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BRITISH COLUMBIA EDITION

January 2026

Featuring Counsel Comments from:

Matthew Nied;
Kevin Hille and Jesse Abell;
Paul Jon and Hayden Cook;
Jeff Robinson; and
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Featured Cases:

Kelowna (City) v Watermark Developments Ltd, 2025 BCCA 382

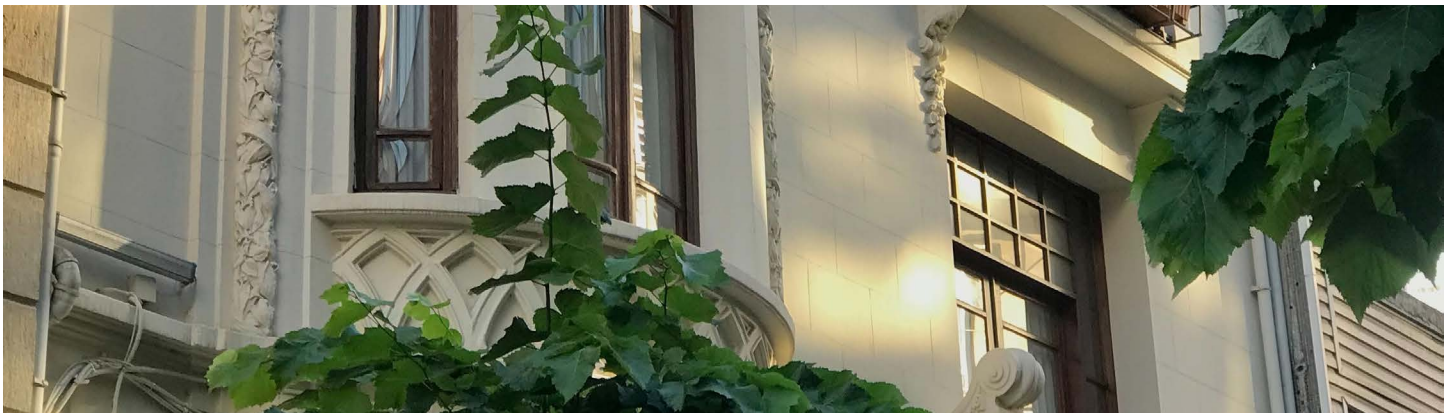
Areas of Law: Real Property; Municipal Law; Restrictive Covenants; Grounds for Cancellation

~The summary trial judge erred in cancelling two restrictive covenants, first by applying a watered-down version of the test for obsolescence, and second by balancing the parties' interests when determining whether the charge-holder would be injured by the cancellation~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned two restrictive covenants registered pursuant to s. 219 of the *Land Title Act*, RSBC 1996, c 250, against a property in the City of Kelowna (the "Covenants"). The Covenants, which were registered in 2009 as a condition of the City's approval for rezoning and subdivision of the property, prohibited the respondent from developing a portion of its property falling within a corridor the City wanted to protect for a future roadway project.

In the court below, the respondent, Watermark Developments Ltd. ("Watermark") applied under s. 35(1) of the *Property Law Act*, RSBC 1996, c 377 (the "PLA") for an order cancelling the Covenants, arguing that the City's proposed roadway project had evolved over time in such a way that the protected corridor was no longer necessary. On summary trial, the judge granted the application and cancelled the Covenants. Although she found that maintaining the Covenants was of some practical benefit to the City, she held that two of the grounds for cancellation under s. 35(2) of the PLA were met: the Covenants were obsolete (s. 35(2)(a)), and cancelling them would not injure the City (s. 35(2)(d)).



Kelowna (City) v Watermark Developments Ltd, (cont.)

APPELLATE DECISION

The Court of Appeal allowed the City's appeal, set aside the order cancelling the Covenants, and dismissed Watermark's application under s. 35(2), finding that the summary trial judge erred in finding that the test for cancellation was met under either ss. 35(2)(a) or (d).

With respect to s. 35(2)(a), the court found that the cases relied upon by the judge did not support the conclusions she drew from them. This flawed legal analysis led her to employ a "watered-down" test for obsolescence. Under the proper test, a no-build covenant to protect a future roadway can only be termed obsolete where the protection is of no use to the charge-holder, or it serves no purpose, whether because the roadway project has been abandoned altogether, superseded by other tangible plans, or is no longer within reasonable contemplation. The evidence did not support any of these conclusions. To the extent that there had been changes in the City's plans, those changes were not material to the Covenants themselves. Further, to the extent that the judge found abandonment for a section of the roadway, this was a palpable and overriding error arising from a misunderstanding of the roadway project plans.

Turning to s. 35(2)(d) of the PLA, the court found that the judge erred by interpreting the section to permit the balancing of the parties' interests. While previous lower court decisions diverged on the question of whether paragraph (d) permitted balancing, the court concluded that it did not. Properly interpreted, paragraph (d) looks only at whether there is an injury to the party holding the charge. In this case, cancellation of the Covenants would deprive the City of the ability to complete a project that remained in concrete contemplation. There was therefore no basis for cancellation under s. 35(2)(d) of the PLA.

