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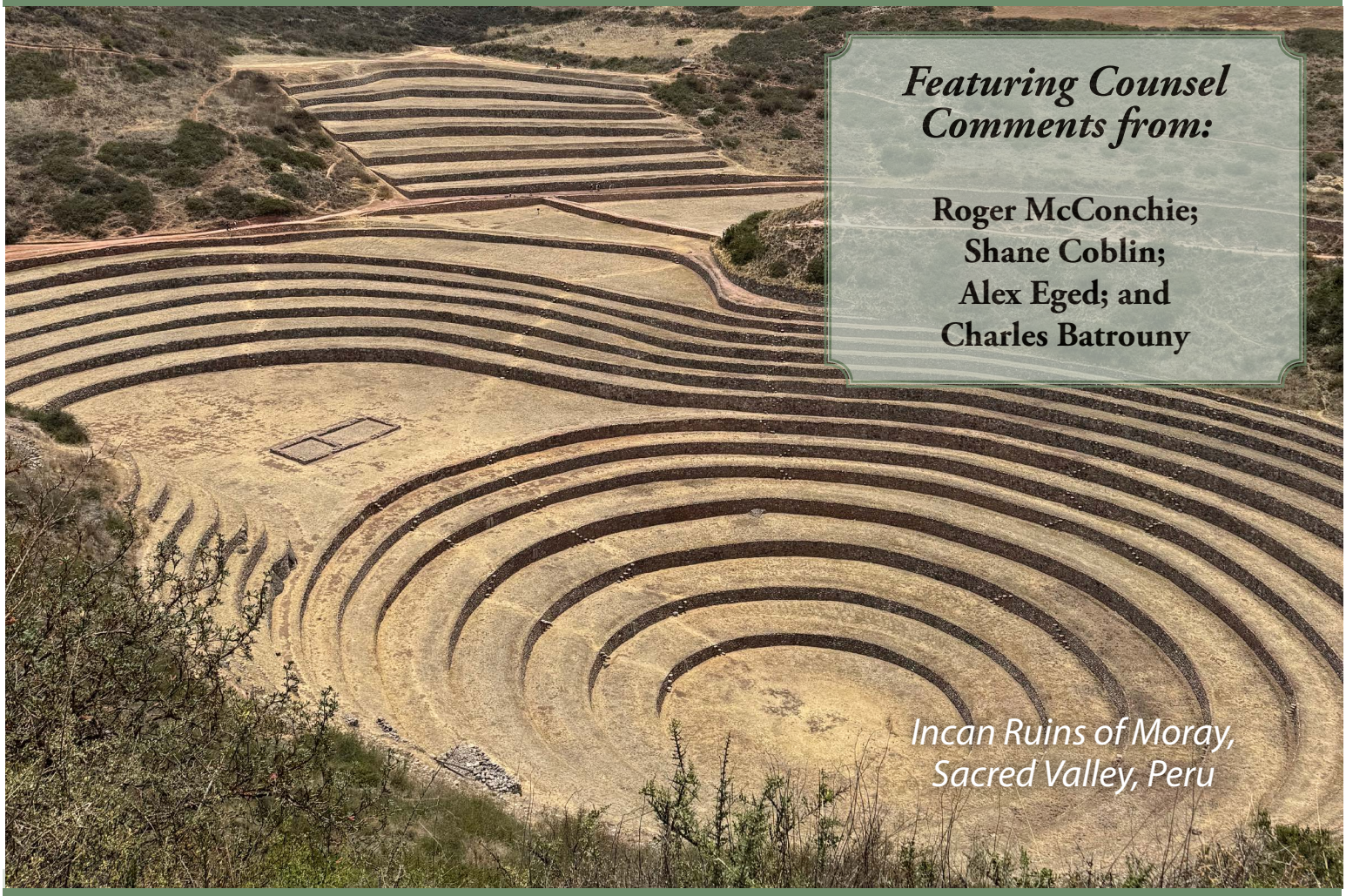

Featuring Counsel Comments from:

Roger McConchie; Shane Coblin; Alex Eged; and Charles Batrouny

Incan Ruins of Moray, Sacred Valley, Peru

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Featured Cases:

