From: Narissa Chadwick
Sent: Monday, November 27, 2023 1:31 PM
To: Emily Bryant
Subject: FW: REZONING ATTEMPT BY CRD FOR ST. JOHN'S POINT CONSERVATION LANDS
Attachments: NEGLIGENCE CLAIM _ THIRD PARTY NOTICE filed (2).pdf; ORDER IN COUNCIL 20011960 HORTON BAY LOT A.pdf; SCC Applicant's Reply in Leave Application.doc; EASEMENT LOT A, HORTON BAY ABE 26.9.1960 copy.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

To file with the rezoning application. MA-RZ-2023.2 (CRD)

From: Paula Buchholz [redacted]>
Sent: Saturday, November 25, 2023 11:11 AM
To: David Maude <dmaude@islandstrust.bc.ca>; Tobi Elliott <telliott@islandstrust.bc.ca>
Cc: Jeanine Dodds <jdodds@islandstrust.bc.ca>
Subject: REZONING ATTEMPT BY CRD FOR ST. JOHN'S POINT CONSERVATION LANDS

Dear Toby:
Dear David:
Dear Jeanine:

Forwarded below, please see my email letter to the Island Trust Planner Narissa Chadwick, of yesterday, November 24, 2023, for your information and response against the very inappropriate action requested to rezone the unsuitable conservation lands adjacent to it's neighbour, with no available access into a very public CRD REGIONAL PARK.

It is not to the advantage of the conservation of the land, or to the Mayne Island community. It would only serve to further erode the property rights of it's neihbour's owner, my company and me, who has been the victim of constant assaults, huge burden of costs, loss of all benefits of it's land since in fact day of purchase in 1973, now 50 years, all since I requested to have my waterfront's use allowed for it's rightful owner, as the registrations on title in favour for the Province for the construction of a footpath did not give any other government or persons under the Land Title Act and our Land registration's Torrens system, a right for the use of my oceanfront.

The ensuing lawsuits, after I waited, and negotiated in good faith, led to gross abuse of government power, collusion and deception of the Courts, ending in further lawsuits, gross violations or my Human Rights and loss of my precious lifetime in my senior years, foreclosure of Arbutus Bay Estates' investment property and with that most of my equity and security in old age, a very grave injustment and misscarriage of Justice.

The federal government has confirmed with it's Negligence Claim towards the Province, some parts of the wrongdoing, to which it added in the later years, aiding the CRD as their client while acting as Attorney General Canada when it was in their interest to get rid of all the recreational harbours on the Westcoast, and their own obligations towards it's people.

For the better understanding what was wrong, please see attached also
1). the Negligence Claim; 2). the Order in Council; 3). the Easement of title at the time when I purchased the land sight unseen from another continent, Europe, 4). a summary of Sean Hern before the Supreme Court of Canada.

But unfortunately, I was not among the usual 10 % getting leave to being heard before the highest Court in the country, and thus, the abuse and injustice continued to this day which the CRD wishes to further extend it to the land, trespassing on the small waterfront areas between public road, and their 3 meters only access to the conservation lands to inviting and welcoming large visitor amounts that the circumstances do not allow in their present state.

I ask you, to please consider for your decision all of these circumstances. If you have any question to the history, please ask me, as I can clarify it honestly, with integrity.

Sincerely

ARBUTUS BAY ESTATES
Paula M. Buchholz

FOR PLAN SEE [illegible]

307

THIS INDENTURE made the [illegible] day of [illegible] 1960

BETWEEN: Francis Winterton Pratt
of Mayne Island, Province of British Columbia

hereinafter called the "Grantor"

AND

Her Majesty the Queen in Right of the Province
of British Columbia

hereinafter called the "Grantee"

WITNESSETH that in consideration of the sum of $50.00 now paid by the Grantee to the Grantor (the receipt whereof is hereby acknowledged) the Grantor doth hereby grant and convey unto the Grantee, the owner in fee of those lands and premises described as Lot 431, Cowichan District, her heirs and assigns and her and their agents, servants and workmen a free and uninterrupted right-of-way in perpetuity but subject to the proviso hereinafter contained, through, along and over that certain parcel of land described as :-

"Commencing at a point South 63° 15' 30" East a distance of 263.1 feet more or less from the most Southerly corner of Lot 2, Section 2, Mayne Island, Plan 6166, thence North 22° 02' West 87 feet more or less to High Water Mark of Horton Bay and South 22° 02' East 7 feet more or less from the said commencement point and having a width of ten feet on either side of the above described centreline, containing 0.043 acre more or less for the purpose of constructing a footpath and other works incidental to the operation of wharfage facilities appurtenant to the lands owned by the Grantee hereinbefore described.