Sinclair v TDMC Holdings Ltd, 2025 BCCA 402

Areas of Law: Commercial Law; Arbitration; Appeals; Time Limits

~An application for leave to appeal from an arbitral award must be brought within 30 days after the date of receipt of the arbitral award, whether the appeal could be described as a cross appeal or not~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned the timeline for appeals under the *Arbitration Act*, SBC 2020, c 2, which provides for an appeal to the Court of Appeal with leave, but only where the application for leave is brought within 30 days after the date of the receipt of the arbitral award. The appellants filed their notice of appeal and application for leave to appeal just before the expiry of the 30-day limit. The respondents then decided to cross appeal, filing their notice of appeal outside the time limit under the *Arbitration Act*, although within the 15-day time limit for initiating a cross appeal provided by the *Court of Appeal Rules*, BC Reg 120/2022 (the "CA Rules").

The appellant applied to a justice in chambers for an order quashing the respondent's application for cross appeal on the basis that it was filed out of time. The chambers judge dismissed the application, finding that the *Arbitration Act* did not bar the cross appeal; he concluded that once an appeal had been commenced by either party, the *Arbitration Act* no longer imposed time limits, so that the timelines under the CA Rules applied. In his view, practical considerations strongly favoured this interpretation, as respondents would otherwise be encouraged to file free-standing appeals to avoid losing the opportunity to cross appeal.

The appellants applied to a full panel of the Court to vary the order of the chambers judge.

Sinclair v TDMC Holdings Ltd, (cont.)

APPELLATE DECISION

The Court of Appeal allowed the application and quashed the respondent's application for leave to cross appeal. The chambers judge erred in principle when he failed to consider whether, as a matter of statutory interpretation, the term "appeal" in the sections of the *Arbitration Act* governing appeals from arbitral awards included a "cross appeal." When the court undertook that analysis, it concluded that "appeal" must include "cross appeal," as the Court of Appeal would otherwise lack jurisdiction to hear a cross appeal from an arbitral award. An application for leave to cross appeal from an arbitration award must therefore be brought within the timelines set by ss. 59 and 60 of the *Arbitration Act*.

While the court acknowledged that this approach provided a party with a "perverse incentive" to appeal to preserve its rights, it concluded that the language of the Act could not support the interpretation taken by the chambers judge. Further, the jurisdictional mischief resulting from his conclusion outweighed any such practical considerations. However, in recognition of these concerns, the court urged the Legislature to consider an amendment to the *Arbitration Act* to include a separate time limit for the filing of a cross appeal.

COUNSEL COMMENTS

Sinclair v TDMC Holdings Ltd, 2025 BCCA 402

Counsel Comments by Matthew Nied,
Counsel for the Appellants/Respondents on Cross Appeal

Matthew Nied

"The implication of the decision in *Sinclair* is that any party to an arbitration that may wish to appeal an arbitral award must ensure strict compliance with the 30 day deadline under the *Arbitration Act*, failing which they will forever lose their right to seek leave to appeal. As a result, parties that may wish to appeal an arbitral award must act quickly in assessing whether to seek leave to appeal. It matters not whether their prospective appeal is characterized as the 'main appeal' or a 'cross-appeal': the same 30 day deadline applies.

The Court's decision is faithful to the wording of the *Arbitration Act* and the principles of statutory interpretation, but it is admittedly inconvenient for those parties whose decision to seek leave to appeal may be dependent on whether the opposing party seeks leave to appeal. If a party's decision to seek leave to appeal may be dependent on whether the opposing party seeks leave to appeal, the prudent course of action is to take the necessary steps to preserve the right to seek leave to appeal within the 30 day period and then reassess whether to proceed with the appeal process after the expiry of the 30 day period.

The decision may cause parties to tactically engage in a reverse of the proverbial 'race to the courthouse'. If a party files first, and sufficiently in advance of the end of the 30 day period, then doing so may prompt the opposing party to file for a cross-appeal before the end of the 30 day period. As a result, parties may have an incentive to wait until the last minute to file.

It is for these reasons that the Court urged the Legislature to 'to give careful consideration to amending the *Arbitration Act* to include a separate time limit for the filing of a cross appeal as that procedure is contemplated in the [*Court of Appeal*]

COUNSEL COMMENTS

Act'. As the Court explained, doing so 'would have no more than a negligible impact on the time it takes for an arbitral appeal to proceed through the Court' and it 'would, as well, have a salutary restraining effect on the launching of potentially unnecessary appeals.'

The decision leaves open the interesting question of whether the requirement to bring 'an application for leave to appeal' within 30 days requires only that the party file a notice of appeal (indicating that leave is required) within 30 days, or whether the party must also file its notice of application for leave to appeal and its application book, which must include the party's memorandum of argument. In *Sinclair,* the appellants filed their notice of appeal (indicating that leave is required), their notice of application for leave to appeal, and their application book all within the 30 day period. Time, and further guidance from the Court of Appeal in future cases, will tell whether doing so was required or overly cautious."