Valley Traffic Systems Inc v Malak, 2024 BCCA 370

Areas of Law: Torts; Joint Liability; Common Design; Defamation; Damages

~The trial judge's award of damages for defamation, while high, was not inordinately so. While the judge did not err in awarding aggravated damages in this case, as a rule trial judges should compensate a successful plaintiff in a defamation action using general damages alone, given the real risk of over-compensation if both general and aggravated damages are awarded~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned a successful defamation action. The trial judge found that the appellants had engaged in a common design to defame the respondents, namely Mr. Malak and his five corporations (the "Ansan Group"), who were the appellants' direct competitors in the traffic control services industry. The parties had been in competition to win a BC Hydro contract, which was ultimately awarded to the corporate appellant Valley Traffic Systems Inc. The judge found that the appellants' defamatory publications had accused the respondents of money laundering, obtaining contracts through illegal kickbacks, secret bribes, and other corrupt and illegal activities. The judge awarded $1.5 million in total damages to the respondents; the award included punitive and aggravated as well as general damages.

Valley Traffic Systems Inc v Malak, (cont.)

APPELLATE DECISION

The Court of Appeal dismissed the appeal. Regarding the appellants' position on liability, the court found, first, that the judge had not erred in applying the participation element of the test for common design torts, which requires that each joint tortfeasor must have assisted substantially in the commission of the tort. Reading the judgment as a whole, it was clear that the judge was satisfied the participation requirement had been met on the evidence.

The court further found that the judge's inferences as to what had occurred were not speculative, but supported by the evidence. Judges are not required to refer to every piece of evidence or to detail how each item of evidence has been assessed. The trial judge's reasons, read as a whole, demonstrated that he ultimately considered the evidence as a whole in inferring, on a balance of probabilities, that the test for common design was made out.

The judge did not conflate credibility determinations with factual findings. His rejection of the appellants' evidence in relation to certain facts did not mean that those facts were not otherwise supported by the evidence. Nor did the judge err in relying on hearsay evidence drawn from an examination for discovery. An assessment of reliability and necessity was not necessary in the circumstances; at trial the respondents had relied on the traditional co-conspirator exception to the rule against hearsay to justify the admissibility and use of the discovery evidence, and the appellants did not object.

With respect to damages, the $300,000 in general damages awarded to the Ansan Group was high, but not inordinately so. Given the nature and persistence of the defamation in this case, the judge did not err in inferring that the Ansan Group had likely suffered economic harm; the court did not accede to the appellant's argument that corporate plaintiffs cannot suffer harm

Valley Traffic Systems Inc v Malak, (cont.)

to their feelings, noting that such damages are intended to compensate injury to goodwill and reputation.

Nor was the judge's award of $500,000 in general damages to Mr. Malak inordinately high in the unique circumstances of this case. Libel awards vary widely and are fact-specific; the judge did not err in assessing such damages by also considering the impact of the defamation campaign on third parties.

Valley Traffic Systems Inc v Malak, (cont.)

While there is a real risk of overcompensation if both general damages and aggravated damages are awarded in defamation cases, the judge did not err in awarding a further $200,000 in aggravated damages to Mr. Malak. However, the court observed that it would be preferable for judges, as a rule, to compensate successful plaintiffs in defamation cases through general damages alone.

The court affirmed further that the judge did not err in awarding the respondents $500,000 in punitive damages. The judge clearly identified the need to consider whether punitive damages were rationally required to denounce and deter the appellants' conduct in light of the compensatory awards he had already made.

Finally, the court affirmed that punitive and aggravated damages may be awarded on a joint and several basis against common-design joint tortfeasors who engage in the same malicious conduct. The conduct of all the defendants was equally worthy of rebuke in this case; there was no basis to set aside the joint and several basis of the awards.

COUNSEL COMMENTS

Valley Traffic Systems Inc v Malak, 2024 BCCA 370

Counsel Comments by Roger McConchie,
Counsel for the Respondents

Roger McConchie

"The unanimous Court of Appeal decision released November 6, 2024 [2024 BCCA 370], affirming the second trial verdict of August 2, 2023 [2023 BCSC 1337], brings this litigation to a close. Nobody is seeking leave to appeal to the SCC.

