they did, the Court noted that it is "also significant that the Strata's application was brought in a petition proceeding and the petition itself sought recovery of legal costs under the section": para. 87.

[208] I therefore conclude that the relief sought in the NOA is not properly before me as it does not relate to the issues raised in the Petition. To seek this type of relief, Mr. Azarnia is required to commence a separate proceeding.

[209] Consequently, the relief sought at para. 3(d) of the NOA, is dismissed.

[210] Before leaving this issue, I wish to address the question of whether or not the matters raised by Mr. Azarnia are properly before the CRT or the Supreme Court. As noted, the Petitioner argues that even if Mr. Azarnia had commenced his own

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petition, by operation of ss. 16.1 – 16.4 and 120 – 123 of the *Civil Resolution Tribunal Act,* S.B.C. 2012, c. 25 [*CRT Act*], this Court does not have jurisdiction to grant the relief sought. Mr. Azarnia relies on ss. 164 to 165 of the *Strata Property Act*, as well as s. 39 of the *Law and Equity Act* to support his argument that this Court does have jurisdiction to grant this relief.

[211] Unfortunately, aside from a reference to the statutory provisions, neither counsel provided this Court with any authority in support of their respective positions on the jurisdiction of the CRT or this Court, over the matters raised in the NOA.

[212] Section 121 of the *CRT Act* grants jurisdiction to the CRT over certain Strata property disputes, as follows:

> Claims within jurisdiction of tribunal for strata property claims
>
> 121 (1) Except as otherwise provided in section 113 *[restricted authority of tribunal]* or in this Division, the tribunal has jurisdiction over a claim, in respect of the *Strata Property Act*, concerning one or more of the following:
>
> (a) the interpretation or application of the *Strata Property Act* or a regulation, bylaw or rule under that Act;
>
> (b)the common property or common assets of a strata corporation;
>
> (c)the use or enjoyment of a strata lot;
>
> (d) money owing, including money owing as a fine, under the *Strata Property Act* or a regulation, bylaw or rule under that Act;
>
> (e) an action or threatened action by a strata corporation, including the council, in relation to an owner or tenant;
>
> (f)a decision of a strata corporation, including the council, in relation to an owner or tenant;
>
> (g)the exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of this Act, the tribunal is to be considered to have specialized expertise in respect of claims within the jurisdiction of the tribunal under this Division.

[213] Section 122 of the *CRT Act*, sets out claims brought under various provisions of the *Strata Property Act*, over which the CRT does not have jurisdiction. In relation to the provisions under Part 10 of the *Strata Property Act*, only ss. 173(2) and 174 are listed.

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[214] Section 16.1 of the *CRT Act* requires the court to dismiss a proceeding where the court has determined that all matters are within the jurisdiction of the CRT, provided that certain conditions are met. Section 16.2 empowers the court to order that the CRT not adjudicate a claim in certain circumstances. Section 16.4(1) stipulates that a person may not bring or continue a claim in court that is within the jurisdiction of the CRT, unless certain conditions are met, such as the CRT failing to give an initiating order or refusing to resolve the claim.

[215] It must be kept in mind that neither party had a well-developed argument in relation to whether this Court had jurisdiction, nor did they provide me with any case authorities to assist with the interpretation of the applicable statutory provisions. As such, my following comments are provided to guide the parties only, in order to assist them in determining the next steps.

[216] Based on the manner in which Mr. Azarnia has framed the relief he is seeking, I am unable to find any reason why Mr. Azarnia would be prohibited by statute from proceeding before the Supreme Court to seek the orders in para. 3(d) of the NOA. Having regard to the applicable provisions in the *CRT Act* and the *Strata Property Act*, I find that the orders sought fall outside the scope of both s. 121 and s. 122 of the *CRT Act*, thereby making it possible for Mr. Azarnia to seek this relief in either forum.

[217] Having dismissed Mr. Azarnia's application on procedural grounds, I will not comment on its merits. Much will depend on how the parties articulate their positions if they are not able to resolve this matter amicably. I also do not wish to tie the hands of the body that may be hearing this matter in the future.

[218] However, I urge the parties to review the authorities and carefully consider the merits of their legal positions on the substantive issues raised, before expending further monies on this issue. The question of expending money out of the contingency reserve fund, or production of legal invoices in strata property disputes, is not a novel issue. There is sufficient authority available in the caselaw which was

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referenced by the parties, that should provide them with guidance in determining the Strata Corporation's obligations in this respect.

[219] Similarly, in the event they are not able to resolve the issues raised in the NOA, the parties should make efforts to come to an agreement on the proper forum for this dispute. All members of the Strata Corporation, regardless of which side of the dispute they fall, stand to benefit if the Petitioner and the Respondents are able to resolve (or at least narrow down) the issues without resort to further litigation.

VIII. RELIEF REQUESTED BY FANNING RESPONDENTS

[220] In their Response to the NOA, under "Legal Basis", the Fanning Respondents have asked:

a) At para. 6 for an order to "invalidate any contracts or agreements with Mr. Tomas Hekl or Garland Canada Inc., if any, as such contracts or agreements have not been approved by the owners"; and

b) At para. 7 for an order that the strata manager "post all court proceedings and documents related to this petition including all responses on its website under Section 36(1) of the Act".

[221] Those matters are not properly before this Court. No application was filed seeking these orders. Nor were any submissions made on this issue by any of the parties.

[222] In the event that the Fanning Respondents still seek such orders, I would urge the parties to try to reach agreement on these issues, rather than expending further resources to have them adjudicated. This applies particularly to the request regarding the posting of the court proceedings onto the Strata website.

[223] In light of my comments that it is incumbent on the Strata Corporation to be transparent with the Owners, it is reasonable to expect that the material filed in the Petition proceeding, together with these Reasons, will be made available to all Owners.

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IX. COSTS

[224] Both parties indicated a desire to address the Court on the question of costs. In the event they are unable to resolve this issue, they may provide the Court with written submissions, as follows.

[225] A party seeking costs may prepare written submissions up to a maximum of 10 pages in length (excluding attachments), for my consideration. These should be submitted to my attention, through Supreme Court Scheduling within 60 days of this Order. Responding submissions are to be provided 14 days thereafter and are not to exceed 10 pages. Any Reply submissions are to be provided within seven days following receipt of Response submissions, and are limited to three pages.

[226] In the event that both parties seek costs, then the Petitioner is to file their submissions first, within the timelines and in the manner set out above.

"Shergill J."

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