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Gitxaala v British Columbia (Chief Gold Commissioner), 2025 BCCA 430

Areas of Law: Aboriginal Law; Mines and Minerals; Crown; Duty to Consult; International Law

~The United Nations Declaration on the Rights of Indigenous Peoples *is incorporated into the domestic law of British Columbia, and the question of whether a provincial enactment is consistent with the rights of Indigenous people as recognized by that declaration is justiciable~*

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned the interpretation and legal effect of the Declaration on the *Rights of Indigenous Peoples Act*, SBC 2019, c 44 (the "*Declaration Act*") and the *United Nations Declaration on the Rights of Indigenous Peoples*, UNGA, 33rd Sess, UN Doc A/RES/61/295 (2007) ("UNDRIP"). In the court below, the two appellant First Nations brought petitions challenging the mineral tenure system operating at the time under the *Mineral Tenure Act*, RSBC 1996, c 292. They alleged that an automated online registry which permitted registration of mineral rights claims on Crown land prior to consultation with affected First Nations was inconsistent with, among other things, the rights recognized under UNDRIP.

The chambers judge accepted that the mineral claims regime in question breached the Crown's duty to consult under s. 35 of the *Constitution Act*, 1982, issued declarations to that effect, and suspended them for eighteen months to allow for the design and implementation of a system providing for the required consultation. However, he concluded that UNDRIP had not been incorporated into British Columbia law, so that it remained a non-binding international instrument. Further, he found that s. 3 of the *Declaration Act*, which requires that the provincial government take all measures necessary to ensure the laws of British Columbia are consistent with UNDRIP, did not create justiciable rights. He therefore declined to determine whether the mineral claims regime was inconsistent with UNDRIP. The Gitxaala and Ehattesaht First Nations appealed the portion of the decision dealing with UNDRIP and the *Declaration Act*.

Gitxaala v British Columbia (Chief Gold Commissioner), (cont.)

APPELLATE DECISION

The majority of the Court of Appeal allowed the appeal and issued a declaration that the mineral claims regime was manifestly inconsistent with article 32(2) of UNDRIP.

After reviewing the history of UNDRIP in Canada and its treatment at the federal level in several recent Supreme Court of Canada decisions, the majority then went on to consider the effect of s. 8.1(3) of the *Interpretation Act*, RSBC 1996, c 238, which mandates that every Act and regulation in the province must be construed as being consistent with UNDRIP. The majority found that s. 8.1(3) imposes a rebuttable presumption of consistency between British Columbian enactments and UNDRIP, which operates in functionally the same manner as the presumption of conformity which applies to binding international instruments. The judge below erred in not applying

Gitxaala v British Columbia (Chief Gold Commissioner), *(cont.)*

this presumption of conformity in construing the *Mineral Tenure Act* or the *Declaration Act*.

When properly construed, the majority concluded that the *Declaration Act* has the effect of implementing UNDRIP in British Columbia in an immediate, albeit partial, way. Further, when there is an inconsistency between a British Columbia law and one or more provisions of UNDRIP, s. 3 of the *Declaration Act* triggers an obligation on the Crown, in consultation and cooperation with Indigenous peoples, to develop and implement measures—whether they be legislative, executive, or administrative—necessary to resolve the inconsistency.

With respect to justiciability, the appellant First Nations argued that when Indigenous peoples and the government disagree on the question of consistency, they must have access to the courts to resolve that dispute, as the rights under s. 3 would otherwise be rendered unenforceable. The majority agreed, concluding that the question of consistency with UNDRIP was fundamentally legal in nature and could be adjudicated by the court against an objective legal standard.

Gitxaala v British Columbia (Chief Gold Commissioner), *(cont.)*

On remedy, the provincial respondents argued that a declaration would lack utility, given that they had admitted the existence of an inconsistency between the mineral claims regime and UNDRIP prior to the hearing of the appeal. The majority disagreed, concluding that issuing the declaration sought would help affirm the appellants' right to raise UNDRIP consistency in consultation and thereby promote the goal of reconciliation.

In dissent, Justice Riley disagreed with the majority as to the *Declaration Act*'s legal effect and the role the courts could play in achieving its aims. In his view, the *Declaration Act* gives the government a statutory mandate and responsibility to pursue legislative reconciliation through the implementation of UNDRIP but does not contemplate the litigation of inconsistency in the courtroom.

COUNSEL COMMENTS

Gitxaala v British Columbia (Chief Gold Commissioner), 2025 BCCA 430

Counsel Comments by Kevin Hille and Jesse Abell,
Counsel for the Intervener, Cheona Metals Inc.

Kevin Hille

Jesse Abell

"The Court of Appeal's decision in *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2025 BCCA 430, is significant because it affirms the status of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP') in BC law, in Canadian law, and across the country. This decision makes it clear that even in jurisdictions without UNDRIP implementation legislation, UNDRIP rights attract the presumption of conformity, and laws must be interpreted consistently with them, absent express legislative intent otherwise.

The majority recognized that UNDRIP is part of BC and Canadian law, and attracts the presumption of conformity in both jurisdictions.

The majority recognized that BC's *Declaration on the Rights of Indigenous Peoples Act,* S.B.C. 2014, c. 44 ('*BC Declaration Act*'), brought UNDRIP into BC's positive law with immediate legal effect, and BC laws must be interpreted consistently with UNDRIP.

Likewise, the majority recognized that the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*, S.C. 2021, c. 14 ('*Federal Declaration Act*'), brought UNDRIP into Canadian law and UNDRIP should be applied as a weighty source for the interpretation of Canadian law, consistent with the presumption of conformity.

