COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *GMC Properties Inc. v. Rampart Estates Ltd.,* 2023 BCCA 172

Date: 20230421
Docket: CA48083

Between:

GMC Properties Inc.

Appellant
(Plaintiff)

And

Rampart Estates Ltd.

Respondent
(Defendant)

Before: The Honourable Mr. Justice Groberman
The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated January 28, 2022 (*GMC Properties Inc. v. Rampart Estates Ltd.*, 2022 BCSC 142, Victoria Docket S192484).

Counsel for the Appellant:	I.G. Nathanson, K.C. C. Ohama-Darcus
Counsel for the Respondent:	L.J. Alexander
Place and Date of Hearing:	Vancouver, British Columbia May 22, 2022
Place and Date of Judgment:	Vancouver, British Columbia April 21, 2023

Written Reasons by:
The Honourable Justice Dickson

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant registered a certificate of pending litigation against land that is the subject of a purchase and sale agreement it seeks to compel the respondent to perform. The chambers judge granted the respondent's application to cancel the certificate. The appellant appeals, alleging the judge erred in exercising his discretion by misconstruing the nature of its claim, failing to have due regard to informal steps it has taken in the litigation, and failing to consider the fact that the certificate caused no actual prejudice to the respondent. Held: Appeal allowed. The chambers judge erred in the ways the appellant identifies. The application to cancel the certificate is dismissed without prejudice to the respondent's right to bring a new application.

Reasons for Judgment of the Honourable Justice Dickson:

Introduction

[1] This appeal concerns the cancellation of a certificate of pending litigation ("CPL") under s. 252 of the *Land Title Act*, R.S.B.C. 1996, c. 250. The appellant, GMC Properties Inc., registered the CPL against land that is the subject of a purchase and sale agreement it seeks to compel the respondent, Rampart Estates Ltd., to perform. The chambers judge granted Rampart's cancellation application, finding that GMC's claim in the underlying action was not for an interest in land and that GMC took its last formal step in the proceeding more than a year before Rampart brought the application. GMC appeals on the basis that the judge erred in the exercise of his discretion by misconstruing the nature of GMC's claim, failing to have due regard to informal steps taken after GMC's last formal step, and failing to consider the absence of actual prejudice to Rampart caused by the CPL.

[2] In my view, the judge erred in the ways that GMC identifies. For the reasons that follow, I would allow the appeal and dismiss the application without prejudice to Rampart's right to bring a new application.

Background

The Agreement as Amended

[3] In February 2017, GMC and Rampart entered into an agreement for the purchase and sale of commercial property (the "Agreement"). The subject property

is located in Esquimalt, B.C. (the "Lands"). In April 2017, the parties agreed to amend portions of the Agreement. In September 2017, they amended it again. The September amendments began with the following recital:

> WHEREAS, THE PARTIES ENTERED INTO AN AGREEMENT OF PURCHASE AND SALE DATED FEBRUARY 3, 2017 ("AGREEMENT") AND in consideration of the mutual covenants and agreements set forth in this agreement and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), the parties agree to revive and amend the Agreement, hereby as follows…

[4] Under s. 2.1 of the September Amending Agreement, Rampart agreed, among other things, to deliver to GMC a report concerning the environmental condition of the Lands in a form acceptable to GMC and its lender. That report was defined in s. 2.1 as the "DSI Environmental Report":

> 2.1 … [Rampart] has authorized and instructed Hemmera Environmental Inc. ("[Rampart's] Environmental Consultant") to conduct investigations to confirm the environmental condition of the Lands, all at the expense of [Rampart], and has received a verbal interim report that is satisfactory to [Rampart]. [Rampart] will instruct [Rampart's] Environmental Consultant to conduct further necessary investigations and tests that are recommended under the interim report and will prepare a final report verifying the results of such further investigations ("DSI Environmental Report") in a form acceptable to [GMC] and its lender, and will address and deliver same to [Rampart], [GMC] and [GMC's] lender.

[5] The amended Agreement also included due diligence conditions and a waiver provision. Under s. 4.1, GMC's obligation to complete the purchase was "… conditional upon [GMC] being satisfied, in its sole and absolute discretion, with the results of …" various listed items, including at 4.1 (e) "[GMC] and its lender approving the DSI Environmental Report". Section 4.2 provided that the Agreement would be terminated if GMC did not waive the s. 4.1 due diligence conditions by the "condition removal date". Under s. 1.1(o), the "condition removal date" was defined as the first business day 21 days after GMC "receives the final DSI Environmental Report (described in s. 2.1 herein)" or such other reasonable date as mutually agreed upon.

[6] Section 2.4(a) required GMC to pay Rampart a $25,000 deposit. It did so. Sections 9.6 and 4.3 provided that the parties' agreements "create and constitute a binding agreement of purchase and sale for the Assets". The Assets were defined as including the Lands.

The Dispute

[7] On January 30, 2019, Rampart delivered a report to GMC entitled "Stage 2 Preliminary Site Investigation and Remedial Cost Estimate" (the "Stage 2 PSI Report"), which was reviewed by GMC's consultant. On February 7, 2019, the consultant provided GMC with a report describing its findings on that review (the "Review Report"). In particular, the consultant opined in the Review Report "on the nature of investigation required to permit a fixed-price quote … for remediation, which you require to finance the purchase and development of the Site".

[8] GMC concluded that the Stage 2 PSI Report did not satisfy Rampart's obligation to deliver a "DSI Environmental Report" in a form that it accepted. In February 2019, it advised Rampart of this conclusion, forwarded a copy of the Review Report, and suggested the parties meet to discuss next steps.

[9] In April 2019, Rampart wrote to GMC advising that the condition removal date specified in s. 1.1(o) of the amended Agreement had expired, that GMC had not provided a waiver notice under s. 4.2., and that therefore the Agreement had terminated.

The Action

[10] GMC commenced the underlying action on June 7, 2019. In the notice of civil claim, it pleaded that Rampart is the registered owner of the Lands. It also pleaded that in February 2017 the parties entered into the Agreement, which they amended in April and September 2017. It pleaded further that the Stage 2 PSI Report did not meet the definition of a "DSI Environmental Report" in a form that it accepted, the condition removal date had not passed, the Lands are unique, and Rampart's April 2019 letter constituted a breach or anticipatory breach of the amended Agreement.

