ANNUAL LEGAL UPDATE  
Annual General Meeting – July 21, 2015

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# New Legislation in Force / Practice Changes

## Changes to the *Real Estate Development Marketing Act*, related regulations and practices

The 2014 annual update reported on the important amendments to the *Real Estate Development Marketing Act* (“REDMA”) which came into force on May 29, 2014 and introduced additional requirements for the exercise of the purchaser rescission rights under section 21(3) and for the availability of non-enforceability remedy under section 23 of the REDMA. Among other changes to the REDMA, the amendments permitted phase disclosure statements and consolidated disclosure statements, provided for electronic delivery of disclosure statements with the purchaser’s consent and permitted a trustee to release deposits to the developer where the purchaser failed to pay the balance of the purchase price, without the need for a court order.

Since the changes to the REDMA, the regulations and policy statements under REDMA have been amended as follows, primarily to reflect and complement the 2014 legislative amendments.

### Amendments to *Real Estate Development Marketing Regulation,* B.C. Reg. 505/2004 (amended by B.C. Reg. 173/2014):

Effective September 8, 2014, the regulations to REDMA were amended, notably to adopt the definition of “related person” from the *Property Transfer Act* (which in turn uses a definition from s. 251 of the *Income Tax Act*) and to modify the definition of “municipality” in the regulation to include the Resort Municipality of Whistler.

The definition of “purchaser” under REDMA is broad and includes “a prospective purchaser or lessee, from a developer, of a development unit” and REDMA requires the developer, among other things, to provide a disclosure statement to the purchaser and to obtain an acknowledgment from the purchaser prior to entering into a purchase agreement with a purchaser for the sale or lease of a development unit. The amended regulations now exempt certain transactions from the REDMA‘s marketing requirements, including situations where the sole transaction to be engaged in by the exempt person with respect to the development property is to lease or sell the development property to the developer or to hold an encumbrance, such as a mortgage, assignment of rents, rent charge or equitable charge registered on title to the development property or a security interest in crops or fixtures.

Finally, the amended regulations provide for an additional mechanism for the release of a deposit in the event of a termination of the purchase agreement. The developer and the purchaser can agree on the distribution of the deposit amongst themselves and provide to the trustee holding the deposit a written certification confirming termination of agreement and agreed distribution. Upon receipt of the certification, the trustee is required to pay all or a portion of the deposit in accordance with distribution agreed to by the developer and the purchaser.

### Policy Statement amendments

The Superintendent of Real Estate has revised eight policy statements (Policy Statements 1, 2, 3, 5, 8, 9, 10 and 11) relating to the content and delivery of disclosure statements in order to reflect the changes to the legislation. The policy statements now require clear disclosure of construction commencement and completion dates and zoning, address marketing with multiple or staged building permits, allow for a disclosure statement related to a specific phase of a strata development and a consolidated disclosure statement and permit a developer to provide a copy of a disclosure statement by electronic means with the written consent of the purchaser.

The amended policy statements became effective on October 1, 2014 and all disclosure statements filed with the Superintendent of Real Estate on or after that date must meet the new requirements. The transitional provisions state that a disclosure statement filed prior to October 1, 2014, continues to “satisfy the circumstances, applicable terms and conditions, under which the superintendent’s permission to begin marketing is deemed to be granted in accordance with this Policy Statement, if that disclosure statement or prospectus complied with this Policy Statement immediately prior to October 1, 2014”.

## Amendments to *Real Estate Services Act*

On March 25, 2015, Bill 13, the *Finance Statutes Amendment Act* received Royal Assent, containing several technical amendments to the *Real Estate Services Act*, some of which came into force later on June 9, 2015. The changes include creating in provincial government a power to make regulations with respect to the minimum rate of interest for brokerage trust accounts and requirement for payment into brokerage trust account of amounts received by the brokerage or licensee of amounts received on account of remuneration for recommending services of a home inspector, mortgage broker, notary public, lawyer or savings institution or another person in a business relating to real estate. The balance of the amendments relate to discipline hearings, compensation amounts and procedures and composition of real estate council.