Although the majority did not mention the status of UNDRIP in the Northwest Territories, given the

COUNSEL COMMENTS

similarities between the *BC Declaration Act, the Federal Declaration Act*, and the Northwest Territories' *United Nations Declaration on the Rights of Indigenous Peoples Implementation Act*, S.N.W.T. 2023, c. 36, the status of UNDRIP in the Northwest Territories must be the same as in BC and Canada.

This decision puts to rest any suggestion that because UNDRIP is a United Nations Declaration, and not an international treaty, it is a non-binding, aspirational document. Instead, the majority recognized that Parliament and the BC legislature incorporated UNDRIP into the law of their jurisdictions, giving domestic legal effect to Canada's adoption of UNDRIP. This approach is consistent with our dualist system of incorporating international law into domestic law by legislative action. This means that in BC, the Northwest Territories, and federally, UNDRIP acts as the floor of Indigenous peoples' rights. BC, the Northwest Territories, and federal law should be presumed to provide at least as great a level of protection for Indigenous peoples' rights as is found in UNDRIP.

What about jurisdictions without UNDRIP implementation legislation?

The majority recognized that certain UNDRIP rights have independent status at international law, as they are principles of customary international law and contained in binding international treaties. This means that these rights independently attract the presumption of conformity.

This is the case across the country, even in jurisdictions without UNDRIP implementation legislation, like Alberta. And this would remain the case in BC, even if the province were to repeal the *BC Declaration Act.* Across the country, laws must be presumed to conform with these UNDRIP rights, unless there is express legislative intent otherwise.

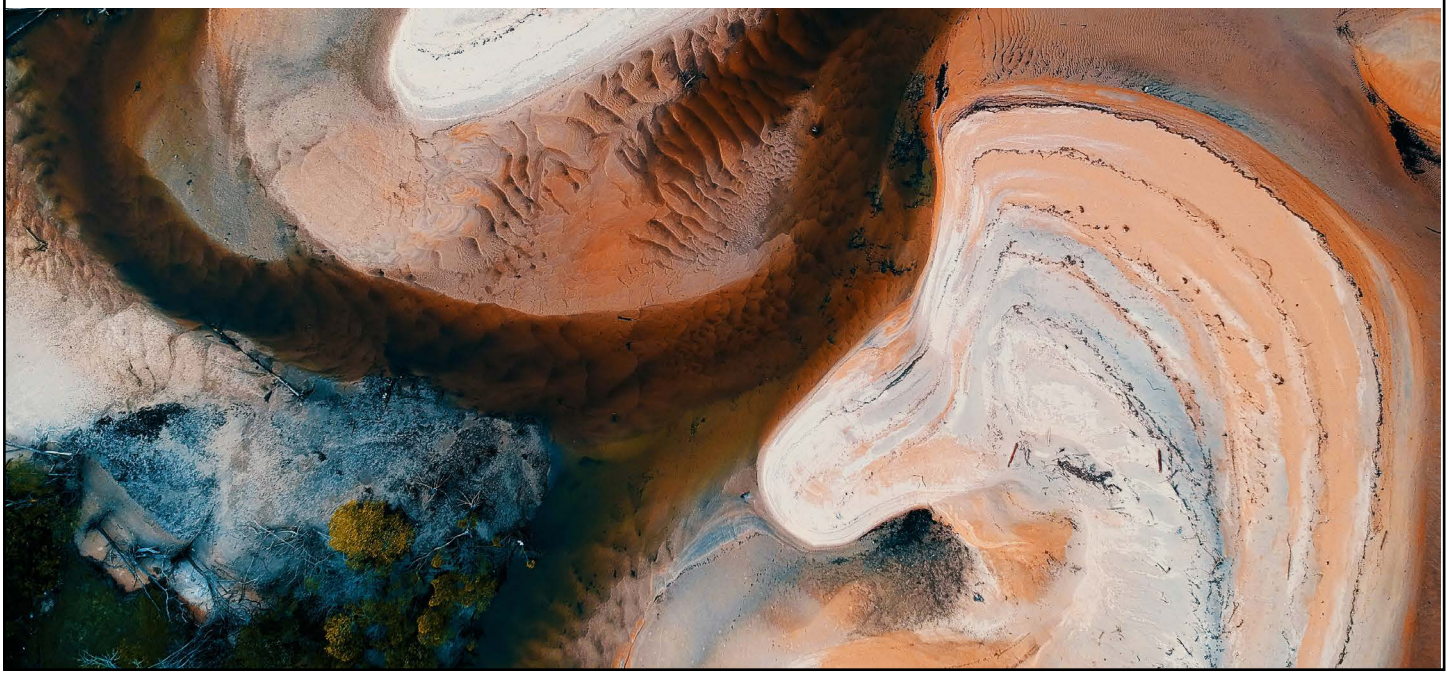
Which rights have binding international law status? The majority held that Indigenous peoples' right to self-determination is a binding international right. The majority also suggested that Indigenous peoples' right to lands and resources, and right to be consulted in relation to state action affecting their lands, are generally accepted as matters of international law. However, the majority explicitly left open whether the right to free, prior and informed consent ('FPIC') is a binding international right that laws must conform with.