The complexity of the defamatory Internet campaign complained of by the plaintiffs is described in the first trial verdict [2017 BCSC 1739] which was rendered more than a year after the conclusion of a 24-day hearing in May, June and September, 2016. That first trial before Justice Funt dealt only with issues of liability. An Order made May 17, 2016 on the eve of trial severed all issues of liability from issues of remedies, and directed liability was to be determined first. Funt J. held the defendants Philip Jackman, Valley Traffic Systems Inc., Trevor Paine and Remon Hanna were jointly and severally liable for defamatory websites, blogs, YouTube videos, emails and other Internet publications particularized in the Third Amended Notice of Civil Claim. All defendants appealed although Hanna's appeal did not contest the finding of fact that he personally authored the expression on websites, blogs, YouTube, the Telus Ethics Line, and emails to Premier Clark and Minister Coleman.

On April 1, 2019, nearly a year after the appeal hearing in early June, 2018, the Court of Appeal [2019 BCCA 106] sustained the liability findings of the trial judge against Hanna relating to the websites, blogs, YouTube, Telus Ethics Line, and emails to Premier Clark and Minister Coleman. The Court ordered that a new trial on the issues of whether the defendants Jackman and Paine were liable for any defamation on the basis they participated in a common design with Hanna, and whether Valley Traffic Systems was vicariously liable for any defamation.

The element of 'common design' – coupled with the many different Internet facilities involved in the dissemination of the defamatory expression – guaranteed

COUNSEL COMMENTS

a complex hearing at the second trial. Virtually all of the relevant documents were electronic in their native format. Putting the Court in the shoes of those who viewed the defamatory expression meant finding a method to display it in a native format. The obvious answer: display the expression on a computer monitor.

In the Case Management Process, the parties reached an agreement, which the Court approved, that the second trial be an E-Trial. Pursuant to that agreement, Veritext was engaged to provide, *inter alia*, an 'E-Trial Technician and Services' and additional computer monitors for all lawyers, the witness, and the Court to display potential exhibits, submissions, discovery transcripts, and authorities. The key element was the 'Technician', who received portable document storage media from counsel, and as directed by counsel, displayed them to the witness (and simultaneously to everyone else). We were fortunate to have an experienced technician who knew when to 'zoom' in on a document to display a segment to which the witness was being directed. At the end of each day, conversely, the 'Technician' would provide all counsel with a small drive containing copies of all new electronic exhibits marked that day by the Court Clerk.

Needless to say, the E-Trial which took place significantly enhanced and accelerated the presentation of evidence at the second trial in January and February, 2023. Speaking for the plaintiffs, I can say that the plaintiffs' preparation of its final submissions for the last three trial days in March took about half the time that would otherwise have been required if physical binders of tabbed documents had been involved. Being able to take away copies of all entered exhibits, transcripts, pleadings, submissions, and authorities on a portable drive that weighed a few ounces was a huge daily relief. In our humble opinion, every trial longer than 3 days should be an E-Trial. Every trial involving a large volume of digitized records should be an E-Trial. The added incremental expense is significantly offset by the value of time saved. I should say that in this case, the parties (and I suspect the court) also benefitted from daily transcripts. The transcripts facilitated cross-examination and guaranteed the reliability of references in the parties' final submissions in March, following the month-long hearing in January-February 2023. Our experience organizing the transcripts and related digital exhibits in a litigation relational database saved us not only much time, but allowed energy that we preferred to apply to shaping our submissions."

Yegre EB Ltd v Seguin, 2024 BCCA 365

Areas of Law: Jurisdiction; Contractual Interpretation; *Forum non conveniens*; Forum Selection Clause

~A forum selection clause using the term "submit", rather than "attorn", should not be interpreted, without more, as a grant of exclusive jurisdiction to a particular court; likewise, the language "for all purposes arising in connection with this Agreement" is not sufficiently clear and express so as to establish exclusive jurisdiction~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned the interpretation and enforcement of a forum selection clause contained in a property purchase agreement (the "Purchase Agreement"). The clause in question stated that the parties agreed to "submit" to the jurisdiction of the Alberta courts "for all purposes arising in connection with this Agreement" (the "Clause"). The appellant commenced the underlying proceeding in the B.C. Supreme Court, alleging that it was induced to enter the Purchase Agreement through the respondent's fraudulent misrepresentations. The respondents applied for a stay of proceedings on the basis that the Agreement conferred exclusive jurisdiction over any contractual dispute on the Alberta courts. Alternatively, they argued that Alberta was the more appropriate forum pursuant to s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 (the "*CJPTA*"). The appellant contended that the Clause simply reflected the parties' agreement to attorn to the jurisdiction of the Alberta courts and did not create a grant of exclusive jurisdiction.