Provided, and it is hereby expressly agreed, that if and whenever the operation of the said wharfage facilities is discontinued, the said right-of-way and all the rights incidental thereto and hereby granted shall cease and determine.

The Grantee for herself, her heirs and assigns covenants with the Grantor his heirs and assigns that the Grantee will at her own expense keep the right-of-way in proper repair and condition.

IN WITNESS WHEREOF the Parties have hereunto set their hands and seals on the date first above mentioned.

SIGNED, SEALED AND DELIVERED)
in the presence of :-)

F. W. Pratt
.....
MAYNE Grantor

.....

No. VIC-S-S-130225
Victoria Registry

In the Supreme Court of British Columbia

ARBUTUS BAY ESTATES LTD.

Plaintiff

and

ATTORNEY GENERAL OF CANADA, and
CAPITAL REGIONAL DISTRICT

Defendants

and

HER MAJESTY THE QUEEN IN RIGHT OF THE PROVINCE OF BRITISH COLUMBIA

Third Party

THIRD PARTY NOTICE

Filed by: Attorney General of Canada and Capital Regional District

To: Her Majesty the Queen in Right of the Province of British Columbia

THIS ACTION has been brought by the plaintiff against the defendants for the relief set out in the notice of civil claim filed in this action.

TAKE NOTICE that the claiming parties claims against you for the relief set out in Part 2 below.

IF YOU INTEND TO RESPOND TO this claim against you, or if you have a set-off or counterclaim that you wish to have taken into account at the trial, YOU MUST FILE a response to third party notice in Form 6 in the above-named registry of this court within the time for response to third party notice provided for below and SERVE a copy of the filed response to third party notice on the claiming parties' address for service.

YOU OR YOUR LAWYER may file the response to third party notice.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the response to third party notice within the time for response to third party notice described below.

TIME FOR RESPONSE TO THIRD PARTY NOTICE

A response to third party notice must be filed and served on the claiming parties,

(a) if you reside anywhere in Canada, within 21 days after the date on which a copy of the filed third party notice was served on you,

(b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed third party notice was served on you,

(c) if you reside elsewhere, within 49 days after the date on which a copy of the filed third party notice was served on you, or

(d) if the time for response to third party notice has been set by order of the court, within that time.

CLAIM OF THE CLAIMING PARTIES

Part 1: STATEMENT OF FACTS

1. The plaintiff's claim against the defendants, as it appears in the notice of civil claim, is for declarations and damages arising out of alleged nuisance, trespass, and interference with riparian rights occasioned by the use and operation of public harbour facilities (the "Horton Bay Harbour") comprising a public wharf (the "Horton Bay Wharf") and a gravel roadway connecting a near-by public road known as Horton Bay Road to the Horton Bay Wharf (the "Wharf Access Road") on Mayne Island, British Columbia.

2. The defendants, the Attorney General of Canada ("Canada") and the Capital Regional District ("CRD") dispute the plaintiff's claims on the grounds appearing in the further amended response to civil claim.

3. Her Majesty the Queen in right of British Columbia ("BC") has an address for delivery in care of the Deputy Attorney General, Legal Services Branch, Ministry of Justice, 1st Floor, 1001 Douglas Street, Victoria, British Columbia.

4. In or about 1959, in response to requests by community groups for a public wharf in Horton Bay on Mayne Island, Canada requested and BC agreed to participate in the creation and operation of a public harbour by, amongst other things, reserving and granting Canada a water lot for a wharf, and securing and registering an easement and a right of way, and constructing and maintaining an access road for the purpose of providing public access from Horton Bay Road to the proposed wharf.

5. At all material times, the acquisition, construction, expansion, maintenance, operation and use of the Horton Bay Harbour has been and continues to be a joint enterprise between Canada and/or CRD and BC. The particulars of BC's participation, involvement and responsibilities with the Horton Bay Harbour include the following:

a. In or about September 1959, BC entered into an agreement with Francis Pratt, who at that time was the owner of the upland property adjacent to the Horton Bay Wharf ("Lot A"), whereby Mr. Pratt agreed to grant BC a 20 foot wide easement for a pathway from Horton Bay Road to the public float to be installed at Horton Bay (the "Easement");

b. In or about November 1959, BC constructed the Wharf Access Road pursuant to the Easement;

c. In or about August 1960, BC by a provincial Order in Council, reserved and set aside approximately 0.287 acres of provincial land covered by water in Horton Bay known as Lot 431, Cowichan District, for the use of Canada as a site for a public wharf, for so long as required for such purpose;