## Amendments to *Land Tax Deferment Regulation* in force June 9, 2015, BC Reg 109/2015

The amended regulations now provide that an agreement under s. 2 of the *Land Tax Deferment Act* to defer taxes is not terminated by a transfer of a portion of an owner's interest in the property to one or more of the other owners of that property and that registration of transfer of one owner's interest to one or more other owners is permitted without minister's consent. The form of agreement to defer property taxes included as a schedule to the regulations has also been amended.

## Amendments to *Strata Property Regulation* effective July 7, 2014, BC Reg amendment 68-2014, effective July 16, 2014

The amendment affects provisions governing investments of contingency reserve funds and money collected for special levies and permits such funds and moneys to be invested in Guaranteed Investments Certificates (GICs).

## New residential mortgage underwriting and mortgage insurance underwriting guidelines

### Office of Superintendent of Financial Institutions (Canada) mortgage insurance underwriting guideline

The 2014 annual update referenced a set of draft guidelines released by the Office of Superintendent of Financial Institution Canada (“OSFI”) entitled *Residential Mortgage Insurance Underwriting Practices and Procedures* and more commonly known as Guideline B-21 that were expected to be finalized late in 2014.

On November 6, 2014, OSFI issued the final version of Guideline B-21.

The guideline sets out best practices in residential mortgage insurance underwriting, including mortgage insurers’ insurance underwriting governance, internal controls, and risk management, and applies to all federally-regulated mortgage insurers for residential mortgage loans in Canada. The guideline is designed to complement the Government of Canada’s mortgage insurance guarantee framework.

As previously reported, Guideline B-21 follows publication of Guideline B-20 released in 2012 which addresses residential mortgage underwriting practices and procedures and applies to lenders rather than insurers.

### Financial Institution Commission (British Columbia) mortgage underwriting guideline

In January 2015, British Columbia Financial Institution Commission (“FICOM”) published a Residential Mortgage Underwriting Guideline setting out the expectations for residential mortgage underwriting, portfolio management, documentation, reporting, recourse planning and risk management practices for credit unions. The final version incorporates changes made based on feedback received during the consultation period.

The guideline affects both mortgages underwritten directly and mortgages acquired from brokers and other parties, including acquisition of a mortgage as part of a portfolio and places a responsibility on the credit union for compliance of the underwriting with the guideline in the event any part of the underwriting process is outsourced to a third party. The guideline addresses limits with respect to home equity lines of credit, non-income qualifying or equity mortgages and reverse mortgages (for example, the guideline states that the non-amortizing HELOC component of a residential mortgage to a maximum loan-to-value ratio not exceed 65%, unless accompanied by a documented approval in accordance with the guideline).

The guideline is to be applied by the British Columbia credit unions on a going forward basis from January 2015, with some allowance for the scaling of the requirements to the size, scope and complexity of a credit union, as determined in consultation with the FICOM Relationship Managers.

# Proposed Legislation - British Columbia

## *Societies Act*, Bill 24-2015

The new Act received Royal Assent on May 14, 2015, but the date of its coming into force is not yet determined. It is expected that it will come into force following the draft of regulations under the Act and that it would take place within approximately 18 months of the Royal Assent. The changes include enhanced criteria for eligibility of the society directors, relaxation of certain regulatory requirements with respect to member-funded societies, increased regulation of other societies (including public disclosure of remuneration to directors and certain employees and imposition of director-like duties on senior managers), clearer record-keeping requirements and greater obligations for filing of society information in public records.

The Act contemplates a two-year transition period for the existing societies, within which societies will be required to file a transition application containing a constitution and bylaws in a required form. Transitioning under the Act will be a condition for any pre-existing society to alter its bylaws or amalgamate with other entities.

While in the short run the transitioning requirements may add time and complexity to documenting loans to societies and related due diligence, on the long-term horizon, the legislative changes, specifically those related to record-keeping and public records, are likely to streamline the lending processes and make it comparable to those involving British Columbia corporate borrowers.

As welcome news to the mortgage lenders, of note is the absence in the Act of the provision equivalent to s. 35 of the current *Society Act* containing a requirement for special members’ resolution approving the society issuing debentures. The existing section results in uncertainty as to whether typical security instruments, such as real estate mortgages and personal property security agreements constitute debentures and lenders routinely obtain special resolution to mitigate the related risk. By contrast, s. 34 of the new Act provides that directors may determine whether the society may borrow funds and issue debentures, unless the society bylaws provide otherwise. In practice, in many cases this change would eliminate delays currently resulting from having to call a meeting of members with requisite notice and to file the special members’ resolutions, once passed, with the Registrar of Companies for British Columbia. Of note also is the lowering of the legislated threshold for special resolution approval from 3/4 to 2/3 of the vote.