In addition to seeking a declaration that the timing with respect to the condition removal date had neither passed nor started to run, it sought "[a]n order for specific performance with respect to [Rampart's] obligations with respect to the Purchase Agreement, as amended, including, but not limited to, the delivery of a final DSI Environmental Report as set out in the September Amending Agreement", together with a CPL and other relief.

[11] On June 19, 2019, GMC registered the CPL against the Lands.

[12] On February 26, 2020, Rampart filed a response to civil claim. On April 22, 2020, it delivered a list of documents to GMC. On May 8, 2020, GMC delivered a list of documents to Rampart.

[13] Between July 2020 and February 2021, the parties attempted to resolve their dispute by negotiating a new agreement for the purchase and sale of the Lands to replace the amended Agreement. However, while several drafts were exchanged, a replacement agreement was not reached.

[14] Following the failed negotiations, counsel for the parties corresponded regarding setting the matter down for trial. Their correspondence was exchanged between May 31, 2021 and July 14, 2021. The trial date proposed was in June 2022.

The s. 252 Application

[15] On July 20, 2021, Rampart brought an application to cancel the CPL under s. 252 of the *Land Title Act*. Section 252 provides:

> 252(1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.
>
> (2) An application under subsection (1) must be made to the court in which the proceeding was commenced and must be brought
>
> a) as an application in that proceedings, if the applicant is a party to the proceeding, or

> b) by petition, if the applicant is not a party.
>
> (3) The registrar must, on application and on production of a certified copy of the order of the court directing cancellation under subsection (1), cancel the registration of the certificate of pending litigation.

[16] In its notice of application, Rampart emphasized the key principles engaged by s. 252(1), including the extraordinary nature of a CPL, its prejudicial effect and a claimant's obligation to pursue a claim actively. It contended that the CPL had caused it prejudice by effectively freezing the Lands on the basis of a conditional sale contract GMC had not yet elected to abandon or confirm. In addition, it contended, GMC's claim "does not even advance an enforceable interest in land", but instead "claims to enforce a contractual right to receive documents prior to it exercising any contractual right to enter [into] a binding contract to purchase any land".

[17] In its response, GMC emphasized that Rampart had held Lands since February 2001, they are tenanted, and they produce substantial income. It also emphasized the background leading up to the application, including counsel's correspondence in June and July of 2021 about setting the matter down for trial. GMC argued that its claim for an interest in the Lands had a reasonable prospect of success by virtue of the parties' rights under the amended Agreement and its claim for specific performance, and that Rampart did not stand to suffer any actual prejudice if the cancellation application was refused. In contrast, it submitted, if the CPL was cancelled, Rampart could convey the Lands to a third party and thus restrict GMC from obtaining specific performance set out in the notice of civil claim.

[18] On August 26, 2021, the judge heard the application. GMC changed counsel shortly thereafter and both parties made supplemental submissions in November, 2021. In its supplemental submissions, GMC argued that, regardless of how the due diligence conditions are characterized, it acquired an equitable interest in land immediately upon entering into the Agreement. In support, it relied on several authorities, including *Barabash v. Nand*, [1980] A.J. No. 586, *Sandhu v. Chan*, 2017 BCSC 1279 and *2123201 Ontario Inc. v. Israel Estate*, 2016 ONCA 409. Rampart

responded that those authorities were distinguishable, and that the due diligence conditions were purely subjective and thus not a true condition precedent.

[19] On January 28, 2022, the judge granted Rampart's application and cancelled the CPL.

Reasons of the Chambers Judge: 2022 BCSC 142

[20] The judge began by setting out the factual background, the parties' positions and s. 252(1) of the *Land Title Act*. Then he summarised his view of the salient legal principles:

> [18] The right to file a CPL is an extraordinary remedy because its filing secures a claim before the claim is proven. Since the CPL is itself prejudicial to the property owner there is no requirement for the owner to show prejudice. A claimant is to actively pursue its claim in the one year term set out in s. 252 of the *LTA*. The reference to "step" in s. 252 is limited to formal steps required or permitted by the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("*Rules*") and that are intended to move the litigation forward to resolution. An informal step a solicitor or party may take is not a "step" under s. 252 (*Ningbo Zhelun Overseas Immigration Service Co. Ltd. v. USA-Canada International Investments Inc.*, 2021 BCSC 1279, at para. 4; citing *Motz Bros. Holdings Ltd. v. McKean*, 2009 BCSC 1133, at paras. 7, 8; *Khan v. Johal*, 2006 BCSC 1547, at paras. 12-14; *Wiest v. Middelkamp*, 2005 BCSC 1626, at paras. 12, 13; *Lawn Genius Manufacturing (Canada) Inc. (Drainmaster) v. 0856810 B.C. Ltd.*, 2016 BCSC 1915, at para. 12).

[21] Next, he identified what he saw as the issues for determination:

> [19] I will consider the issues of whether the plaintiff has claimed an interest in land and whether any steps have been taken by the plaintiff in the year preceding the registration of the CPL.

[22] In addressing the first issue he identified, the judge stated that s. 215(1)(a) of the *Land Title Act* provides that a person who has commenced a proceeding and is claiming an estate or interest in land may register a CPL against the land in question. He also stated that the court possesses an inherent jurisdiction to cancel a CPL that does not meet the pre-conditions in s. 215. However, he observed, citing *Yi Teng Investment Inc. v. Keltic (Brighouse) Development Ltd.*, 2019 BCCA 257, the court may not cancel a CPL because the claim is weak or there is no triable

issue, and it must consider the pleadings alone when determining whether the s. 215 pre-conditions are met (at para. 21).

[23] As to the pleadings in this case, the judge quoted the relief sought in para. 2 of the notice of civil claim, namely, "[a]n order for specific performance with respect to [Rampart's] obligations with respect to the Purchase Agreement, as amended, including, but not limited to, the delivery of a final DSI Environmental Report as set out in the September Amending Agreement". Then he said this:

> [24] According to this, if the plaintiff was successful in its claim, the defendant would be required to deliver an environmental report "as set out in the September Amending Agreement." A report has been provided by the defendant (which the plaintiff has not accepted) so this would presumably be a different report and a trial judge would perhaps decide whether the new report complies with the agreement.