The chambers judge granted the stay, holding that the Clause was both valid and enforceable in assigning exclusive jurisdiction to the Alberta courts. The judge found that the Clause was properly interpreted as an exclusive jurisdiction clause, not merely as an attornment clause, because it did not contain a "limiting reference" to attornment; rather, it used the term "submit" with regard to the jurisdiction in question. She further concluded the appellant had not met its onus of establishing "strong cause" why the Clause should not be enforced.

Yegre EB Ltd v Seguin, *(cont.)*

APPELLATE DECISION

The Court of Appeal allowed the appeal and dismissed the stay application. The court affirmed the legal framework, namely the test for enforcing a forum selection clause, which requires clear and express language, as well as the test for declining jurisdiction based on *forum non conveniens*. The court rejected the appellant's argument that the judge had failed to interpret the Clause with reference to objective surrounding circumstances, and had instead looked only to what other cases said about similar language; the court found that, in any event, the circumstances allegedly overlooked by the chambers judge did not strongly favour one interpretation of the Clause over the other.

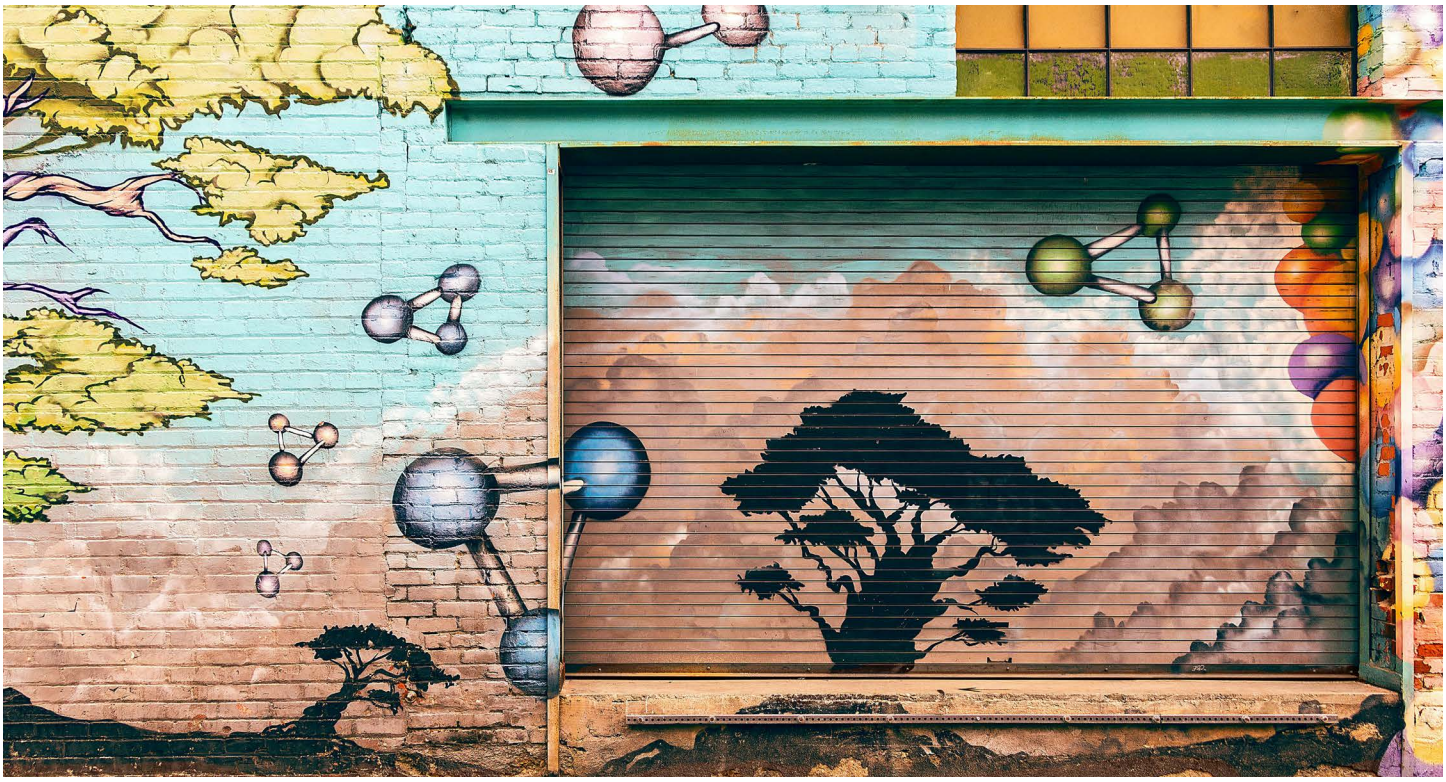
The court agreed with the appellant, however, that the judge had erred in interpreting the case law as recognizing a meaningful distinction between the words "attorn" and "submit" in forum selection clauses. Such a distinction is not, in fact, supported by a proper reading of the case law, nor by the generally accepted meaning of those terms in the context of jurisdiction. The judge misinterpreted the authorities as establishing a principle (that "submit" and "attorn" have different meanings) that was unconnected to the factual matrix.