d. On or about September 26, 1960, BC registered an encumbrance against title of Lot A whereby Mr. Pratt granted BC, her heirs, assigns, agents, servants and workmen a free and uninterrupted right-of-way in perpetuity containing approximately .043 acres (the "Right of Way") for the purpose of constructing a footpath and other works incidental to the operation of wharfage facilities appurtenant to Lot A;

e. In or about 1974, BC reserved additional provincial land covered by water for use by Canada for the Horton Bay Wharf (the "Expanded Reservation"), and BC has renewed the Expanded Reservation from time to time thereafter;

f. At all material times, BC has expressly or implicitly permitted, invited, and encouraged members of the public to use the Wharf Access Road to access the Horton Bay Wharf from Horton Bay Road;

g. At all material times, BC has assumed responsibility for the construction and maintenance of the Wharf Access Road, expending public funds to do so.

6. At all material times, BC has expressly or implicitly permitted, invited and encouraged Canada and/or CRD to construct, expand, maintain and operate the Horton Bay Wharf.

7. At all material times, the use and operation of the Horton Bay Harbour as a public harbour facility has been dependent on BC's permission, consent and/or encouragement, as the Horton Bay Harbour could not operate as a public harbour if BC did not permit members of the public to use the Wharf Access Road to travel across the Right of Way to access the Horton Bay Wharf.

8. Further, any members of the public and any municipal, regional, provincial or federal officials and employees ("Public Servants") who have used the Wharf Access Road to travel across the Right of Way to access Horton Bay Wharf have done so with the express or implicit permission, invitation and/or encouragement of BC.

9. Due to its involvement in the acquisition, creation, construction, expansion, maintenance, operation and use of the Horton Bay Harbour, BC owed and continues to owe Canada and/or CRD a duty of care to carry out is responsibilities and involvement with due care and diligence, including securing all necessary permits, consents, licenses, easements and other authorizations that enable and provide for lawful operation and use of the Horton Bay Harbour.

10. BC breached its duty of care to Canada and/or CRD, by, amongst other things, failing to:

    a. secure, perfect and register on title of Lot A a right for the members of the public and Public Servants to access the Horton Bay Wharf from Horton Bay Road;
    b. secure, perfect and register on title of Lot A a right for Canada and CRD to interfere with any riparian right Lot A may have;
    c. ensure that the Horton Bay Harbour, its operation and/or use does not create or cause trespass, interference with riparian rights or nuisance to Lot A and the owners and occupiers of Lot A;
    d. provide for adequate or any parking for those using the Wharf Access Road to access the Horton Bay Wharf.

Part 2: RELIEF SOUGHT

1. A declaration that Canada and CRD are entitled to contribution and indemnity pursuant to s. 4 of the *Negligence Act,* [RSBC 1996] c. 33 to the extent of the degree in which BC is found by the Court to have been at fault for any liability Canada and/or CRD may be under to the plaintiff, for any amount that may be due from Canada and/or CRD to the plaintiff, including interest pursuant to the *Court Order Interest Act*, [RSBC 1996] c. 79, any costs Canada and/or CRD may be ordered to pay to the plaintiff, as well as for the amount of Canada's and CRD's own costs of defending this action and of the proceedings against BC.

2. Judgment for any amount that may be found due from Canada and/or CRD to the plaintiff, including interest pursuant to the *Court Order Interest Act,* [RSBC 1996] c. 79.

3. Judgment for the amount of any costs that Canada and/or CRD may be adjudged liable to pay to the plaintiff, and for the amount of Canada's and CRD's own costs of defending this action and of the proceedings against BC.

4. Post-judgment interest pursuant to the *Court Order Interest Act,* [RSBC 1996] c. 79.

5. Costs.

6. Such further and other relief as to this Court seems just.

Part 3: LEGAL BASIS

1. As a result of BC's participation, permission, invitation, and/or encouragement in and for the acquisition, construction, expansion, maintenance, operation and use of the Horton Bay Harbour, any nuisance, trespass or interference with riparian rights suffered by the plaintiff, which is denied, was caused or contributed to by BC.

2. Further, BC breached its duty of care to Canada and CRD, thereby causing and contributing to the plaintiff's injury and loss, which injury and loss is denied.

3. Therefore, in the event Canada and/or CRD are held liable to the plaintiff, Canada and CRD are entitled to contribution and indemnity pursuant to s. 4 of the *Negligence Act*, [RSBC 1996], c. 333 from BC to the degree in which BC is found by the Court to have been at fault for any liability Canada and/or CRD may be under to the plaintiff because BC's actions, omissions and/or negligence caused or were a contributing cause to the alleged nuisance, trespass and interference of riparian rights.