## *Building Act,* Bill 3-2015

This bill received first reading on May 5, 2015 and introduces a number of changes to building regulation in British Columbia with the aim of promoting consistency in the regulation of building throughout the province. It notably does not apply to the City of Vancouver. The bill introduces mandatory qualifications for local building officials and restricts the authority of local governments with respect to establishing local building requirements that is currently available to them. The bill's transitional provisions state that such restrictions will apply to the local authority two years after they come into force.

## *Builders Lien Notice to Owners Act*, Bill M216-2015

Currently in British Columbia there is no requirement on the prospective lien claimants to inform property owners of the claim of builders lien which may be registered against their property.

This bill received first reading on May 5, 2015 and if adopted will require a lien claimant to serve written notice to all owners who may be affected by a claim of builders lien before being able to file that claim against land title or mineral title. A land title office registrar or a gold commissioner will not file a claim of builders lien until he or she has been given evidence of the service of that notice. The explanatory note to the bill states that it is aimed at “procedural fairness”.

CASE-LAW UPDATE

# Section 8 of the *Interest Act*

Section 8 of the *Interest Act* states that no greater rate of interest is payable on any arrears of principal or interest secured by a mortgage on real property than the rate of interest payable on principal money not in arrears and prohibits fines or penalties payable after the mortgage is due and has been demanded. This provision effectively prohibits any increase in the interest rate, including that resulting from a change in the compounding period.

Lenders have sought to avoid violating s. 8 of the *Interest Act* and still escalate the interest by several methods. Two of them were recently considered by the courts, in *York Ventures Ltd. v. 0775740 B.C. Ltd.* and *Equitable Trust Company v. Lougheed Block Inc.*, respectively. The first is to, rather than expressly associate the interest increase with a default, provide for one interest rate up to a certain date, usually shortly before maturity, and a higher rate thereafter. The other is to choose the higher rate of interest as the rate for the term of the loan and provide for incentives and return of a portion of the interest paid if the loan is paid in full and on time on maturity date and absent any late interim payments.

**Rate increase on a date preceding maturity - *York Ventures Ltd. v. 0775740 B.C. Ltd., 2015 BCSC 1105***

Historically, the British Columbia courts have not been consistent in assessing whether the increase of a rate shortly before maturity offends s. 8*.* Primarily, the judicial analysis centered on whether there was a legitimate commercial purpose for the rate increase or whether the increase constituted a penalty. However, in 2006 the BC Court of Appeal in *Reliant Capital Ltd. v. Silverdale Development Corp.* questioned the value of the legitimate commercial purpose test and suggested that parties are entitled to enter into agreements to avoid application of s. 8, if such agreements were fair and not tainted by coercion or penalty. The Court went on to suggest that the provision had to be considered in the circumstances in which the loan was made. In interpreting the interest escalation provision, the Court in *Reliant Capital* focused on the question of whether it resulted in higher interest being charged on arrears than on other amounts and concluded that s. 8 was not invoked because the higher rate applied equally to arrears and amounts not in arrears.

The recent *York Ventures* decision was rendered in a foreclosure proceeding and the s. 8 argument with respect to the first mortgage was raised by the second mortgagee. The first mortgage was registered against bare land, provided for a term of six months with an interest rate increase after four months and stated that any interest increase within the term is "for commercial reasons". The court followed *Reliant Capital* to find that the interest increase did not violate s. 8. In reaching the decision, the master noted that the borrowers did not challenge the enforceability of the interest rate provisions, that the second lender's mortgage also contained an "interest bump" provision, that all parties were represented by mortgage brokers and legal counsel in connection with the financing arrangements and that there was nothing about the lending transaction to suggest unfairness, abuse or coercion.