[24] The judge acknowledged that the notice of claim "talked about" an alleged agreement, removing conditions precedent, and specific performance. Nevertheless, he stated, the claim was akin to a mandatory injunction and the relief sought by GMC did not include an interest in land:

> [25] I am unable to find that the plaintiff's claim is for an interest in land. At its best, as reflected in paragraph 2 above, the claim is for something akin to a mandatory injunction with respect to the environmental report. Other parts of the claim (paragraphs 1-14) do talk about an agreement including removing the conditions precedent and the issue of specific performance but, again, the relief sought does not include an interest in land.

[25] The judge went on to find the objective of the claim was to require Rampart to comply with its idea of an acceptable environmental report. He stated that, while GMC was entitled to take that position, he was "unable to find it is a claim of an interest in land for the purposes of s. 215 of the [*Land Title Act*]". In explaining this view, he quoted from GMC's response, which he saw as supportive of his understanding of the claim:

> [26] Overall, I conclude that the objective of the plaintiff's claim is to require the defendant to comply with the plaintiff's idea of what the environmental report should be. The plaintiff is entitled to take that position but I am unable to find it is a claim of an interest in land for the purposes of s. 252 of the *LTA*. Instead, as set out in the plaintiff's response to the subject

> application, the claim is to obtain information to assist the plaintiff in costing the redevelopment of the property in dispute:
>
> > 28. The Defendant's failure to provide the Plaintiff with an environmental report acceptable to the Plaintiff pursuant to the September Amending Agreement has prevented the Plaintiff from being able to ascertain the cost of redeveloping the Lands and make a reasonable decision as to whether or not to remove its conditions precedent in connection with its purchase of the Lands.

[26] In further explaining his view, the judge acknowledged that "[t]here is a reference in *Yi Teng* to using the agreement between the parties to 'illuminate the substance' of the pleadings". However, he stated:

> [28] … this should not be used for examining the contentious points in issue in the underlying litigation, only to review extrinsic evidence "for the purpose of illuminating the substance of the pleadings" (*Yi Teng*, at para. 45; citing *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, at para. 39).

[27] The judge summarised his conclusion on the nature of GMC's claim in this way:

> [29] The problem here is that the claim is not about an interest in land but about getting information to assist the plaintiff in deciding whether to agree to the agreement between the parties. It is true that the agreement is about the transfer of an interest in land but the substance of the pleadings does not include a claim for that interest.

[28] Next, the judge turned to the second issue that he had identified. He began by noting a claimant is obliged to pursue their claim actively, and defining the relevant period for purposes of s. 252. He observed that "a step" under s. 252 means a formal step under the *Rules*, and does not include exchanges of correspondence. He also observed that the last formal step was taken on May 8, 2020 when GMC delivered its list of documents. Following this, he noted, the parties attempted to negotiate a replacement agreement. Then he stated "[a]fter these negotiations ended in February 2021, the plaintiff took no steps to move the litigation forward to resolution" (at paras. 31–32).

[29] The judge went on to state that he retained a discretion to dismiss the application even if the preconditions in s. 252 were satisfied. For present purposes, it is helpful to set out his full analysis in this regard:

> [33] The underlying purpose of s. 252 is "to keep property from being tied up in dormant litigation" (*Wiest*, at para. 15). However, the Court retains its discretion to disallow the remedy even where the applicant has met the statutory precondition where to grant it would be unjust. Factors relevant to this analysis include whether the respondent's explanation for the delay is acceptable, whether there is any actual risk of prejudice to the claimant if the order is not granted, and whether respondent's claim has a reasonable prospect of success (*Wiest*, at paras. 12-13). Here the onus lies on the plaintiff to establish that justice weighs in their favour.
>
> [34] The plaintiff submits that the delay in proceeding with the claim can be explained by the efforts to negotiate an out-of-court resolution, and the parties making efforts without the assistance of the Court to set the matter down for trial. The plaintiff says that no actual prejudice will be suffered by the defendant if the CPL persists and that their claim has a reasonable prospect of success. The plaintiff emphasizes that sale of the property to a third party would be equivalent to a dismissal of the plaintiff's claim.
>
> [35] The defendant emphasizes that they are not required to show serious prejudice and, in essence, asserts that the plaintiff's claim is tenuous.
>
> [36] I am not convinced that justice weighs in the plaintiff's favour in this case. Although negotiations were clearly underway during the preceding year such would not prevent the plaintiff from also taking formal steps (as discussed above) to advance their claim. Further, those negotiations ended in February 2021. There is no reasonable explanation for why no steps were taken at this point either.
>
> [37] In light of my conclusion that the plaintiff has not taken steps for more than one year, the onus is on them to show that the prejudice is not serious or that it would be otherwise unjust to cancel the CPL. This is because a CPL is an extraordinary remedy and it is by itself prejudicial to the property owner (*Ningbo*, at. paras. 16, 17). I find that it is a serious matter to effectively freeze many of the rights the owner of a valuable commercial property has over the property.
>
> [38] I conclude that the CPL in this case must also be cancelled under s. 252 of the *LTA* because the plaintiff took no steps in advancing it in the one year prior to its registration.

[30] The judge completed his reasons by referring to GMC's supplemental submissions and summarising his conclusions on the two issues he had identified. As to the former, he found the supplemental submissions unhelpful because he considered himself unable to analyse the merits of the underlying claim:

> [42] … I am not permitted to analyze the merits of the underlying claim at this stage and I must take the facts pled as true. In making submissions about the nature of certain contractual conditions and alleging the creation of an option to purchase the plaintiff has gotten ahead of itself. Those are issues to be decided by the trial judge.

[31] As to his final conclusions, the judge said this:

> [43] I conclude that the claim underlying the CPL in this case does not include a claim for an interest in land, contrary to the requirement in s. 215 of the *LTA*. As well, the plaintiff has not complied with s. 252 by taking steps in the year preceding the registration to advance its claim.
>
> [44] For this reason the CPL must be cancelled.

[32] The entered order provides that the CPL is "cancelled pursuant to Section 252 of the *Land Title Act*".

[33] On March 3, 2022, Justice Griffin granted a stay of the order, which this Court continued pending the determination of the appeal.

On Appeal

[34] In GMC's submission, the judge erred in the exercise of his discretion under s. 252 by mischaracterizing the amended Agreement as a mere "agreement to agree" that did not claim an interest in land. Properly understood, GMC contends, its claim was that it acquired an equitable interest in the Lands when the Agreement was formed. In addition, it says, the judge erred in dismissing the CPL when the parties had engaged in extensive settlement negotiations and moved to set the matter down for trial in the year after GMC delivered its list of documents. Moreover, the judge erred by relying solely on a presumption of prejudice without considering whether Rampart experienced actual prejudice referable to the CPL.