4. Rule 3-5(1) of the *Supreme Court Civil Rules*.

Address for service of claiming parties: Department of Justice Canada
900 – 840 Howe Street
Vancouver, BC V6Z 2S9
Attention: Marja K. Bulmer

Fax number address for service (if any): (604) 775-7557

E-mail address for service (if any): Not applicable

The address of the registry is: 850 Burdett Avenue, Victoria, BC, V8W 1B4.

Dated: January 7, 2014.

Signature of
☐ filing party ☒ lawyer for filing party(ies)
Jasvinder S. Basran,
Regional Director General
Per: Marja K. Bulmer
Department of Justice
British Columbia Regional Office

Rule 7-1(1) of the Supreme Court Civil Rules states:

(1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,

(a) prepare a list of documents in Form 22 that lists

(i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and

(ii) all other documents to which the party intends to refer at trial, and

(b) serve the list on all parties of record.

THIS THIRD PARTY NOTICE is prepared and served by Jasvinder S. Basran, Regional Director General, British Columbia Regional Office, Department of Justice (Canada), whose place of business and address for service is the Department of Justice, 900 - 840 Howe Street, Vancouver, British Columbia, V6Z 2S9, Telephone: (604) 666-8261, Facsimile: (604) 775-7557, Attention: Marja K. Bulmer.

Approved and ordered this 26th day of August, A.D. 19 60.

Administrator.

At the Executive Council Chamber, Victoria,

PRESENT:

The Honourable in the Chair.

Mr. Martin
Mr. Black
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.
Mr.

To His Honour
The Administrator in Council:

The undersigned has the honour to report:

THAT an application has been received from the Department of Public Works, Canada, for the reservation of certain foreshore and land covered by water situated at Horton Bay as the site for a wharf.

THAT the foreshore and land covered by water applied for has been surveyed at the expense of the Department of Public Works, Canada, as Lot 431, Cowichan District, containing 0.287 acres.

THAT the foreshore and land covered by water are not lawfully held by pre-emption, purchase, lease, Crown grant or under Timber Licence.

AND TO RECOMMEND THAT under the provisions of Section 93 of the Land Act, being Chapter 175, Revised Statutes of British Columbia, 1948, Lot 431, Cowichan District, be reserved and set apart for the use of the Department of Public Works, Canada, as the site for a wharf for so long as required for such purpose.

DATED this 25th day of Aug. A.D. 1960

Acting Minister of Lands and Forests

APPROVED this 25th day of Aug. A.D. 1960

Presiding Member of the Executive Council

File: 0227020

MEMO

Recommends that certain foreshore and land covered by water situated at Horton Bay, Mayne Island surveyed as Lot 431, Cowichan District, containing 0.287 acres, be reserved and set apart for the use of the Department of Public Works, Canada, as the site for a wharf for so long as required for such purpose.

REPLY MEMORANDUM OF ARGUMENT

Introduction

1. The submissions made by the respondents demonstrate the importance of granting leave to appeal in this case. At issue in this proposed appeal is whether the missing or incorrectly stated elements in a registered instrument are properly considered "unregistered" or "not registered" interests in land due to their absence from title. In this case, a private easement for limited construction purposes was registered, and the courts below have determined that the drafters of the Easement intended but failed to include language granting a public easement for all purposes. The applicant says that additional unstated interests in land are properly considered "unregistered" interests and should be subject to the rules governing unregistered interests set out in section 29 of British Columbia's *Land Title Act*. Section 29 reflects the "curtain principle" for British Columbia's Torrens system and provides that unless fraud is pled and proven, unregistered instruments do not affect subsequent purchasers of land.

2. The respondents say that missing or incorrectly stated elements in a registered instrument are interests in land that ought *not* to be considered "unregistered", and instead should be governed only by the common law rules of rectification for ordinary contractual documents. In this regard, the respondents seek to uphold the reasoning of the British Columbia Court of Appeal in paragraph 65 of the decision from which leave to appeal is sought. However, the response arguments reveal no principled basis for distinguishing between interests in land that do not appear on title because no document has been registered, and interests in land that do not appear on title because the documents that have been registered say something different than what was perhaps intended by their drafters. In both instances, the interests in land at issue are absent from the register.

3. If the Court of Appeal decision below stands, some interests in land that are absent from the register will be subject to s. 29 of the *Land Title Act* and affect subsequent owners only if fraud is pled and proven, and others will affect subsequent owners in much broader circumstances. This is a judicial finding that erodes the statutory scheme in an unprincipled manner, creating different results for buyers of land who are in substantively the same position in relation to the title of the land they have acquired.