COUNSEL COMMENTS

The majority noted that not all UNDRIP rights have the same status at international law, so what is required for a law to be consistent with UNDRIP will vary case-by-case. And which other UNDRIP Articles are binding international law remains to be seen. But this is an important step forward in recognizing Indigenous peoples' rights, as expressed in UNDRIP.

The majority made further important findings for the BC context. The majority found that the court can determine whether BC laws are consistent with UNDRIP, and concluded that BC's mineral tenure regime was manifestly inconsistent with UNDRIP. Other BC legislation may likewise be inconsistent with UNDRIP, and this decision gives Indigenous groups an avenue to challenge that legislation.

Further, the majority recognized that the *BC Declaration Act* constitutes a binding Crown promise, which means that BC government officials must act as though UNDRIP applies. The majority recognized that this means that UNDRIP can and should inform the interpretation of the common law duty to consult, and Indigenous groups can raise their s. 35 and UNDRIP rights in relation to the mineral grant system in consultation. This will be significant for Indigenous groups seeking to protect their rights in consultation processes."



Lamoureux v Hedquist, 2025 BCCA 438

Areas of Law: Family Law; Property Division; Significant Unfairness; Interim Support

~The trial judge's emphasis on the relative contributions of the parties to the increase in value of the respondent's business was not consistent with the legislative scheme, which provided for equal division of family property regardless of contribution outside of exceptional circumstances~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal concerned the division of family property and the repayment of interim support in a family law case. While the parties had agreed to an equal division of much of the family property, at trial the respondent sought an unequal division of the increase in the value of the shares of the companies through which he ran his business (the "Share Value Increase"). The trial judge concluded that the companies had increased in value during the marriage-like relationship entirely due to the respondent's efforts and business acumen and accordingly found that equal division of the Share Value Increase would be significantly unfair. He therefore reapportioned the Share Value Increase 75% in favour of the respondent.

On support, the trial judge ordered non-compensatory spousal support to the appellant but refused to order stepparent support for the appellant's child from her previous relationship. As the appellant had been receiving both spousal and child support under an interim order made two years before trial, the effect of this order was that the appellant had to repay approximately $90,000 in interim support payments.

Lamoureux v Hedquist, *(cont.)*

APPELLATE DECISION

The Court of Appeal allowed the appeal in part, setting aside the order for unequal division and substituting an order for equal division of the Share Value Increase.

While the trial judge stated the law on property division correctly, he erred in principle in finding that it would be significantly unfair to divide the Share Value Increase equally. The court found that he placed undue emphasis on the importance of the relative contributions of the parties to the increase in wealth in a manner that, if upheld, would defeat the legislature's intention to provide for equal division of family property regardless of relative contribution other than in exceptional circumstances. On the facts, there was nothing objectively unusual or exceptional about the parties' circumstances that would justify a departure from equal division; the court noted that it is common for spouses to establish a relationship at a time when one spouse is beginning to see earlier efforts to build a business come to fruition, and to continue to build that business without the other spouse's contribution or involvement.

The court dismissed the appeal from the order requiring repayment of support. The trial judge made no error in ordering repayment or in failing to explicitly discuss the principles applicable to retroactive orders. Those principles are only directly engaged when a final order for support is varied, not where a final order replaces an interim order. Because interim orders are temporary orders designed to do rough justice between the parties and are made without a full record, parties should expect that a trial judge may revisit and adjust the amounts of support provided for in an interim order.

COUNSEL COMMENTS

Lamoureux v Hedquist, 2025 BCCA 438

Counsel Comments by Paul Jon and Hayden Cook,
Counsel for the Appellant

Paul Jon

Hayden Cook

"*Lamoureux v. Hedquist*, 2025 BCCA 438, reinforces the very limited role played by the parties' respective or relative contributions to family property on an application for unequal division under s. 95 of the *Family Law Act* ('*FLA*'), specifically with respect to the increase in value of one party's pre-existing businesses.

This case can be viewed as bookending one of the Court of Appeal's first decisions on the property division regime under the *FLA: Jaszczewska v. Kostanski*, 2016 BCCA 286. In that case, the Court explained that the objectives of the then-new regime (which had replaced the *Family Relations Act* in March 2013) were to simplify property division, to make it more certain and predictable, and to better fit society's expectations of fairness. Notably, the legislature created a detailed regime for determining family and excluded property, imposed a higher standard of 'significant unfairness' (rather than mere 'unfairness') to depart from the presumption of equal division of family property, and omitted relative contributions as an enumerated consideration for unequal division in s. 95(2).

Importantly, the Court in *Jaszczewska* did not close the door entirely to unequal contribution as a factor that may be relevant to reapportionment, but it noted that the circumstances in which it might be relevant were intended to be 'much constrained'. *Lamoureux* addresses the extent to which that door remains ajar. Specifically, where one spouse owns and operates a pre-relationship business with positive momentum, which

COUNSEL COMMENTS

increases in value during the relationship thanks to their continued contributions and that momentum, is that spouse entitled to a greater share of the increase in value?

In the trial judge's view, equal division was significantly unfair where one spouse had 'hitched their wagon' to an already successful and growing enterprise that the other spouse had spent years developing. In the judge's view, this approach was consistent with the door left open in *Jaszczewska*, as well as a broad interpretation of the Court's subsequent decision in *Venables v. Venables,* 2019 BCCA 281, which he saw as affirming the court's discretion to look into the 'origins' of family property.