[35] Rampart responds that the appeal raises two main questions: i) whether s. 252 of the *Land Title Act* is a discretionary provision such that the Court has a discretion not to cancel a CPL once an applicant meets the statutory requirements, and, if so, the scope of that discretion; and ii) whether the judge exercised his discretion on incorrect principles, based on factual errors, or in a way that amounts to an injustice. In Rampart's submission, although the Court below has done so, this

Court has never interpreted s. 252 as a discretionary provision. If a residual discretion can be implied, Rampart says, it should be limited to a discretion not to cancel a CPL where the statutory preconditions are satisfied and its exercise should be subject to high appellate deference. Rampart also submits that the judge characterized the nature of GMC's claim correctly and made no errors in considering the prejudice issue or other circumstances in exercising whatever discretion he had under s. 252.

[36] The issues that emerge for determination are:

a. What is the extent of judicial discretion, if any, to refuse to cancel a CPL where the statutory preconditions provided for in s. 252 of the *Land Title Act* are met?

b. Did the judge err in the exercise of his discretion, and, if so, how? In particular, did he err by:

i. misconstruing the nature of GMC's claim?

ii. failing to have due regard to the informal steps taken following GMC's last formal step?

iii. failing to consider the absence of actual prejudice to Rampart if the order sought was not granted?

Discussion

Legal Framework

[37] As Justice Fenlon explained in *Berthin v. Berthin*, 2018 BCCA 57, a CPL is an extraordinary pre-judgment mechanism under the *Land Title Act* which is intended to protect a claim to an interest in land prior to the resolution of litigation. By registering a CPL against the land in issue, the claimant prevents the property owner from defeating the claim by transferring the land to a third party: *Berthin* at para. 32.

[38] Section 215(1) of the *Land Title Act* is located in Part 14: Registration of Title to Charges. It sets out the preconditions for valid registration of a CPL. Section 215(1) provides:

> 215(1) A person who has commenced or is a party to a proceeding, and who is
>
> a) claiming an interest in land, or
>
> b) given by another enactment a right of action in respect of land,
>
> may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the *Court Order Enforcement Act*, a copy of the notice of application or other document by which the claim is made.

[39] Pursuant to s. 216(1), after a CPL is registered, and subject to exceptions, "the registrar must not make any entry in the register that has the effect of charging, transferring or otherwise affecting the land described in the certificate until registration of the certificate is cancelled in accordance with this Act".

[40] Entitlement to a CPL must be founded on the state of the pleadings when it was registered: *Bilin v. Sidhu*, 2017 BCCA 429 at para. 62. Where the pleadings are incapable of supporting a claim to an interest in land, the court may cancel the CPL in the exercise of its inherent jurisdiction, with immediate effect. The authority to cancel a CPL on this basis is a necessary corollary to the litigant's right to register a CPL under s. 215: *Bilin* at paras. 51, 55; *Yi Teng* at para. 31; *Berthin* at para. 44; *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at para. 7. In other words, "[i]f the claim could not give rise to an interest in land, the CPL will be ordered to be cancelled because, essentially, it was improperly registered from the start": *Bajwa v. Singh*, 2016 BCSC 916 at para. 20.

[41] On an application to cancel a CPL for non-compliance with s. 215(1), the court does not analyse the merits of the claim brought by the claimant. Rather, the question is whether the facts pleaded, assuming they are true, are capable of supporting a claim to an interest in land. As Justice Mackenzie explained in *Yi Teng*,

"[t]his connotes a nexus or causative link between the facts alleged and the interest to which they would give rise if the facts were ultimately proved": at para. 39. As she also noted, evidence is not considered on an application to cancel a CPL for non-compliance with s. 215(1): at para. 13.

[42] Where a CPL has been validly registered in accordance with s. 215(1) of the *Land Title Act*, it may be cancelled under one of several provisions in Part 16: Cancellation of Charges. In particular, an application to cancel a CPL may be brought: under s. 252(1), where no step has been taken in the proceeding for one year; under s. 253, where the underlying action has been discontinued; under s. 254, where the underlying action has been dismissed; under s. 255, where the party initiating the proceedings requests its cancellation; and, under s. 256(1), where the property owner claims the CPL is causing or likely will cause hardship and inconvenience.

[43] The continued presence of a validly registered CPL is presumptively prejudicial to a property owner. For this reason, a claimant is obliged to prosecute their claim diligently. Section 252 of the *Land Title Act* is intended to ensure that claimants do so without undue delay: *Kultak Financial Inc. v. Grewal*, 2018 BCCA 94 at paras. 34–35; *Motz v. McKean*, 2009 BCSC 1133 at paras. 7–8. Its underlying purpose "is to keep property from being tied up in dormant litigation": *Wiest v. Middelkamp*, 2004 BCSC 882 at para. 15.

[44] Section 252 is the first of the Part 16 provisions that deal with applications for cancellation of a CPL. To repeat, s. 252 provides:

> 252(1) If a certificate of pending litigation has been registered and no step has been taken in the proceeding for one year, any person who is the registered owner of or claims to be entitled to an estate or interest in land against which the certificate has been registered may apply for an order that the registration of the certificate be cancelled.
>
> (2) An application under subsection (1) must be made to the court in which the proceeding was commenced and must be brought
>
> a) as an application in that proceedings, if the applicant is a party to the proceeding, or
>
> b) by petition, if the applicant is not a party.

> (3) The registrar must, on application and on production of a certified copy of the order of the court directing cancellation under subsection (1), cancel the registration of the certificate of pending litigation.