Where Fraud is not Pled, Knowledge of the Subsequent Purchaser is Irrelevant

4. Notwithstanding that under section 29 of the *Land Title Act* (and its equivalents across the country) even "actual knowledge" of the terms of an unregistered interest is not sufficient to impose an unregistered interest on a subsequent purchaser of land, the respondents place great emphasis on the subjective recollection of the applicant's principal as to her state of mind when she considered buying the property in 1973, when she was in Germany. The reason the respondents emphasize this largely reflects the typical approach in advocacy of attempting to disparage the equities of the applicant's position, and that will be addressed in paragraphs 5-9 below. However, the respondents' submissions also highlight the procedural and evidentiary consequences of their position, and demonstrate why it is so important to straighten out the law in this area to avoid long, costly trials over historical documents that were negligently drafted and registered on title. The knowledge of the applicant's principal was irrelevant to the interpretation of the Easement and it ought to have been irrelevant to the claim for rectification because fraud was not pled.

5. In the proceedings before the trial court (with different counsel), the applicant's principal, Ms. Buchholz, was asked about what she remembered understanding when she read the Easement in 1973 before purchasing the Property. In 1973 she was still living in Germany, where she was born and raised. The Easement was in English and her first language is German. When asked about what she thought in 1973, Ms. Buchholz explained that she could not remember what she thought four decades prior. In extracts from her examination for discovery on October 21, 2013 that were later tendered as evidence in trial, she said this to questions 290, 309 and 373 (emphasis added):

> 290 Q. Do you remember receiving a document that described the right of way around 1973 before you entered into the sale agreement?
>
> A. Out of my memory now, I don't, but I'm sure I received it because I was fully aware that there was a right of way on it, and I got the wording of it.
>
> …
>
> 309 Q. [looking at the Easement] This is part of this document that we were just looking at, so I just wanted to ask you whether you have any recollection as of 1973 of actually reading this indenture?

A. As I said before, Ms. Bulmer, I don't remember in my head now that I looked at it and what I thought about it. But I'm sure I have looked at it.

…

373 Q. Okay. So we were also looking at that indenture related to the right of way before the break, and the indenture agreement had a September 1960 date on it. So was it your understanding in 1973, when you were contemplating purchasing this land, that this wharf that was in front of the property had been used by members of the public since 1960s?

A. I don't recall what I thought in 1973.[1]

6. At the trial in 2014, in examination in chief, Ms. Buchholz said this, first looking at a realtor's marketing document, and then the Easement:

Q. Do you have any recollection of reading that now [the realtor's document]?

A. I don't exactly remember when I received it and what I read, but I remember that at some point I received it, yes.

Q. And you see under the – if you look down at "anchorage", there's a—it says:

> An excellent, safe, protected anchorage in Horton bay plus a government wharf suitable for small yachts.

Do you see that? ...

...Q. What did you understand that to mean?

A. I don't remember what I understood in 1973.

...

Q. Did you read this document [referring to the Easement] before purchasing the land?

A. I don't recall having seen pages 1, 2, but that might just be the passing of time. I definitely recall seeing page 4.[2]

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[1] Affidavit of J. Fisher, Exhibit A

[2] Affidavit of J. Fisher, Exhibit B

7. In cross-examination at trial, her discovery evidence was put to her, including this passage:

> Q. This is part of this document that we were just looking at, so I just wanted to ask you whether you have any recollection as of 1973 of actually reading this indenture.
>
> A. As I said before Ms. Bulmer, I don't remember in my head now that I looked at it and what I thought about it. But I am sure I have looked at it. [3]

8. Notwithstanding those answers, questioning went on at length and some reconstructions of memory ensued, including that when she saw three photos[4] of the wharf she thought it was used by the Province, its workmen and fishermen.[5] Why the witness was permitted to be questioned about things she said she did not remember is unclear, but it occurred, and in this context, the notion that her credibility was called into question or that she "resiled" from anything is very unfair. She said she didn't remember and that was the only reasonable answer considering four decades had passed. Despite this, much was made at trial and on appeal by the respondents about what thoughts were in Ms. Buchholz's mind in 1973. However, not only was that evidence unreliable, it was not relevant. Purchasers are statutorily affixed with notice of the contents of charges against title as set out in the registered documents.[6] The documents say what they say. Subjective recollections of what a purchaser may have believed at the time of purchase are irrelevant to the interpretation of easements, mortgages and other charges, and are equally irrelevant to a claim of rectification unless fraud is pled.