Turning to the interpretation of the Clause, the court reviewed the relevant case law and found that the application of interpretive principles led to two reasonable interpretations of the language of the Clause, including one that indicated non-exclusive jurisdiction. Accordingly, the respondents had not discharged their burden of demonstrating that the Clause had the clear, express, and unambiguous effect of granting jurisdiction to the Alberta courts to the exclusion of all other forums. It should be interpreted, rather, as granting non-exclusive jurisdiction to the Alberta courts.

Finally, the court agreed that it was appropriate to consider, on appeal, the respondents' alternative position based on *forum non conveniens*; it rejected their argument, however, that the B.C. court should decline jurisdiction on this basis.

Yegre EB Ltd v Seguin, *(cont.)*

With regard to the s. 11(2) factors in the *CJPTA*, the Clause was a neutral factor; it did not state a preference for bringing proceedings in Alberta, but rather confirmed the parties' commitment not to object to the Alberta courts' jurisdiction. Considering the relevant factors as a whole, the respondents had not discharged their burden of demonstrating that Alberta was clearly the more appropriate forum.



COUNSEL COMMENTS

Yegre EB Ltd v Seguin, 2024 BCCA 365

Counsel Comments by Shane Coblin,
Counsel for the Appellant

Shane Coblin

"This case provides guidance on the test applicable when interpreting a forum selection clause, and it clarifies that the failure to properly interpret or apply case law constitutes an extricable error of law in the contractual interpretation process.

The case involved a 2015 purchase agreement in which the appellant purchased five industrial properties in British Columbia and Ontario from the respondents. In 2022, the appellant commenced proceedings in the BC Supreme Court alleging misrepresentation, breach of contract, and negligence in connection with the purchase of the properties. The respondents filed a jurisdictional response and then brough an application to stay the claim on the basis of the forum selection clause.

The clause stated that the parties 'submit to the jurisdiction of the Alberta courts for all purposes arising in connection with this Agreement.' The Chambers Judge agreed with the respondents and interpreted the clause as granting exclusive jurisdiction to Alberta. Fundamental to the Chambers Judge's decision, was her finding that the common law draws a distinction between the words 'submit' and 'attorn', and that 'submit' means something more than simply attorning; she determined that it signals exclusivity.