[45] In *Lawn Genius Manufacturing (Canada) Inc. v. 0856810 B.C. Ltd.*, 2016 BCSC 1915, Justice Bernard conducted a thorough review of the jurisprudence on s. 252. In doing so, he discussed the discretion of the court not to cancel a CPL where the preconditions are met, the presumption of prejudice, and the meaning of a "step" for purposes of s. 252:

> [12] …The court retains the discretion not to cancel the CPL, even where the statutory prerequisites are met, if cancellation would not be fair and equitable: see *Kal West Mechanical Inc. v. Bush*, 1999 CarswellBC 774 (S.C.) at para. 6; and *Tomczyk v. Toronto Dominion Bank* (1982), 36 B.C.L.R 149 (S.C.). Where the statutory prerequisites are met, prejudice to the landowner is presumed and the respondent must show that the prejudice is either not serious or outweighed by other factors that suggest cancellation of the CPL would be unjust: see *Wiest v. Middelkamp*, 2005 BCSC 1626 at para. 12 and *Motz Bros. Holdings Ltd. v. McKean*, 2009 BCSC 1133 at para. 12. The meaning of "step" in s. 252 of the *Act* is informed by case law in which the definition of that term in the analogous provisions in the *Supreme Court Civil Rules* is discussed. The step must be either required or permitted by the *Supreme Court Civil Rules*, and it must move the action forward towards trial or resolution; see *Motz Bros. Holdings Ltd. v. McKean*, 2009 BCSC 1133 at paras. 9-10; *Canadian National Railway Co. v. Chiu*, 2014 BCSC 75 at para. 7; *Easton v. Cooper*, 2010 BCSC 1079 at paras. 6-13; and *Khan v. Johal*, 2006 BCSC 1547 at paras. 11-15 …

[46] The test to be applied on a s. 252(1) application is less onerous than the test applied on an application to dismiss a claim for want of prosecution: *Kultak Financial* at para. 35. In *Wiest v. Middelkamp*, 2005 BCSC 1626, Justice Halfyard described the test on a s. 252(1) application:

> [12] In an application of this kind, where the applicant shows that no step has been taken in the proceeding for a period of one year, the court retains a discretion to disallow the remedy. However, prejudice to the owner of the land will be presumed, and the respondent bears the onus of proving that the prejudice is not serious or is outweighed by other factors which would make it unjust to cancel the certificate of pending litigation. See *Kal West Mechanical Inc. v. Bush* 1999 Carswell B.C. 774 (Cole, J.) and *Wilson v. Hrytsak* (1997) 34 C.L.R. 2d 65 (Master Joyce).
>
> [13] In my opinion, the factors relevant to the exercise of the court's discretion in this type of application include the following:

a) Whether the respondent has given an acceptable explanation for the delay in prosecuting the claim;

b) Whether, despite the presumed prejudice, no actual prejudice would be incurred by the applicant if the order was not granted; and

c) Whether the respondent's claim for an interest in the land has at least a reasonable prospect of succeeding.

[47] A property owner may also apply under s. 256(1) for cancellation of a CPL on the basis that it is causing or likely will cause "hardship and inconvenience". However, where the applicant succeeds in establishing hardship and inconvenience a cancellation order does not follow automatically. Rather, under s. 257, upon being satisfied that an order for security is proper, that damages will provide adequate relief to the claimant and that security is in fact provided, the court has a discretion to cancel a CPL or it may refuse to cancel and order the claimant to give an undertaking as to damages and security: *Yi Teng* at para. 28.

[48] Sections 256 and 257 provide, in relevant part:

> 256(1) A person who is the registered owner of or claims to be entitled to an estate or interest in land against which a certificate of pending litigation has been registered may, on setting out in an affidavit
>
> a) particulars of the registration of the certificate of pending litigation,
>
> b) that hardship and inconvenience are experienced or are likely to be experienced by the registration, and
>
> c) the grounds for those statements,
>
> apply for an order that the registration of the certificate be cancelled.
>
> …
>
> 257(1) On the hearing of the application referred to in section 256(1), the court
>
> a) may order the cancellation of the registration of the certificate of pending litigation either in whole or in part, on
>
> i) being satisfied that an order requiring security to be given is proper in the circumstances and that damages will provide adequate relief to the party in whose name the certificate of pending litigation has been registered, and
>
> ii) the applicant giving to the party the security so ordered in an amount satisfactory to the court, or
>
> b) may refuse to order the cancellation of the registration, and in that case may order the party

> i) to enter into an undertaking to abide by any order that the court may make as to damages properly payable to the owner as a result of the registration of the certificate of pending litigation, and
>
> ii) to give security in an amount satisfactory to the court and conditioned on the fulfillment of the undertaking and compliance with further terms and conditions, if any, the court may consider proper.
>
> …
>
> (4) On hearing the application referred to in section 256(2) and on being satisfied that
>
> a) the facts set out in the affidavit are consistent with the records of the land title office, and
>
> b) there is nothing in the pleading or petition by which the proceeding was commenced or notice of application attached to the certificate that expressly or by necessary implication alleges that the owner is not a purchaser in good faith and for valuable consideration
>
> the court may make an order declaring that the owner's indefeasible title or charge is not affected by the certificate of pending litigation or the outcome of the proceeding.
>
> …

[49] Where the underlying action involves a claim for specific performance, an applicant must satisfy the Court on a s. 256 application that it is plain and obvious the claimant seeking specific performance would not succeed at trial. In other words, if there is a triable issue as to whether damages would provide an adequate or appropriate remedy for the claimant, a s. 256 application should be dismissed and the matter should proceed to trial: *Yi Teng* at para. 29.

[50] Sections 256 and 257 constitute a "statutory code for balancing the rights of the parties where adverse consequences caused by the registration of the CPL prejudices the land owner": *Liquor Barn Income Fund v. Becker*, 2011 BCCA 141 at para. 28.

Standard of Review

[51] Whether pleadings disclose a claim for "an estate or interest in land" within the meaning of s. 215(1) of the *Land Title Act* is a question of law reviewable on a standard of correctness: *Yi Teng* at para. 22; *Xiao v. Fan*, 2018 BCCA 143 at

para. 31. The same is true of a question of statutory interpretation: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 50; *Hinz v. Davey*, 2022 BCCA 232 at para. 34.

[52] This Court will set aside a discretionary order where the lower court "erred in principle, ignored or misapplied a relevant factor, or was clearly wrong so as to amount to an injustice": *Ip v. Wilson*, 2019 BCCA 189 at para. 4. An error in principle includes giving no or insufficient weight to a relevant consideration: *Drennan v. Smith*, 2022 BCCA 86 at para. 24.

[53] However, as stated in *Dhillon v. Pannu*, 2008 BCCA 514, this Court will not substitute its opinion in place of that of the judge below "under the guise that the judge did not give sufficient weight to a relevant consideration". Nor will it interfere with an exercise of discretion simply because the judge did not mention a relevant consideration. On the contrary, if a decision is not so clearly wrong as to amount to an injustice, this Court will intervene only where it is "manifest from the judge's reasons that he or she misdirected himself or herself, or gave no weight, or insufficient weight, to a relevant consideration": at para. 28.