Interest rate change framed as an incentive rather than a penalty - *Equitable Trust Company v. Lougheed Block Inc.,* 2014 ABCA 234, leave granted [2014] S.C.C.A. No 435

In this Alberta Court of Appeal case, a second renewal of a mortgage provided for interest rate of 25% for the term but the monthly payments were to be based on a lower rate (which was the greater of 7.5% and prime plus 5.25%). The amount of the difference between the monthly payment and the interest at 25% was added to the principal amount, to be paid by the borrower at maturity (such added amount was referred to as “Accrued Interest”). The terms stated that on full repayment, provided there was no default, the Accrued Interest would be credited back to the borrower. Upon default and until such default was cured, accrual of the Accrued Interest ceased and 25% interest rate replaced the lower rate, and on any default the lender did not permit to be cured, the Accrued Interest became due and payable. The previous renewal provided for an increase of interest rate to 25% prior to maturity (which the Court unanimously found not to be problematic) and at the time of negotiation of the second renewal, the borrower had failed to repay the mortgage under the first renewal and the applicable interest rate was 25%. When the borrower failed to pay, the lender called the loan and demanded payment of all principal and interest based on the 25% interest rate.

With respect to the second renewal, the majority of the Alberta Court of Appeal with some reluctance felt bound to follow an earlier appellate Alberta authority of *Dillingham Construction Ltd v. Patrician Land Corp.*, 1985 ABCA 91, which it cited for the proposition that s. 8 of the *Interest Act* is directed at penalties for non-performance, not at incentives for performance (and which it understood as expressly rejecting the Ontario approach of treating penal and non-penal provisions alike and focusing instead on their effect). Relying on this binding authority and drawing for its support on the wording of the *Interest Act,* secondary sources and other case law (including the British Columbia case of *North West Life Assur. Co. of Can. v. Kings Mount Hldg. Ltd.,* 1987 CanLII 2617 (BCCA)), the Court found that the mortgage provisions were in the nature of an incentive and that s. 8 of the *Interest Act* did not apply.

The dissenting judge distinguished *Dillingham* and found that the interest provisions of the renewed mortgage exhibited “all of the earmarks of a penalty” and held that offending arrangements could not escape operation of s. 8 by using words such as "bonus" or "discount". He reasoned that the lender's decision to call the loan triggered the effect prohibited by s. 8, i.e. it converted the amounts not previously in arrears to amounts in arrears and the rate of interest applicable to such amounts increased. Accordingly, he held the provisions to be unenforceable.

Both the majority and the dissenting judge were united in upholding a rate increase on a specified date as set out in the first mortgage renewal and in stating that the test for application of s. 8 is not dependent on the motives of the lender or the sophistication of the borrower, that the legitimate commercial purpose test is not useful and to apply the same would result in commercial uncertainty and arbitrary application. The questioning of the test’s utility is consistent with the doubts expressed in the recent British Columbia jurisprudence.

The case was granted leave to appeal to the Supreme Court of Canada and the highest court will hopefully introduce some much needed clarity and consistency into the interpretation and application of s. 8, both specifically with interest rate changes framed as incentives and for the interest escalation provisions generally*.*

Interest escalation provision contained outside of the mortgage instrument - *P.A.R.C.E.L. Inc. v. Aquaviva*, 2015 ONCA 331

The issue considered in this Ontario casewas whether only mortgage instrument terms were subject to s. 8 analysis or whether terms contained in a separate document related to a single loan secured by a mortgage may be held to be unenforceable on the same basis.

Here, the debtors executed a promissory note as evidence of a debt and the note stated that it was secured by a mortgage of a specified property. One of the debtors granted a mortgage in the same principal amount as the note over the property identified in the note. Although the documents did not expressly require it, all monthly payments made by the debtors were credited in full against both the note and the mortgage and the parties did not contest that payment under one constituted payment under the other. The two documents contained the same repayment terms until default. On default, the note's applicable interest rate escalated to 10% per annum but the mortgage did not contain a corresponding interest escalation provision.

The Court of Appeal unanimously held that on the facts s. 8 of the *Interest Act* applied to both the promissory note and the mortgage, and consequently the interest escalation provision in the promissory note was unenforceable. The court rejected the argument that the provision must be in the mortgage instrument for s. 8 to apply, and held that where two debt instruments are for the same principal amount, on the same payment terms, and where payment of one is payment of the other and both relate to a single loan, s. 8 applies to both.