The Court of Appeal disagreed and found the clause to be ambiguous, noting it could reasonably support both exclusive and non-exclusive interpretations. The Court held that a review of the common law does not support a distinction between words 'attorn' or 'submit'; and that neither word conclusively denotes exclusivity on its own. The Court clarified that the burden on a jurisdictional application rests with the party seeking to invoke a forum selection clause and

COUNSEL COMMENTS

requires that party to demonstrate that the clause clearly and unambiguously confers exclusive jurisdiction upon another forum. In this case, the language was ambiguous. As such, the Court of Appeal set aside the order of the Chambers Judge, interpreted the clause as merely conferring non-exclusive concurrent jurisdiction on Alberta, and dismissed the underlying stay application.

This decision is also notable as it represents a unique finding by the Court of Appeal: *the misinterpretation of case law is an error of law extricable from the contractual interpretation process.*

In the end, this case provides a useful reminder to parties drafting forum selection clauses that clear and unambiguous language is required to confer exclusive jurisdiction upon a particular forum. In this regard, the words 'submit' or 'attorn', on their own, do not connote exclusivity."

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JM Food Services Ltd v Waheed, 2024 BCCA 381

Areas of Law: Business Corporations; Limitation Periods; Statutory Interpretation

~The retroactive effect of the respondent company's restoration occurred without prejudice to the appellants' intervening acquired right to dismiss the action on the basis that the limitation period had expired during the company's period of dissolution~

CLICK HERE TO ACCESS THE JUDGMENT

The respondents Tariq Waheed and his company 0923063 B.C. Ltd. ("092") commenced an action alleging that the appellants had engaged in fraudulent conveyances to avoid complying with a court-ordered judgment for damages. At the time the action was filed, 092 had been dissolved as a company, apparently through inadvertence. At trial, the appellants argued that by the time 092 was restored and the claim revived, the limitation period had expired, such that the action should be dismissed.

The appellants did not dispute that, due to the retroactive effect of s. 364(4) of the *Business Corporations Act*, SBC 2002, c 57 (the "*BCA*"), 092 could continue the action as if it had never been dissolved, despite the notice of civil claim having been filed during 092's period of dissolution. They argued, however, that pursuant to s. 358(2) of the *BCA*, s. 364(4)'s effect was subject to the important qualification that the retroactive effect of restoration could not prejudice any rights acquired by another party in the intervening period. The appellants argued that this included their acquired right to have 092's claim dismissed on the basis of an expired limitation period. The trial judge concluded that the action was not statute-barred, relying on s. 364(4) of the *BCA*.

APPELLATE DECISION

The Court of Appeal allowed the appeal. The court rejected, as a preliminary issue, the respondents' argument that a limitation issue cannot arise in the absence of a pleaded limitation defence; the court noted that the limitation issue was both raised prior to and argued at trial, and that a

JM Food Services Ltd v Waheed, *(cont.)*

failure to plead the limitation period was a procedural irregularity that should not deprive the appellants of their substantive right to advance such a defence.

The Court of Appeal held that the judge erred in law in focusing on the effect of s. 364(4) of the *BCA* without reference to the important qualification on retroactivity contained in s. 358(2); further, highly persuasive relevant precedents from other provinces' appellate courts indicated the opposite conclusion. The court affirmed that the retroactive effect of s. 364(4) is expressly subject to the rights acquired by persons prior to the restoration, which included the appellants' right to dismiss the action on the basis that the limitation period had expired.

The court set aside the orders of the judge as they related to 092's claim and remitted the matter to the Supreme Court for trial on the question of whether the limitation period for 092 had, in fact, expired prior to its restoration, as the record was insufficient to permit a fair and proper adjudication of this issue.

Sidhu v Kalgidhar Darbar Sahib Society, 2024 BCCA 402

Areas of Law: Societies; Governance; Bylaw Interpretation

~The chambers judge erred in failing to evaluate, pursuant to the appellants' claim, whether a selection process for a religious society's governing body complied with the society's bylaws~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned whether the respondent Kalgidhar Darbar Sahib Society had violated the *Societies Act*, SBC 2015, c 18 (the "*Act*") by exceeding its powers as conferred by its bylaws, specifically with regard to its selection process for appointments to its religious council. The appellants, members of the Society, applied to set aside or nullify the appointment of their religious council and to direct the respondent Society to conduct a new selection process consistent with its bylaws.

The religious council qualification criteria, as set out in the Society's bylaws, included seven requirements. At issue were two elements of the selection process: the interview questions used to assess the religious council applicants' eligibility, and the reasons provided for rejecting certain applicants.