9. Moreover, it is essential to note that even taking the evidence at its highest in favour of the respondents' position, what Ms. Buchholz is said to have admitted in discovery was not in any way comprehensive of what the terms of the alleged Easement were claimed to be for rectification. For example, the questioning did not ask who Ms. Buchholz understood to comprise the "public", whether the purposes for which the public was permitted to use the

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3 *Supra*

4 Affidavit of J. Fisher, Exhibit C; referenced in Trial Reasons para 20

5 Trial Reasons, para 87

Easement were limited in any respect, or for how long she understood the Easement for public use would last. In other words, basic terms of the Easement that have now been imposed by way of rectification were not established in evidence as having been in the understanding of the applicant's principal over four decades prior to her examination for discovery. Nevertheless, the respondents argue that rectification was appropriate because in the rectified instrument, the applicant has "received no less" than what its principal believed the terms of the Easement were at the time of purchase. That is not an accurate submission, and was not established in the evidence. Had rectification been denied, the applicant would not have received any "windfall", but rather would have received the property encumbered as its title showed in 1973, which was presumptively reflected in the price offered and paid for it.[7]

10. All of that evidence is in any event, irrelevant to the analysis that ought to govern these types of cases when there has been no pleading of fraud. Section 29 ought to be a complete answer and evidence of subjective belief and recollection should form no part of the record in a case like this, or should be disregarded in the analysis if admitted for other reasons.

The Respondents' Proposal that Subjective Knowledge Ought to Govern

11. The respondents argue that the ordinary rules of common law rectification are appropriately employed in the rectification of instruments registered on title at the land title offices in British Columbia. Documents registered against land titles attach themselves to the properties and bind subsequent purchasers who will likely know nothing of the formation or drafting of the registered documents. The respondents acknowledge these subsequent purchasers are "third parties" to the original instrument, but say that such third parties can be

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6 *Land Title Act*, section 27(1)

7 The applicant notes that contrary to Canada and the CRD's suggestion that there was evidence that some properties subdivided and sold by the applicant may have benefited from moorage in Horton Bay, moorage was not dependent on the wharf as boats are also moored in the bay to buoys. Moreover, the appraisal evidence led by the applicant at trial was that as of 2007, the footpath and wharf diminished the value of the applicant's property by $978,000. The rectification clearly caused prejudice to the applicant's interest in the land.

subject to rectification so long as they suffer no prejudice from the corrections sought to be made.

12. In this regard, the respondents place great emphasis on the notion that rectification is appropriate where the purchaser has "relied" on the instrument registered against title, writing, "if a purchaser reads a flawed easement and innocently relies on the flaw when deciding to purchase property, this will preclude a subsequent rectification to his or her detriment".[8] The difficulty with this scheme arises when the question is asked as to what "reliance" to the purchaser's detriment actually means? Section 27(1) of the *Land Title Act* provides that every person dealing with land has notice of the contents of documents registered on its title, so how can it be determined whether there was reliance or not? Must the purchaser have acted in some way differently to trigger reliance? What if the purchaser's subjective evidence is that they didn't read the instrument carefully, or don't remember if they did – have they "relied" on it in completing the purchase? Moreover, the price offered and paid for a property presumptively reflects the burdens of the charges registered on title. In that sense, every purchaser has relied on the charges registered against title when the purchaser price is paid and suffers a detriment if the charge is rectified to something more onerous because the change diminishes the value of the property. As a result, the concept of "reliance" by a purchaser of land is a vague and uncertain benchmark for determining when rectification against a subsequent purchaser is appropriate.

13. The respondents' position highlights the important difference between common law rectification and the proper functioning of the *Land Title Act*. The Torrens legislation replaces the laws of equity with a stricter regime, where "prejudice" is not a sufficient foundation for the court's intervention; the foundation for relief from what the register says is fraud. The policy rationale for allowing only fraud to open the door for unregistered instruments is to achieve the desired certainty and stability of the land title register. While in isolated cases the trial court may wish to see a different result than permitted by the operation of the Torrens statutes, those anomalies are to be tolerated in furtherance of the larger systemic and economic benefits of having a land title register that can be relied upon by *bona*

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[8] See Canada and the CRD's memorandum of argument, para 5

fide purchasers for value, like the applicant.[9] Justice Anglin's words that are quoted in paragraph 43 of the applicant's memorandum of argument are a complete answer to the respondents' submissions on this point. That the *Land Title Act* demands care when executing documents that are to be registered against title is not an unreasonable imposition when the objective is to create a register of titles that is accurate and reliable for people dealing with land.

14. Canada and the CRD's *in terrorem* submission that unscrupulous landowners will "scour their titles" for mistakes and take advantage of them is internally inconsistent given that Canada and the CRD submit that rectification can only be granted if a purchaser believed in the corrected terms of the instrument at the time of purchase. Surely these unscrupulous owners Canada and the CRD are concerned about will be unlikely to tell the truth about what they knew or thought at the time of purchase, so rectification will not succeed in any event.