**B. Good faith performance of contracts - *Bhasin v Hrynew*, 2014 SCC 71**

The Supreme Court of Canada has established a general organizing principle of good faith in the law of contract and, under that principle, having found no existing doctrine that applied to the facts, created a new duty of honesty in the performance of contractual obligations.

The principle of good faith is "a standard that underpins and is manifested in more specific legal doctrines" and will serve as the basis for development of new common law doctrines, duties and causes of action. In substance, it "exemplifies the notion that, in carrying out his or her own performance of the contract, a contracting party should have appropriate regard to the legitimate contractual interests of the contracting partner" and not seek to undermine those interests in bad faith. Good faith, however, does not go as far as to impose a duty of loyalty or require a party to place the other's interests ahead of its own or forgo advantages flowing from the contract.

The newly recognized duty of honesty represents an incremental step in the development of the organizing principle of good faith and now applies to all contracts. It requires that parties not lie or knowingly mislead each other about matters directly linked to the performance of the contract, however, it does not include a positive obligation of disclosure. When describing the nature of the duty, the Court said that it is a general doctrine of contract law, that it should not be thought of as an implied term of a contract, that it operates irrespective of the intentions of the parties and is in that sense analogous to equitable doctrines, such as the doctrine of unconscionability, which impose limits on the freedom of contract. Although the parties cannot contract out of the duty, the Court noted that parties are free to relax the requirements of the doctrine through contractual arrangements, as long as they respect its core minimum requirements.

The application of both concepts is highly context-specific and the Court did not offer extensive practical guidance, so it remains to be seen how the case law will develop under the new approach. In the meantime, the parties should factor in the risk of breaching the duty of honesty when conducting their affairs in connection with performance of contractual obligations and related matters.

**C. Municipality's duty of procedural fairness - *Community Association of New Yaletown v. Vancouver (City)*, 2015 BCCA 227**

The Supreme Court's decision in this case introduced a measure of uncertainty, not just about the fate of the project that was halted in the middle of construction as a result, but more broadly about the scope of the City's duty of procedural fairness and the developer's ability to rely on the City's approval of development permits and enactment of zoning. Thankfully, this case was heard by the Court of Appeal on an expedited basis and relieved the concerns prompted by the lower court's decision.

The basic facts were as follow. The City of Vancouver and Brenhill Developments Ltd. entered into a land exchange contract, under which Brenhill was to build a social housing project for the City on Brenhill's land, and, following its completion, exchange Brenhill's land for the adjacent City lot and develop a tower on the acquired lot. Following public consultation, the City approved a development permit for the social housing project and enacted a rezoning bylaw for the site of the tower and Brenhill commenced the construction of the social housing project.

A judge of the Supreme Court, on an application from Community Association of New Yaletown, quashed both the development permit and the bylaw on the basis that the City had acted unfairly in its consultation process. The main objections to the disclosure were that (i) it contained only enough information to technically comply with the minimum requirements of a public hearing and the information was not presented "in simple, direct terms", (ii) the dollar values attached to the components of the land exchange appeared arbitrary and (iii) the disclosure should have included the broader land exchange proposal, rather than just rezoning matters.

Shortly before the appeal, the City issued a new development permit, held a new public hearing and adopted a new rezoning bylaw on terms largely replicating those initially issued. The Court of Appeal nevertheless heard the case because a benefit would flow to Brenhill from restoration of the original rezoning bylaw and because the case raised issues of general importance.

The Court of Appeal reversed the Supreme Court decision and held that the City met its duty of procedural fairness. The public hearing was required in the first place because of the proposed rezoning and therefore the content of disclosure and discussion had only to relate to rezoning bylaw and not to the social housing project or the land exchange generally. The City is free to issue development permits, sell, acquire and develop property without holding public hearings and without providing economic justifications for its business decisions. The City's public disclosure before the hearing was adequate, as it included everything that was or will be considered by council in relation to rezoning and in fact exceeded the City's disclosure obligations. The chambers judge was in error when requiring the level of disclosure comparable to what is required in a discovery in civil litigation context.