What is the extent of judicial discretion, if any, to refuse to cancel a CPL where the statutory preconditions provided for in s. 252 of the Land Title Act are met?

[54] According to GMC, the law in British Columbia is well-established on the question of judicial discretion under s. 252 of the *Land Title Act*. Citing *Wiest* and *Kal West Mechanical Inc. v. Bush*, [1999] B.C.J. No. 805 (S.C.), it submits that where the statutory preconditions provided for in s. 252 are met the Court retains a discretion to refuse to cancel a CPL.

[55] According to Rampart, while the Court below has implied a residual discretion, s. 252 does not expressly refer to judicial discretion. On its face s. 252 provides for only two mandatory statutory preconditions, namely, that a CPL has been registered and that no step has been taken in the proceeding for one year. That being so, Rampart submits, this Court should hold that the test for cancellation

of a CPL under s. 252 is met where the applicant establishes that a CPL was registered and no formal step was taken within the period prescribed. Further, it says, if a judicial discretion is to be implied, it should be limited to a residual discretion not to cancel a CPL where the statutory preconditions are met. However, it adds, the exercise of that discretion should be subject to a highly deferential standard of appellate review.

[56] In support of its submission, Rampart emphasizes this Court has not previously interpreted s. 252 as a discretionary provision. It also emphasizes the contrast between the language of s. 252, which does not expressly provide for judicial discretion, and that of s. 257, which, read together with s. 256, does. It says that, had the Legislature intended to make s. 252 a discretionary provision, it could have provided that the Court may cancel the CPL on hearing an application under s. 252(1) and being satisfied that the statutory preconditions are met. However, it chose not do so. Bearing in mind the words of s. 252, the statutory scheme, the extraordinary pre-judgment nature of CPLs, and their presumptively prejudicial effect, Rampart submits that a restrictive interpretation of any residual judicial discretion that may be permitted under s. 252 is required.

[57] I am not persuaded by this submission. In my view, where the statutory preconditions provided for in s. 252 are met the Court has a discretion to refuse to cancel a CPL based on whether, in all of the circumstances, cancellation is in the interests of justice.

[58] The applicable principles of statutory interpretation are straightforward. Pursuant to s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, the provisions of the *Land Title Act* must be given such fair, large and liberal construction and interpretation as best insures the attainment of its objects. The words of s. 252 must also be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme and objects of the *Land Title Act* and the intention of the legislature: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (S.C.C.) at para. 21. If a literal reading of s. 252 would lead to a manifest contradiction of its

purpose or “some absurdity which can hardly have been intended”, the plain meaning of the words may be modified to avoid an absurd result and achieve the legislature’s presumed intent: *R. v. Paul*, [1982] 1 S.C.R. 621 at 662. However, a provision can usually be reasonably interpreted as part of a harmonious statutory whole without deviating from the grammatical and ordinary sense in which its words are generally understood: *Canada Trustco Mortgage Co. v. Canada*, [2005] 2 S.C.R. 601 at para. 10.

[59] With these principles in mind, I turn to consider the text, context and purpose of s. 252 of the *Land Title Act*.

[60] I begin by observing that s. 252(1) is silent on the extent of the power of the court to grant or refuse a cancellation application, whether discretionary or otherwise. As noted, ss. 252(1) and (2) provide that a property owner may apply to the court for an order cancelling a CPL if certain preconditions are met. In my view, when the words of 252(1) are read in context, in their grammatical and ordinary sense, it is clear that the preconditions specified refer only to the applicant’s entitlement to bring a cancellation application (*if a [CPL] has been registered and no step has been taken … [the property owner] may apply for an order that the [CPL] be cancelled*). They do not define, limit or otherwise illuminate the extent of the court’s power once an application is brought.

[61] On the other hand, that a property owner is entitled to bring an application under s. 252(1) plainly implies the court is empowered to grant it. If it were otherwise, the provision would be pointless, which cannot have been the intention of the legislature. Similarly, the words of s. 252(3) imply that the court is empowered to grant the application in providing that the registrar must cancel a CPL on production of a court order directing its cancellation under s. 252(1). However, while it provides expressly that the registrar has no discretion to refuse an application in specified circumstances, s. 252(3) implies nothing about the power of the court beyond the fact that it may make an order cancelling a CPL under s. 252(1).

[62] Notably, the absence of express language in s. 252 on the extent, if any, of the court's discretion differs from the language found in other Part 16 provisions dealing with CPL cancellation applications. For example, ss. 253 and 254 provide that the registrar must cancel a CPL in prescribed circumstances, and s. 255 provides that, in others, the registrar may cancel a CPL. In other words, like s. 252(3), ss. 253, 254 and 255 are express in either permitting or excluding the exercise of discretion where the scheme empowers the registrar to cancel a CPL. Sections 257(5) and 258 also expressly exclude the exercise of discretion from the power of the registrar in expressly prescribed circumstances (i.e., "on receipt of … the registrar must …" and "on … production of … the registrar must …").

[63] Moreover, as noted, s. 256(1) provides that a property owner may apply to the court for an order cancelling a CPL on the basis of hardship and inconvenience. Under the heading "Power of court to order cancellation", s. 257(1) provides that on hearing an application brought under s. 256(1), the court may grant or refuse the application for specified reasons on specified terms. Thus, read together, ss. 256(1) and 257(1) define and limit the extent of judicial discretion on s. 256(1) applications using express language. The same is true of ss. 256(2) and 257(4).

[64] Based on the text and context of s. 252, I cannot conclude that the legislature intended to exclude or limit the court's power to refuse to cancel a CPL if an applicant establishes the statutory preconditions since it chose not to express any such intention. As I have explained, the preconditions in s. 252 manifestly refer to the applicant's entitlement to bring an application, not to the court's power to grant or to refuse an application once it is brought. Other provisions in the same scheme exclude or limit the exercise of discretion by employing express language. In my view, had the legislature similarly intended to exclude or limit the exercise of judicial discretion once a s. 252 application is brought, it would have said so. It did not.

[65] Furthermore, it would not best ensure the attainment of the objects of the *Land Title Act* scheme for registering, maintaining and cancelling CPLs to interpret s. 252 as excluding or limiting the exercise of judicial discretion by implication. The

objects of the scheme include, in general, fairly balancing the rights of claimants to an interest in land and those of affected property owners, and, in particular, keeping property from being tied up in dormant litigation. While ensuring that claimants proceed with their claims without undue delay is undoubtedly fair, determining whether a given delay is undue is an inevitably and intensely fact-sensitive exercise. It is also a matter of judgment, based on the circumstances of the case.