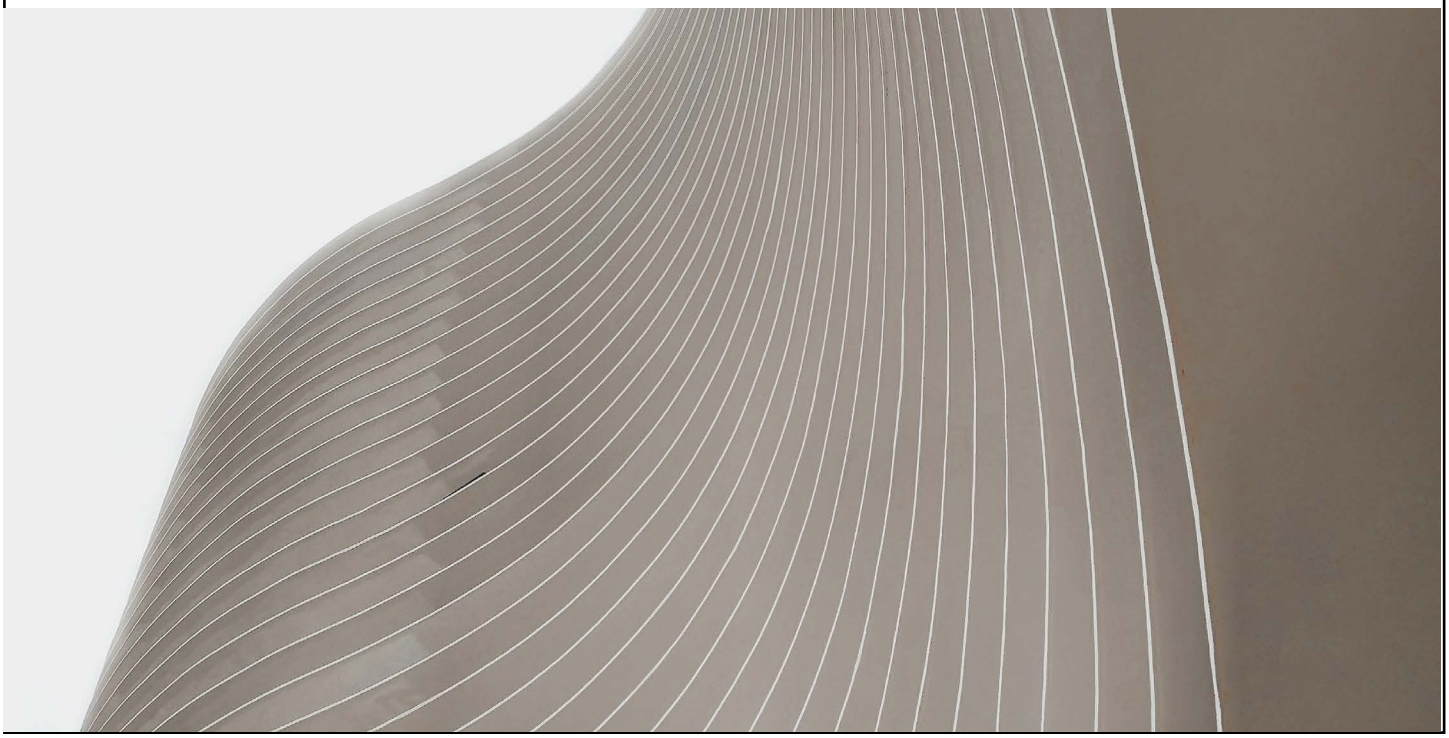
In substituting an order for equal division, the Court of Appeal has confirmed that the trial judge's approach is not consistent with the authorities and amounts to 'exactly the kind of analysis the new statutory framework eschews' (para. 27). There is nothing unusual about parties establishing a relationship 'at a time when one spouse is beginning to see earlier efforts to build a business bearing fruit and continues to build the business during the relationship, while the other spouse is uninvolved in the business and contributes to it not at all, marginally, or at best indirectly' (para. 27). As the Court recognizes, the value that one spouse brings into the relationship (including in their pre-existing businesses) is already protected from division as excluded property. However, for increases in value of that property *during* the relationship, an objective of the *FLA* is 'to ensure that departures from equal division would be rare, even where one spouse had made no contribution to the increase in value' (para. 44).

This decision provides important guidance to parties, their counsel, and the courts in achieving the *FLA*'s objective of making the division of property more straightforward and predictable and less costly. The Court affirms that the door should not be opened to litigation routinely focused on relative contribution to family property (para. 27). Accordingly, parties should be very hesitant to view their circumstances as exceptional or significantly unfair on the basis of their relative contributions, even where their prior or ongoing contributions and work may be seen as directly and solely responsible for a particular increase in value.

COUNSEL COMMENTS

It is a reminder that the division of family property must be approached holistically, recognizing that in most modern relationships, one partner will earn more than the other and contribute more to family finances, but that contributions come in many other forms that may not be easily quantifiable but contribute to the overall 'family venture' (see *e.g., Khan v. Gilbert*, 2019 BCCA 80 at para. 36). Relationships are, fundamentally, a partnership.