# D. The registered owner’s knowledge of encumbrances inadvertently discharged from real property title

*BC Retail Partners (Boitanio Mall) Ltd. v. Overwaitea Food Group*, 2015 BCSC 404

This recent case, although unique in its facts, highlights the potential perils of a typical property acquisition structure in British Columbia where, primarily in order to avoid property transfer tax, on purchase the registered title to the property is not transferred, but rather the new beneficial owner acquires shares in the existing registered owner. The case demonstrates the uncomfortable fit of the separation between the beneficial and legal ownership of property with the Torrens land title system and confirms that protections of the land title regime extend only to registered owners of real property.

Here, the registered owner (BC Retail) and the original beneficial owner (BC Retail Partners General Partnership) prior to their original acquisition of the property were aware of the restrictive covenant registered against the property which prohibited use of the land or buildings as a grocery store. The covenant was erroneously released from title before completion of the transfer of the property to the registered owner and the original beneficial owner.

Later, the beneficial interest in the property was sold to Janda Group Holdings W.S. Ltd. (“Janda”), who obtained a transfer of beneficial interest and also purchased shares of the registered owner and replaced the registered owner’s directors and officers. Janda and the new director and officer of the registered owner had no notice of the restrictive covenant. When Janda attempted to lease the retail space on the property to a grocery store, it discovered the existence of the unregistered restrictive covenant affecting the property.

In arguing against restoration of the restrictive covenant on title, Janda invoked s. 29 of the *Land Title Act* which states that a person taking title to land or a charge from the registered owner “is not, despite a rule of law or equity to the contrary, affected by a notice, express, implied, or constructive, of an unregistered interest affecting the land or the charge”. The court held that only the registered owner could take advantage of s. 29 protectionsbut that they were not available on the facts: the registered owner here had actual knowledge of the covenant when it was registered on title. Furthermore, even though the principals of Janda and the new director and officer of the registered owner had no personal knowledge of the covenant, the corporate knowledge of the registered owner was imputed to Janda on the principles of the law of agency resulting from the analysis of the declaration of trust governing the relationship between the registered owner and Janda. As a result, the court restored the restrictive covenant to the title.

The court expressly stated that the result of the case would have been different had the new beneficial owner also taken registered title to the property or if a new registered owner took title as nominee of the beneficial owner.

Although erroneous discharges of encumbrances are not common and the risks of a similar scenario repeating itself are not high, this case reminds us that knowledge acquired by a registered owner prior to the transfer of beneficial interest in the property will continue to bind the registered owner and will limit the protections available to a beneficial owner against unregistered interests in property. A practical lesson of this case is that the risks related to maintaining the same registered owner on title should be weighed against the tax savings benefits and should be mitigated by enhanced due diligence, including review of any charges that may have been erroneously discharged from title and of which the registered owner may be aware.

# E. Equitable rescission of transactions as a result of unintended tax consequences

The recent decisions below demonstrate that on appropriate facts, a remedy of rescission will be granted where a rescission is aimed at avoiding an unintended tax liability, including tax incurred under the *Excise Tax Act* on real property transfer.

*Re: Pallen Trust*, 2015 BCCA 222

This case involved payment of dividend to a discretionary trust that was structured based on an understanding of the tax consequences of certain tax statute provisions reflected in numerous Canada Revenue Agency (“CRA”) publications. Subsequently, a Federal Court of Appeal decision changed the legal interpretation of provisions applicable to the trust and the CRA reassessed the trust on the basis of that court decision. The petitioner sought to rescind the dividend payment.

The BC Supreme Court stated that “a court may rescind a voluntary disposition where it is found that a mistake of sufficient causative gravity was made that would make it unconscionable, unjust or unfair to leave the mistake uncorrected”, that the mistake would be “either as to the legal character or nature of a transaction, or as to some matter of fact or law which is basic to the transaction”. The Court allowed equitable rescission of the dividend payment on the basis of mistake citing the following relevant factors: the tax implications were basic to the transaction, there was a clear causative mistake, the gravity of the mistake was significant, there was no prejudice against third parties, there was a common general understanding as to the operation of the legislation in question and the CRA would not have sought to reassess the trust prior to the change in the law.

The Court of Appeal upheld the lower court’s decision as it was on the facts of the case in the interests of justice to correct the mistake and the rescission was not aimed at reversing consequences of an aggressive tax plan.