[66] In my view, these are likely the reasons why over two decades ago in *Kal West* Justice Cole rejected the argument that a judge must not refuse a s. 252 application upon being satisfied that no formal step had been taken in the year preceding the application. On the contrary, he stated, "there is nothing in s. 252 of the *Land Title Act* that takes away a judge's discretion to do what [the judge] thinks is fair and equitable between the parties": at para. 6. I agree with that observation and with the interpretation of s. 252 it reflects.

[67] Bearing in mind all of the foregoing, I conclude the court may grant or refuse a s. 252 application to cancel a CPL based on the interests of justice in all of the circumstances of the case.

Did the judge err in the exercise of his discretion by misconstruing the nature of GMC's claim?

[68] In GMC's submission, the judge erred in the exercise of his discretion in considering whether its claim for an interest in the Lands had a reasonable prospect of success. In other words, it says, he committed an error in principle in his consideration of the third *Wiest* factor by failing to have proper regard to the true nature of its claim. In particular, it submits, the judge mischaracterized the amended Agreement as a mere "agreement to agree", and failed to recognize that its claim was for an equitable interest in the Lands that was acquired immediately upon the formation of the Agreement.

[69] In support of its submission, as it did in the Court below, GMC relies on several authorities, including *Barabash*, *Sandhu* and *Israel Estate*. It says these authorities affirm that upon entering a conditional agreement for the purchase and

sale of land, the purchaser acquires an equitable estate in the land. It says further that this principle applies to its claim regardless of how the due diligence conditions are characterized. For example, it contends, this is so regardless of whether the due diligence conditions are characterized as conditions precedent, conditions subsequent, or as giving rise to a binding option to purchase the Lands.

[70] According to GMC, the judge's erroneous conclusion on the legal character of its claim infected his entire analysis. It was also the primary basis of the cancellation order. In its submission, this fundamental error cannot be extricated from his subsequent weighing of the interests of justice. Consequently, it says, appellate intervention is required.

[71] Rampart responds that GMC is simply advancing the same arguments it made below in an effort to persuade this Court to reach a different conclusion. However, it contends, the judge considered, addressed and rejected all of those arguments, and made no error in fact or principle in reaching his decision on the nature and quality of GMC's claim. In other words, Rampart says, GMC is simply re-arguing the application of the salient principles, but doing so without identifying any principle the judge applied incorrectly or failed to apply. It says further that while this Court might reach a different conclusion, as is clear from authorities like *Dhillon*, that would not justify disturbing the conclusion reached by the judge.

[72] According to Rampart, the judge correctly characterized GMC's claim as seeking no more than the delivery of an "unknown form" of environmental report, not a fee simple interest in land. He also understood that GMC has never committed to purchasing the Lands, and the due diligence conditions are not true conditions precedent because they are subject to the absolute discretion of GMC. In support of its position, as it did below, Rampart argues that authorities such as *Barabash* and *Israel Estate* are distinguishable from this case because they concern, respectively, a true condition precedent and an option. It relies on *Mark 7 Holdings Ltd. v. Peace Holdings Ltd.* (1991) 53 B.C.L.R. (2d) 217 (C.A.), for the proposition that where the

acceptance or waiver of conditions manifestly depends on the subjective state of mind of the purchaser, there is no binding agreement for the sale of land.

[73] Furthermore, Rampart argues, the judge considered the merits of GMC's claim generally, beyond the "interest in land" issue. It argues that he recognized GMC will face significant difficulties in proving its claim, which is clearly very weak. For example, Rampart says, the amended Agreement does not oblige it to provide an environmental report apprising GMC of the "extent delineation, expense and timing of any required remediation", as discussed in the Review Report, but GMC's claim is that Rampart failed to do so. In addition, it says, GMC's interpretation of the amended Agreement is commercially unreasonable and it will likely be rejected at trial.

[74] According to Rampart, the judge was fully alive to the foregoing weaknesses in GMC's claim, which he considered in exercising his discretion. Moreover, it submits, when his reasons are read as a whole it is clear that he understood what really happened here: the parties simply failed to reach a new agreement for the purchase and sale of the Lands.

[75] I do not agree with Rampart. In my view, the judge erred in three interrelated respects regarding the nature and quality of GMC's claim. First, he conducted the first half of his analysis as though Rampart were asking him to exercise his inherent jurisdiction to cancel the CPL for non-compliance with s. 215 when that was not the jurisdictional basis of the application. Second, he misconstrued the nature of GMC's claim, as pleaded, which is for an equitable interest in the Lands. Third, in exercising his discretion under s. 252 he failed to consider whether GMC's claim for an interest in land had a reasonable prospect of success.

[76] It is important to recall that Rampart sought the cancellation of the CPL solely under s. 252, which is the jurisdictional basis cited in the entered order. However, in conducting his analysis, the judge identified the first issue as whether GMC had claimed an interest in land, then asked whether the preconditions in s. 215 were made out and concluded they were not. In my view, given that Rampart's

application was brought under s. 252, in doing so he asked and answered the wrong question. The record suggests this was due, at least in part, to the manner in which Rampart presented its argument, namely, by seeking cancellation of the CPL under s. 252 while contending that GMC's claim "does not even advance an interest in land".

[77] As I have explained, s. 215 is in Part 14 of the *Land Title Act*: Registration of Title to Charges. It provides for the preconditions to valid registration of a CPL. Pursuant to s. 215, a CPL will be validly registered if, and only if, the underlying litigation includes a claim to an interest in land. Section 252, on the other hand, is in Part 16 of the *Land Title Act*: Cancellation of Charges. It provides for the cancellation of a validly registered CPL where no formal step has been taken in the proceeding for one year.

[78] As discussed, where a claimant fails to comply with the preconditions under s. 215, the CPL was never validly registered and the court can cancel it immediately in the exercise of its inherent jurisdiction. In this case, the judge recognized that he had inherent jurisdiction to cancel a CPL for non-compliance with s. 215. He also recognized that, on a cancellation application for non-compliance with s. 215, the court is to consider the pleadings alone, ask whether the underlying claim is for an interest in land, and not assess the merits of the claim. However, the judge failed to appreciate that the sole jurisdictional basis for Rampart's application was s. 252, that s. 252 applies to a validly registered CPL where the underlying claim is to an interest in land, and that on this application he was not only permitted to analyse the merits of the underlying claim in assessing the interests of justice, but was obliged to do so.