The door to relative contributions in *Jaszczewska* has not swung open. It remains, at most, ajar."



COUNSEL COMMENTS

Lamoureux v Hedquist, 2025 BCCA 438

Counsel Comments by Jeff Robinson,
Counsel for the Respondents, Thomas Donald Hedquist and 0867873 B.C. Ltd

Jeff Robinson

"The Court of Appeal's judgment in *Lamoureux v. Hedquist* is a notable family law precedent for two reasons. First, it clarifies the approach to 'retroactivity' where a final support order supplants an interim support order. Second, it addresses unequal division of family property on the basis of 'pre-relationship' contributions that drive growth in value of family property during a relationship.

Facts and the trial judgment

For more than a decade the respondent built up two local businesses. When the parties' relationship started, the companies were 'thriving and growing' and had 'growth potential.' In the trial judge's anachronistic turn of phrase, the claimant "hitched her wagon" to "already successful and growing enterprises that the respondent had spent years developing."

The relationship lasted five years. The trial judge found the companies' significant growth during the relationship was due to the companies' 'momentum' and the respondent's reputation (that is, his personal goodwill).

Joint expert reports opined on the companies' fair market value at the relationship start date. Like all such valuations, they were premised on a notional arms'-length sale and explicitly assumed that the respondent would assist with a transition to new ownership. But there was no assumption the respondent's reputation would be associated with the businesses indefinitely. In other words, the valuation did not account for the in-relationship benefit of the respondent's personal goodwill that was developed before the relationship. Nor did the reports address the companies' prospects for growth (either with or without the benefit of the respondent's personal goodwill).

COUNSEL COMMENTS

The parties agreed that the fair market value of the companies at the relationship start was the respondent's excluded property. The trial judge re-apportioned the growth in the companies' value between the relationship start and trial in favour of the respondent 75/25.

The claimant obtained an order for interim spousal support and interim child support in respect of the claimant's child from her prior relationship. The respondent contested entitlement to child support and the quantum of spousal support on the interim application and again at trial.

The trial judge found the claimant was not entitled to child support and entitled to spousal support at a lower amount than set by the interim order. The result was an overpayment of support, which the trial judge set off against other amounts owing.

Appeal on "retroactive" trial support awards

On appeal, the claimant alleged the trial judge erred in ordering a 'retroactive repayment … without any analysis of the legal framework for retroactive variation of interim support orders.' Her argument drew heavily on *D.B.S. v. S.R.G*, 2006 SCC 37 and *Colucci v. Colucci*, 2021 SCC 24, which are touchstone decisions for retroactive variations of final orders for support.

The Court observed that the factors in *D.B.S.* and *Colucci* 'do not operate in the same way when an interim order is replacing a final order.' As a result 'the *D.B.S.* factors need to be tailored to the different circumstances engaged when a final order is replacing an interim order.'

Importantly, the Court held it was not an error for the judge not to engage explicitly in a discussion of 'retroactivity.' The takeaway for trial counsel is that setoff is not the only option where a final support order results in support having been overpaid, and that counsel have an onus to make a case for a different result.

Appeal on unequal division

The Court held that the trial judge erred by placing 'undue emphasis on the importance of the relative contributions of the parties to the increase in wealth.'

COUNSEL COMMENTS

It observed that market value typically captures future growth potential, and that 'it is only in exceptional circumstances that potential growth in value during the relationship as a result of pre- or during-relationship contributions justify a departure from equal division.'

Though it held that pre-relationship contributions could be a relevant consideration ('perhaps where it is evident that those contributions have clearly not been captured in a fair market valuation of excluded property'), the Court rejected the respondent's argument that the companies' fair market valuation had not captured the value personal goodwill added to the in-relationship growth.

In light of this guidance, trial counsel should consider obtaining valuation evidence that (i) explicitly addresses growth potential as a factor in fair market value and (ii) quantifies how personal goodwill (and other pre-relationship contributions) have contributed to growth in value over the course of the parties' relationship."

Sather v Sather Ranch Ltd, 2025 BCCA 464

Areas of Law: Real Property; Commercial Law; Corporations; Fiduciaries

~The court's remedial discretion in cases where a fiduciary obtains a gain from a breach of their duties is not limited to disgorgement; in crafting a remedy that is responsive to the facts of the case, the court may either require the fiduciary to disgorge their gains or restore the beneficiary's lost opportunity~

CLICK HERE TO ACCESS THE JUDGMENT

The appeal and cross appeal arose out of a director's breach of fiduciary duty to the respondent corporation, which operated a commercial cattle ranch. At summary trial, the judge found that Joseph Sather, the appellant, had breached his fiduciary duty to the respondent when he took personal advantage of a corporate opportunity to purchase certain grazing lands (the "Lands"). Although the respondent sought a constructive trust as a remedy for the breach, the judge found that the appropriate remedy was equitable compensation. In assessing the amount of the compensation, the judge considered certain negative contingencies related to the loss of opportunity.

Mr. Sather appealed, arguing that the judge erred in finding that the respondent's opportunity was to purchase, rather than use, the Lands. The respondent cross-appealed, alleging that the judge erred in applying a loss-based remedy rather than a gains-based remedy.