The Respondents' Attempts to Distinguish Between the Conflicting Authorities

15. The respondents purport to distinguish the conflicting authorities cited by the applicant by suggesting that the interests in land being asserted were either what Canada and the CRD characterize as "true unregistered interests"[10] or were made by a person Canada and the CRD characterize as "someone who innocently relied on a mistake in title"[11]. These purported points of distinction are simply embedded with and engage the very questions in issue in this proposed appeal.

16. The applicant's case is that there is no principled basis to distinguish between an interest in land that is unregistered in the sense that an instrument was not registered at all (either by oversight or intention), and an interest that is absent because the instrument that was registered erroneously failed to state the interest properly or at all. The appellant's point is there is no such thing as a "true" unregistered interest and one that is "not true": if the interest is absent from the document on title, it is not registered.

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9 The applicant was acknowledged to be a *bona fide* purchaser for value by the Trial Judge at paragraph 122 of the Trial Reasons

10 See Canada and the CRD's memorandum of argument at para 43

11 Supra, para 45

17. The applicant says further that if section 29 of the *Land Title Act* applies, there is no distinction to be made between so-called "innocent" reliance and non-innocent reliance, just as there is no difference in legal effect between a purchaser with no notice, actual notice or constructive notice. Under section 29, as with the similar legislation across the country, the relevant distinction is between whether fraud has been committed by the purchaser or not. That is the only distinction that matters. Nowhere in the respondents' arguments do they engage with the question of fraud not being pled or proven in this case.

18. The respondents attempt to distinguish the British Columbia Court of Appeal's reasoning in *Hawkes Estate v. Silver Campsites Ltd.* (1991), 55 B.C.L.R. (2d) 145; 1991 CanLII 5718 (C.A.) on the basis that in that case the party seeking to rectify a title was the subsequent owner of an adjacent property in a boundary dispute, but there is no principled basis to make such a distinction. Although on the other side of the rectification claim, the applicant here is just as much a "stranger" to the Easement as the rectification claimant was in *Hawkes* whose boundary was being defined by the wording used on the title of its neighbour. Neither the rectification claimant in *Hawkes*, nor the applicant here had any role in, or knowledge of the drafting of the instrument for which rectification was sought and in both cases, the interests in land that they held would be substantively affected by the proposed correction.

Canada's Proposed Test is Inconsistent with the Registrar's Power of Rectification

19. Canada and the CRD are incorrect in comparing the common law test of "prejudice" with the statutory concept of prejudice to be applied by the Registrar of Land Titles under section 383 of the *Land Title Act*. That section allows a party to apply to correct a registered document where no prejudice will occur to rights acquired in good faith and for value. The language of that section and the jurisprudence is clear that "prejudice" in that context is not whether the property owner subjectively believed at the time of purchase that the registered deed said one thing or another. Prejudice in section 383 means whether the proposed correction will substantively derogate from or change the owner's interests in land from the terms of the documents registered against title.[12] If there is a derogation of the owner's interests (as would have been the case here with the terms of the Easement being widened

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[12] In the Chief Justice's words in *Canadian Pacific Railway Co. v. Turta*, [1954] S.C.R 427, "the rights conferred for value are not in any event to be invaded" by the Registrar.

from agents and workmen to the public at large, giving rise to greater use of the footpath and wider interference with the applicant's riparian rights), then the Registrar has no jurisdiction to rectify.

20. Accordingly, contrary to Canada and the CRD's argument in paragraphs 53-55, the Registrar's regime allows correction of irregularities, not common law rectification. It does not engage with unregistered interests in land because if the proposed correction involves giving effect to new or additional interests in land, then it will necessarily detract from other interests and the Registar is without jurisdiction to cause such prejudice.

Delay in Rectification Lies with the Province

21. The respondents, particularly the Province, make reference to the passage of time and assert that the applicant did not raise its concerns over the Easement and wharf for a number of years after purchasing the property. There are two points to make in reply. First, the applicant's principal remained in Germany after purchasing the property in 1973 and there was no development of the property until three years after Ms. Buchholz moved to Mayne Island in 1986 and began farming. The applicant was in discussions with Canada about the removal of the wharf as early as 1988 and refused consent to the interference with riparian rights when asked by Canada in 1990. Accordingly, the passage of time before the applicant disputed the lawfulness of the wharf and Easement, considered in context, was not significant.