[79] I do not accept Rampart's submission that the judge considered the merits of GMC's claim beyond the interest in land issue in the exercise of his discretion. On the contrary, he stated expressly that "I am not permitted to analyse the merits of the underlying claim at this stage" (at para. 42). It is apparent from his reasons that he declined to do so because he failed to appreciate the sole jurisdictional basis of the cancellation application and the nature of GMC's claim.

[80] I agree with GMC that the judge misconstrued the nature of its claim, which, as pleaded, is for an equitable interest in the Lands acquired upon the formation of the binding Agreement for their purchase and sale. Whether the due diligence conditions are unenforceable because they are entirely subjective, as Rampart contends, or whether they amount to true conditions precedent subject to a good faith obligation, as GMC pleads and contends, are triable issues. They cannot be resolved solely on the basis of the pleadings, presumed to be true. Accordingly, the judge's failure to analyse the merits of the underlying claim is a material error.

[81] I also agree with GMC that, contrary to the judge's finding, the relief GMC seeks in claiming specific performance of the Agreement is not limited to the delivery of a final DSI Environmental Report to assist it "in deciding whether to agree to the agreement between the parties" (at para. 29). Rather, as pleaded, the delivery of the final DSI Environmental Report is but one of Rampart's obligations under the Agreement for GMC's purchase of the Lands, which Agreement is already formed and binding upon both parties.

Did the judge err in the exercise of his discretion by failing to have due regard to the informal steps taken following GMC's last formal step?

[82] In GMC's submission, the judge erred further in the exercise of his discretion by failing to give proper regard to the parties' informal steps after May 2020 in weighing the competing equities. In particular, while he acknowledged that he had a discretion not to cancel the CPL if it would be unjust to do so, he failed to give any weight to those informal steps, which were directed at resolving the litigation or moving forward to trial. Instead, GMC contends, the judge wholly discounted the informal steps and unduly limited his consideration to the absence of formal steps in the year preceding the application.

[83] In support of its submission, GMC emphasizes the underlying purpose of s. 252 is to keep property from being tied up in dormant litigation. However, it says, the judge failed to consider the fact that this litigation was clearly not dormant in exercising his discretion to cancel the CPL. It also emphasizes the parties took the

informal steps in the context of actively pursuing settlement by negotiation. However, the judge failed to consider the policy of encouraging settlement attempts, which could be impeded by requiring that a party take formal steps during ongoing negotiations or risk facing a cancellation application under s. 252.

[84] According to GMC, given the purpose of s. 252 and the context in which the informal steps in question were taken, the judge's conclusion that the negotiations "would not prevent the plaintiff from also taking formal steps" amounted to a palpable error.

[85] Rampart responds that the judge considered the parties' post-May 2020 informal steps in exercising his discretion. He also considered the applicable principles and salient authorities, including *Lawn Genius*, where Justice Bernard reviewed the jurisprudence with respect to s. 252. Rampart emphasizes the question is not whether this Court would reach the same conclusion as the judge reached, as stated in *Dhillon*. Nor is it whether he expressly mentioned every relevant consideration. Rather, the question is whether the judge manifestly erred in principle, or gave no, or insufficient, weight to a relevant consideration.

[86] According to Rampart, while he could have said more, the judge made no manifest errors when considering the parties' informal steps in the exercise of his discretion. That being so, it says, this Court should not interfere with his discretionary determination to cancel the CPL.

[87] In my view, the judge manifestly failed to give sufficient weight to the parties' informal steps taken after May 8, 2020 in determining whether it would be unjust to cancel the CPL. Although he briefly described those steps, his failure to give them sufficient weight is obvious from his statement at para. 36 that the informal steps did not prevent GMC from also taking formal steps (which is true, but neither here nor there) and his statement at para. 38 that "the CPL in this case must also be cancelled under s. 252 of the [*Land Title Act*] because [GMC] took no steps in advancing it in the one year prior to its registration (*sic*)". Beyond making those two statements, the judge failed to engage with the question of whether, given the nature

and purpose of the informal steps, it would be unjust to cancel the CPL despite the absence of formal steps taken between the dates upon which GMC delivered its list of documents and Rampart brought its application. That failure in the exercise of his discretion amounted to a reviewable error.

Did the judge err in the exercise of his discretion by failing to consider the absence of actual prejudice to Rampart if the order sought was not granted?

[88] Finally, GMC submits the judge also erred by failing to consider the absence of evidence of actual prejudice to Rampart if the CPL was not cancelled. Instead, it says, he relied solely on the presumption of prejudice when exercising his discretion to grant the cancellation order. In addition, he failed to consider the substantive effect on GMC of cancelling the CPL, which, in effect, amounted to a dismissal of its claim for specific performance. According to GMC, in doing so, the judge erroneously treated the presumption of prejudice as a legal, rather than factual, presumption. He also failed to analyse the second *Wiest* factor, namely, "[w]hether, despite the presumed prejudice, no actual prejudice would be incurred by the applicant if the order was not granted".

[89] Rampart responds that the judge made no error in his consideration of the prejudice issue. On the contrary, it says, he dealt with the issue of prejudice, relied on the relevant authorities, and considered the effect of the CPL on Rampart's rights over the Lands, which he characterized as "a serious matter". That his conclusion on the prejudice issue differed from the position advocated by GMC did not amount to an error in principle. According to Rampart, GMC is simply attempting to reargue the issue of prejudice in the hope of achieving a different outcome.

[90] Again, I agree with GMC's submission. Although the judge stated at para. 37 that "it is a serious matter to effectively freeze many of the rights the owner of a valuable commercial property has over the property", he made no finding that Rampart would or would not incur actual prejudice if the cancellation order sought was granted, as contemplated by the second *Wiest* factor. Nor, in exercising his discretion, did he attempt to balance the prejudice to Rampart, presumed or actual,

with any prejudice GMC would incur if the CPL was cancelled. In my view, this, too, amounted to reviewable error.

Conclusion

[91] Given all of the foregoing, in my view it is clear that the order cancelling the CPL should not have been granted. I would allow the appeal and dismiss the application without prejudice to Rampart's right to bring a new application.

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"