APPELLATE DECISION

The Court of Appeal dismissed both the appeal and cross appeal. On Mr. Sather's appeal, it found that the judge's conclusion that the opportunity was to purchase the Lands was amply supported by the facts.

On the cross appeal, the respondent argued that a faithless fiduciary must always be stripped of the gain or benefit obtained from their breach, thereby limiting the court's remedial discretion to determining whether disgorgement would best be accomplished by a constructive trust or disgorgement order. The court rejected this position. While the authorities endorsed the principle

Sather v Sather Ranch Ltd, *(cont.)*

that a fiduciary should not be permitted to profit from their wrongdoing, they did not bind the court's discretion by requiring a gains-based remedy in every case where a fiduciary obtains a gain from their wrongdoing. Enforcing the trust at the heart of a fiduciary relationship could be achieved either by requiring the fiduciary to disgorge their gains, or by restoring the beneficiary's lost opportunity. The court emphasized that the remedy chosen should be responsive to the specific facts of the case.

In the circumstances of this case, the court found no error in the judge's choice of remedy. It was open to the judge, in determining whether to issue a constructive trust, to consider factors such as the seriousness of the breach and its impact on the respondent, including the uncertainty of the opportunity to purchase the Lands.

Finally, the court upheld the trial judge's assessment of damages. The judge did not err by reducing the equitable compensation award for negative contingencies; the value of the loss in the context of a lost corporate opportunity must be assessed with regard to contingencies which affect whether a financial advantage would actually have been realized.

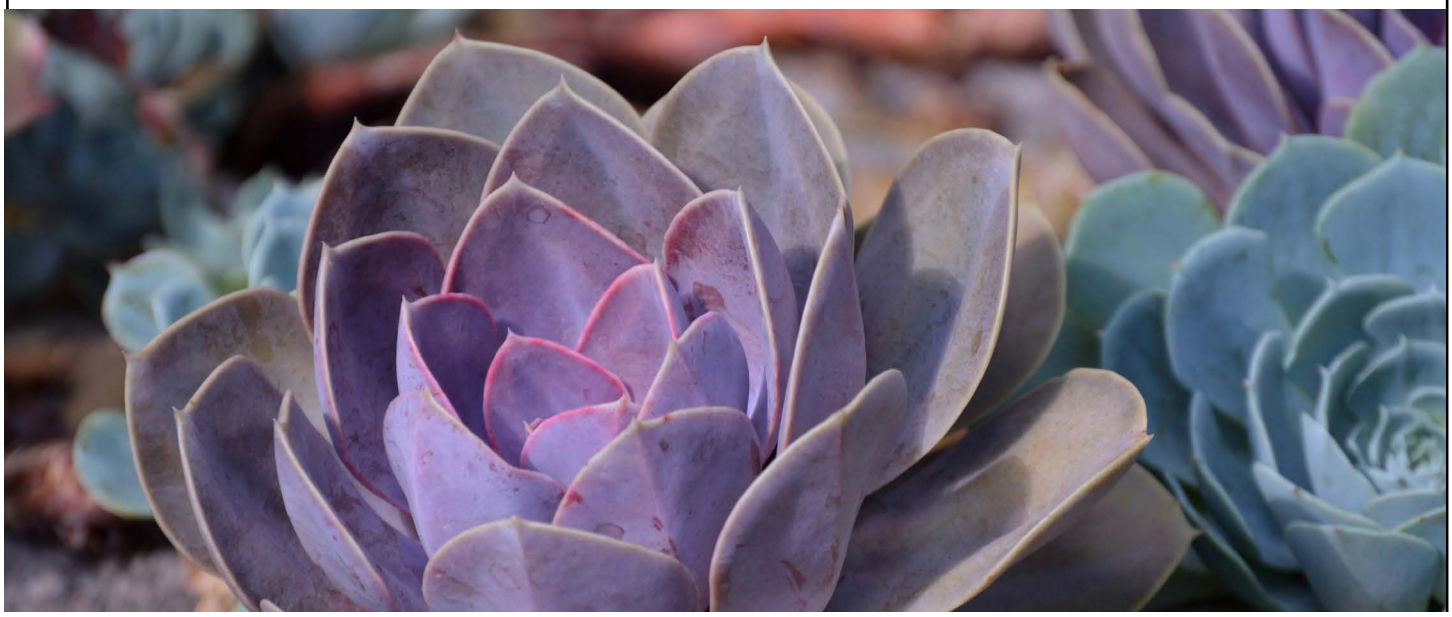
COUNSEL COMMENTS

Sather v Sather Ranch Ltd, 2025 BCCA 464

Counsel Comments by Kaleigh Milinazzo,
Counsel for the Appellant

Kaleigh Milinazzo

"This judgment is a helpful exposition of remedies for breach of fiduciary duty generally and in the context of the corporate opportunity doctrine. It reinforces the principle that equitable remedies are discretionary and must be tailored to the facts of the case. While gains-based remedies such as constructive trusts and disgorgement play an important role in deterring fiduciary breaches, courts retain broad discretion to consider loss-based remedies like equitable compensation, particularly where the plaintiff's opportunity is contingent or uncertain. The decision underscores the importance of proportionality and fairness in crafting remedies, balancing the need for deterrence with the broader context of the dispute."



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