The chambers judge held that the religious council's selection process did not violate the *Act*. She concluded there was nothing improper about the screening interviews, pursuant to the Society's bylaws; she also stated that the court had no role to play in assessing how the selection committee scrutinized and evaluated each applicant for the religious council, noting that the court could not fully understand the criteria for a religious leader in a Sikh temple.

APPELLATE DECISION

The Court of Appeal allowed the appeal. The court found that the judge had erred in law in concluding she could not make any findings as to whether the interview questions were related to the religious council's eligibility criteria, as set out in the Society's bylaws. She also erred in finding

Sidhu v Kalgidhar Darbar Sahib Society, *(cont.)*

that she had no role to play in assessing how and why the selection committee had excluded certain religious council applicants.

The court noted that the judge was required to examine the interview questions to ascertain whether they related to the qualification criteria in the bylaws and to ensure the screening process did not impose criteria not found in the bylaws. The judge was also required to assess how the selection committee had evaluated each applicant to ensure it did not stray from the bylaws.

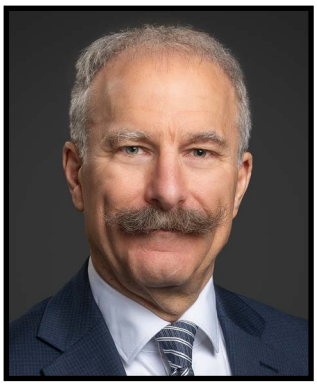
The court concluded that the judge had only scrutinized the selection committee's decision-making in relation to good faith and procedural fairness; she left the ultimate interpretation of the religious council qualification criteria up to the selection committee. The judge failed to fulfill her legal role in determining whether the selection committee had adhered to its duties pursuant to its bylaws.

The court found further that, had the judge properly interpreted the Society's bylaws and applied the required scrutiny, she would have found the selection process was defective and in breach of s. 105 of the *Act*. Several of the interview questions were unrelated to the qualification criteria and the reasons for disqualifying certain applicants were based on criteria not found in the bylaws. The court ordered the Society to select a new religious council in accordance with its constitution and bylaws.

COUNSEL COMMENTS

Sidhu v Kalgidhar Darbar Sahib Society, 2024 BCCA 402

Counsel Comments by Alex Eged,
Counsel for the Appellants



Alex Eged

"I believe that the appeal was necessary because the parties failed to draw the chambers judge's attention to the two or three key cases that describe a court's role in deciding matters of this nature. None of *Farrish*, *Delta Patriots* nor *Kwantlen* were brought to the chambers judge's attention by the parties. Had this been done I believe there would have been no error of law and likely no appeal."

Choi v Westbank Projects Corp, 2024 BCCA 410

Areas of Law: Residential Tenancies; Negligence; Jurisdiction; Striking Pleadings

~It is not plain and obvious that the Residential Tenancy Act, *SBC 2002, c 78 ousts the Supreme Court's jurisdiction to hear a negligence claim brought by a landlord against a tenant, such that the claim will be struck under Rule 9-5~*

CLICK HERE TO ACCESS THE JUDGMENT

The appeal related to a notice of civil claim ("NOCC") filed by the respondent landlords, alleging that the appellant tenants had been negligent in striking and activating a sprinkler nozzle and seeking damages for repair costs totalling $250,000. The appellants applied to strike the NOCC on two bases: first, that the dispute lay within the exclusive jurisdiction of the Residential Tenancy Branch (the "RTB"), and second, because the claim should have been commenced by a petition with notice to the Director of the RTB (the "Director").

The chambers judge dismissed the appellants' application on the basis that it was not plain and obvious that the NOCC failed to disclose a cause of action that could be adjudicated in the Supreme Court. He concluded that the Supreme Court had at least shared, if not exclusive, jurisdiction over the dispute based on the sum claimed. The judge did not address the appellants' second basis for their application to strike.