*0741508 BC Ltd and 0768723 BC Ltd (Re)*, 2014 BCSC 1791

The approach in *Re: Pallen Trust* was applied by the BC Supreme Court in a case involving payment of HST on transfer of interest in the land.

In 2011, the petitioners conveyed land to a general partner of a partnership, to be held in trust for a partnership. The petitioners and the general partner had the same sole shareholder. It was the understanding of the parties that the transaction was taxable for HST, but there was an offsetting input tax credit available that would result in no net HST payable. Inadvertently, a registration under the *Excise Tax Act* as required for the HST exemption was not made for the partnership prior to the transfer. As a result, the CRA assessed the petitioners taxes and penalties for failing to collect HST from the partnership. Following the transfer, HST was eliminated and replaced with GST and PST effective April 2013 with basic tax content provisions having retroactive effect to February 2012 and the partnership was registered under the *Excise Tax Act* in July 2013.

The petitioners sought an equitable rescission of the agreements for purchase and sale. The parties whose interests could be affected by the orders sought (including mortgage holders), other than the CRA, either did not oppose the orders or took no position.

The court cited the BC Supreme Court in *Re: Pallen Trust* and held that it would not be fair or just for the CRA to collect over $6 million plus interest because of an honest mistake and ordered rescission of the agreements. The court appears to have distinguished the case from prior decisions in which relief from adverse tax consequences was not granted (including *771225 Ontario Inc. v. Bramco Holdings Co. Ltd.*, [1994] 17 O.R. (3d) 571 (Gen. Div.), aff’d [1995] 21 O.R. (3d) 739 (C.A.)) on the basis that (i) no adequate legal remedy was available to the petitioners as the reversion to GST and PST limited the petitioners to recovery of only the federal component of the tax, rather than all of the basic tax content available under the HST regime and (ii) that the petitioners did not seek to carry out retroactive tax planning, as it was always the intention of parties to register the partnership under the *Excise Tax Act* so that no net tax would be payable and the HST was triggered only as a result of the mistake in failing to register the partnership. In granting the equitable relief the court also found that there was no prejudice to third parties resulting from the rescission.

# F. Admissibility of assessments prepared by BC Assessment as valuation evidence -*Dosanjh v. Liang*, 2015 BCCA 18

At trial level, the judge was tasked with assessing the damages flowing from failure to close a purchase of the property and had to determine the relevant market value of the property. The available appraisal did not meet requirements for expert evidence and the judge relied instead on an assessment prepared by BC Assessment Authority. The BC Court of Appeal held that an assessment prepared by BC Assessment was not admissible as evidence of the value of property in civil litigation and cannot, absent agreement of the parties, take the place of expert opinion evidence.

# G. Builders liens for pre-construction work - *Stanley Paulus Architect Inc. v. Windhill Holdings Ltd. et al.*, 2014 BCSC 1816

In this case, an architectural consulting firm was not allowed to claim a builder's lien against a project for which construction never commenced.

Since 1997, the *Builders Lien Act* applies to the services of an architect or engineer provided before or after the construction of an improvement has begun. However, in order to claim a builder's lien, there must be an "improvement" to which the lien can attach and where no construction commenced, there is no “improvement”. A 2002 BC Court of Appeal case *Chaston Construction Corp. v, Henderson Land Holdings (Canada) Ltd.,* 2002 BCCA 357, where a project was abandoned and the construction was never started, held that a builder’s lien could not be claimed. In *Stanley Paulus* the plaintiff sought to distinguish the case at bar from *Chaston* by arguing that *Chaston* is authority only for situations where a project is abandoned. The BC Supreme Court rejected this distinction, stating that the absence of an improvement is in itself determinative and the reason for it is irrelevant and followed *Chaston* to deny a claim of builder’s lien to the plaintiff.

In closing remarks, the judge expressed a view that, although the authorities are clear and the result of the case is not in doubt, the 1997 legislative amendments relating to services of engineer or an architect should have gone further and permitted engineers and architects to claim a lien against land, rather than improvement, and thus better protected professionals involved in pre-construction work.