22. Second, the Province, as the party seeking rectification, bore the onus of applying for and obtaining it, so it is in fact the Province that delayed for 53 years before bringing, by way of its counterclaim (which avoided the effect of otherwise applicable limitation periods), a plea of rectification of the Easement. This is precisely the mischief that section 29 prevents, but that the positions of the respondents and the Court of Appeal will foster: long trials over subjective recollections of events from decades ago.

***Gill v. Bucholtz* has no Relevance**

23. The Province suggests that the proposed appeal concerns the application of settled law but cites no cases addressing the issue. Instead, the Province cites the case of *Gill v. Bucholtz*, 2009 BCCA 137, which has nothing to do with the issue at bar. *Gill* considered and applied section 25.1 of the *Land Title Act* to hold that an instrument that is registered against title by

fraud is "void" and therefore of no effect. The case at bar does not concern a void instrument nor section 25.1.

No Distinction Shown with the other Provincial Legislation Cited by the Applicant

24. The Province asserts in its first paragraph of its memorandum of argument that the question at issue in the case at bar is unique to British Columbia's legislation and does not engage the other Torrens-based systems across Canada, but then fails to show any relevant distinction. Instead, the Province inexplicably and without authority suggests the term "interest", which is defined in the Torrens statutes cited by the applicant as "any estate or interest in land", does not include easements, mortgages and other such charges routinely registered against title. Each of the other provincial statutes cited by the applicant has enacted the "curtain" principle, protecting buyers from interests in land that have not been expressly registered on title. The Court of Appeal's decision in this case affects all of them as to the meaning of "unregistered" or "not registered" interests in land where an incomplete or defective instrument is asserted against a subsequent owner who had no part in its drafting. All of the Torrens statutes cited provide that absent fraud, an unregistered interest is not enforceable and that actual notice to the subsequent purchaser of the terms of the unregistered interest is not fraud. The question here is whether the interest that is absent from an instrument and the potential subject of a rectification claim is an unregistered interest. This is a matter of national importance and precedent, and its resolution affects not just cases brought before the courts, but even more importantly and influentially, the consistency of advice that lawyers in the Torrens jurisdictions across the country give to their clients about the significance and stability of interests registered against title to land.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of February, 2018.

FARRIS, VAUGHAN, WILLS & MURPHY LLP
Per:

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Sean Hern, Counsel for the Applicant, Arbutus Bay Estates Ltd.

PART VI – TABLE OF AUTHORITIES

AUTHORITY	PARAGRAPH
Hawkes Estate v. Silver Campsites Ltd. (1991), 55 B.C.L.R. (2d) 145; 1991 CanLII 5718 (C.A.)	18
Canadian Pacific Railway Co. v. Turta, [1954] S.C.R 427,	19
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ADDITIONAL STATUTORY PROVISIONS CITED

(i.e. not reproduced in Part VII of the applicant's initial memorandum of argument)

From British Columbia's *Land Title Act*, RSBC 1996, c. 250

Void instruments — interest acquired or not acquired

25.1 (1) Subject to this section, a person who purports to acquire land or an estate or interest in land by registration of a void instrument does not acquire any estate or interest in the land on registration of the instrument.

(2) Even though an instrument purporting to transfer a fee simple estate is void, a transferee who

(a) is named in the instrument, and

(b) in good faith and for valuable consideration, purports to acquire the estate,

is deemed to have acquired that estate on registration of that instrument.

(3) Even though a registered instrument purporting to transfer a fee simple estate is void, a transferee who

(a) is named in the instrument,

(b) is, on the date that this section comes into force, the registered owner of the estate, and

(c) in good faith and for valuable consideration, purported to acquire the estate,

is deemed to have acquired that estate on registration of that instrument.

Registrar to cancel or correct instruments, etc.

383 (1) If it appears to the registrar that

(a) an instrument has been issued in error or contains a misdescription, or

(b) an endorsement has been made or omitted in error on a register or instrument,

whether the instrument is in the registrar's custody or has been produced to the registrar under summons, the registrar may, so far as practicable, without prejudicing rights acquired in good faith and for value,

(c) cancel the registration, instrument or endorsement, or

(d) correct the error in or supply the entry omitted on the register or instrument or an endorsement made on it, or in a copy of an instrument made in or issued from the land title office.

(2) In correcting an error the registrar must not erase or render illegible the original words.

(3) The registrar must affix the registrar's signature to the correction and the date on which the correction was made or the endorsement supplied.

(4) Subsections (2) and (3) do not apply to a correction made to records stored by electronic means.

(5) A register or instrument so corrected, and an endorsement so corrected or supplied, has validity and effect as if the error had not been made or the entry omitted.

(6) A cancellation of an instrument or endorsement made under this section has validity and effect from the time the instrument was issued or the endorsement was made.