APPELLATE DECISION

The Court of Appeal dismissed the appeal. Not all disputes between a landlord and tenant will constitute a dispute subject to the exclusive jurisdiction of the Director pursuant to the *RTA*. In this case, it was sufficient to find that it was not plain and obvious that the Supreme Court does not have jurisdiction over the dispute because, under s. 58(2)(a) of the *RTA*, the Supreme Court has jurisdiction over a claim for damages exceeding the small claims limit even if the claim is, ultimately, an *RTA* dispute. The respondents'

Choi v Westbank Projects Corp, *(cont.)*

claim far surpassed the $35,000 monetary jurisdiction of the Small Claims Court. It remained open to the appellants to apply in the Supreme Court under s. 58(4) for an order that the negligence claim be heard by the Director, even if, because of the amount involved, it falls within the jurisdiction of the Supreme Court at first instance.

The court rejected the appellants' submission that the procedural irregularity in the form of pleadings warranted a dismissal of the NOCC. The 2021 amendments to the *RTA* did not change the requirement that applicants must apply by way of petition on notice to the Director to have an *RTA* matter heard in the Supreme Court. Under Rule 22-7(3) of the *Supreme Court Civil Rules*, however, even if the respondents commenced the proceeding in the wrong form, this error would amount to a non-fatal irregularity.

COUNSEL COMMENTS

Choi v Westbank Projects Corp, 2024 BCCA 410

Counsel Comments by Charles Batrouny,
Counsel for the Respondents

Charles Batrouny

"*Choi v. Westbank Projects Corp.*, 2024 BCCA 410 is an appellate decision that explores the procedural effects of the 2021 amendments to the Residential Tenancy Act ('**RTA**') and attempts to clarify the bounds of the Supreme Court's jurisdiction to hear claims that may be characterized as either common law or RTA disputes. This decision offers guidance that may be informative for parties seeking to resolve disputes between landlords and tenants that, at their core, **are not** grounded in the RTA.

The Court of Appeal's decision affirms the chambers judge's ruling, thereby seeking to avoid the mischief that arises from the line of argument advanced by the Appellants. It cannot be the case that **only** the Director of the Residential Tenancies Branch ('**RTB**'), and **not** a Provincial or Supreme Court, has jurisdiction to adjudicate tortious disputes as between two parties whose relationship **happens** to be that of landlord and tenant. Especially where that dispute is grounded in negligence, rather than an RTA breach, and the amounts in dispute are over the Director's monetary jurisdiction.

This decision, in light of the ambiguity within the RTA, alongside the test to be applied on an application to strike under Rule 9-5(1) of the Supreme Court Civil Rules, cumulatively solidify that not all disputes between a landlord and tenant will be RTA disputes, subject to the RTB's exclusive jurisdiction and procedural intricacies. Thus claims filed in the Court involving disputes between landlords and tenants must not automatically be struck. This echoes the reasoning, and avoids the dangers of mischief, that the Court of Appeal put forward in their decision *Janus v. The Central Park Citizen Society*, 2019 BCCA 173.

COUNSEL COMMENTS

While we are pleased that the court agreed with the majority of our arguments, the impact of this decision remains to be seen. As the Honourable Justice Fenlon remarked, she '*somewhat reluctantly*' came to her conclusion on the operational effect of these amendments; noting that:

> *'…although the 2021 amendments to the RTA clarify the jurisdictional line between the RTB and the Supreme Court, they have not simplified the procedure to be followed to bring RTA disputes before the Supreme Court—even though those disputes fall within the exclusive jurisdiction of the Supreme Court and are ones that the Director "must not hear," at least at first instance.'* [35]

If anything, the decision further highlights the cyclical and ambiguity ridden nature of the RTA procedures. As the Court of Appeal noted, these procedural requirements are indeed puzzling as they establish an almost moot application mechanism – one may apply by petition to the Director, on a case clearly outside their jurisdiction, for then the Director to refer it to the Court, for the Court to then decide if it ought to stay with the Court or be referred back to the Director. Alternatively, a party may file with the Court, perhaps resist a motion to strike, then face an application under s. 58(4) of the RTA to have the Court determine where the matter belongs. A process such as filing an action or bringing an RTA dispute, that would, at face value, otherwise seem to be straightforward, has therefore been left open as an overly onerous one for Plaintiffs to consider when selecting a venue for their dispute."

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