# H. Leasing matters

Proprietary estoppel remedy and retroactive application of Section 73.1 of the *Land Title Act - Idle-O Apartments Inc. v. Charlyn,* 2014 BCCA 451

This decision related to a 998-year unregistered lease of an unsubdivided parcel of land that was unenforceable as between the parties as a result of 1996 BC Court of Appeal decision in *International Paper Industries Ltd. v. Top Line Industries Inc.* and was not saved by the application of s. 73.1 of the *Land Title Act* (as the BC Court of Appeal previously found that this legislation did not have retroactive effect). At the time of entering into the lease, the parties believed the lease to be valid and conducted themselves on that basis from the time of its grant in 1978 until 2000 when they learned of the *Top Line* effect on the lease. The landlord sought exclusive possession of the lands and the tenant argued that equity should not allow the landlord to insist on its strict legal rights.

At trial, the judge held that the tenant established the elements of proprietary estoppel, including: i) the claim is brought in a property context; ii) the party seeking to rely on its legal rights makes a representation to the claimant; iii) the claimant reasonably relies on the representation; and iv) it would be unconscionable or unjust in all the circumstances for the representor to go back on the assumption that it had allowed the claimant to make. On that basis, the court granted a remedy of a replacement lease on the same terms as the 1978 lease. The landlord objected that the remedy in essence amounted to retroactive application of s. 73.1 of the *Land Title Act*.

The Court of Appeal upheld the lower court's findings regarding proprietary estoppel and concluded that the remedy flowed from the landlord's conduct and not from an unenforceable agreement or from the statute, thus retroactive application of the statute was not required. The Court modified the remedy granted at trial, stating that although the expectations of the parties were for a 998-year lease, such expectations were to be balanced with the assessment of the nature and condition of improvements, the fact that both parties, rather than one, were mistaken as to the law affecting the lease, and the personal value that the land held for the directors of the tenant. Instead of the original 998-year term, the court granted a lease for a term ending on the death of the last survivor of the present directors of the tenant and their children.

Relief from forfeiture - *The Owners, Strata Plan VIS2030 v. Ocean Park Towers Ltd.*, 2015 BCSC 146

The central issue in this case was whether the strata, which was a landlord under a 99-year lease with respect to the use and occupancy of 60 parking stalls in a condominium parking structure, was, following a breach of the lease by the developer tenant, entitled to possession of the parking spaces or whether the tenant was entitled to relief from forfeiture under the court’s broad discretion under s. 24 of the *Law and Equity Act*.

The court granted the tenant equitable relief from forfeiture based on its analysis of the following factors (identified by the Supreme Court of Canada in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*)*:* 1) the conduct of the developer and whether it had clean hands, 2) the severity of the breaches, and 3) the disparity between the value of the property forfeited and the damage caused by the breach. The court attached conditions to the order, including payment by the tenant of property management and legal costs incurred by the landlord in connection with the matter.

Landlord’s exercise of remedy of distress as waiver of right to lease termination - *Delane Industry Co. Ltd. v. PCI Properties Corp. et al.*, 2014 BCCA 285

This recent BC Court of Appeal case clarifies an inconsistency among prior decisions and confirms that the landlord’s election to levy distress against a tenant for a breach precludes, and not merely suspends, the landlord’s right to terminate a lease for the same breach, when following exercise of distress, there remains a deficiency or continuing arrears.

Here, the landlord elected to levy distress for unpaid rent and seized and sold the tenant’s goods, and then proceeded to terminate the lease on the basis of the continuing arrears resulting from breaches pre-dating the distress process. It is noteworthy that the lease in question provided for "cumulative remedies". The tenant applied for a declaration reinstating the tenancy and argued that rent distress and termination were alternate, mutually exclusive remedies and that the landlord, having exercised its right of distress for unpaid rent, could not terminate the tenancy for the same breach.

At trial level, the judge found that the landlord could not terminate the lease because it relied for termination on the notice of breach that it gave the tenant in connection with the distress proceedings and such notice did not meet the lease requirements for a termination notice but suggested that termination was possible if landlord were to give the tenant a "fresh" notice of default specifying an outstanding balance of rental arrears. The Court of Appeal agreed with the trial judge on the first point but disagreed on the second. It held that a new breach of a type giving rise to termination and a notice relating to the same, rather than a “fresh” notice for continuing arrears relating to the same breach, would be required for the landlord to terminate the lease.