

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *British Columbia v. 1084204 B.C. Ltd.*,  
2025 BCCA 110

Date: 20250404  
Docket: CA49548

Between:

**His Majesty the King in Right of the Province of  
British Columbia**

Appellant  
(Respondent)

And

**1084204 B.C. Ltd.**

Respondent  
(Appellant)

Before: The Honourable Mr. Justice Abrioux  
The Honourable Madam Justice Horsman  
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated  
November 17, 2023 (*1084204 B.C. Ltd. v. His Majesty the King in Right of  
British Columbia*, 2023 BCSC 2013, Vancouver Docket S225171).

Counsel for the Appellant:

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Place and Date of Hearing:

Vancouver, British Columbia  
February 6, 2025

Place and Date of Judgment:

Vancouver, British Columbia  
April 4, 2025

**Written Reasons by:**

The Honourable Madam Justice Horsman

**Concurred in by:**

The Honourable Mr. Justice Abrioux

The Honourable Justice Fleming

**Summary:**

*The Deputy Minister of Finance found that the respondent company was liable for payment of additional transfer tax under the Property Transfer Tax Act. This finding was based on her conclusion that the company was both a foreign entity and a taxable trustee under the Act. On appeal, the chambers judge accepted the respondent's argument that it held legal title to the property as an agent and therefore its principal—who was a Canadian citizen—was the true transferee and no additional transfer tax was payable. Held: Appeal allowed. The chambers judge erred in law by finding that an agent who acquires legal title on behalf of a principal is not a transferee under the Act. Liability for property purchase tax, including additional transfer tax, is imposed at the time of the registration of the transfer of legal title, without regard to beneficial ownership.*

**Reasons for Judgment of the Honourable Madam Justice Horsman:**

[1] The respondent, 1084204 B.C. Ltd. (“108”), successfully appealed a decision of the Deputy Minister of Finance confirming 108’s liability for payment of an additional transfer tax (“ATT”) on property under the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 [*PTT Act*]. The ATT applies when the transferee is a “foreign entity”, a “taxable trustee”, or both: *PTT Act*, s. 2.02(2)(b). 108 was controlled by Hans Oeri. Mr. Oeri was neither a Canadian citizen nor a permanent resident of Canada on the date the property transfer was registered. As such, 108 was a “foreign entity” within the meaning of the *PTT Act*.

[2] The chambers judge found that 108 was not liable for ATT because it held legal title to the property in question as an agent for Mr. Oeri’s common law spouse, who was a Canadian citizen. The judge reasoned that because 108 was an agent, it was not the transferee. The chambers judge also found that 108 was not a “taxable trustee” under the *PTT Act* because 108 acted as an agent rather than a trustee. On appeal, the appellant, His Majesty the King in right of the Province of British Columbia (the “Province”), says the judge erred in law in reaching both of these conclusions.

[3] For the reasons that follow, I would allow the Province’s appeal. The chambers judge erred in law by finding that an agent who acquires legal title on behalf of a principal is not a transferee under the *PTT Act*. This conclusion is

contrary to binding authority from this Court holding that liability for property purchase tax is imposed at the time of the registration of the transfer of the legal estate, without regard to beneficial ownership. This error is sufficient to dispose of the appeal in the Province's favour.

**The statutory scheme**

[4] Section 2 of the *PTT Act* imposes a general property purchase tax on the registration of a “taxable transaction” at a land title office. The definition of “taxable transaction” in s. 1 of the Act provides, in relevant terms, as follows:

“**taxable transaction**” means a transaction

- (a) purporting to transfer or grant, by any method including a disposition, an order of a court, including an order absolute of foreclosure, or by the operation of any enactment or law,
  - (i) an estate in fee simple referred to in section 23(2) of the *Land Title Act*, ...

[5] Section 23(2) of the *Land Title Act*, R.S.B.C. 1996, c. 250, creates a statutory presumption of indefeasible title. It states that indefeasible title “is conclusive evidence at law and equity” that the registered owner “is indefeasibly entitled to an estate in fee simple to the land described in the indefeasible title”, subject to certain exceptions. The presumption of indefeasible title may be rebutted where there is evidence that someone other than the registered owner has a beneficial interest in the land, such as through a trust agreement: *Suen v. Suen*, 2013 BCCA 313 at para. 34.

[6] “Transferee” is defined in s. 1 of the *PPT Act* as “a person to whom land is transferred under a taxable transaction”.

[7] Since 2016, the *PTT Act* has also imposed an ATT at a rate specified in the legislation on transactions involving residential properties in specified areas. Pursuant to s. 2.02(2)(b) of the *PTT Act*, the ATT applies to a taxable transaction if “any transferee is a foreign entity or taxable trustee, or both” (emphasis added). Where the ATT applies, the transferee must pay the ATT to the government at the time of an application to register a taxable transaction at a land title office: s. 2.02(3).

[8] The following definitions in s. 2.01 of the *PTT Act* are relevant to the question of 108's liability for ATT:

- a) a "foreign entity" is defined as "a foreign national or a foreign corporation";
- b) the definition of a "foreign corporation" includes a corporation that is incorporated in Canada and is controlled by a foreign national;
- c) "foreign national" is defined as an individual who is a foreign national under s. 2(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27—that is, a person who is not a Canadian citizen or permanent resident; and
- d) the definition of "taxable trustee" in relation to a taxable transaction includes "a trustee of a trust in respect of which...any trustee is a foreign entity".

[9] Based on these provisions, the Province says that 108 is liable to pay ATT on two independent bases: (1) as a foreign entity who is the transferee; or (2) as a taxable trustee.

[10] Section 2.02(4) of the *PTT Act* provides that the ATT rate is 15 percent unless a different rate is prescribed by regulation. Effective February 21, 2018, the *Property Transfer Tax Regulation*, B.C. Reg. 74/88, s. 17.02, prescribes a 20 percent tax rate for the ATT. This is significantly higher than the rate of general property tax which is between one and three percent depending on the value of the property: *PTT Act*, ss. 2, 3(1).

[11] A taxpayer who disagrees with an assessment may appeal to the Minister of Finance under s. 19 of the *PTT Act*. A decision of the Minister may be appealed to the Supreme Court of British Columbia by way of a petition proceeding under s. 21. Pursuant to s. 21(4.1), an appeal to the court "is a new hearing that is not limited to the evidence and issues that were before the minister".

**Factual background**

[12] The basic facts are not in dispute.

**The assessment of ATT**

[13] 108 is a company incorporated in British Columbia. Mr. Oeri is the sole shareholder, officer, and director of 108. At the material time, Mr. Oeri was not a citizen or permanent resident of Canada. Mr. Oeri was therefore a “foreign national” who controlled 108 under the *PTT Act*, and 108 was a “foreign entity”.

[14] On May 16, 2019, 108 signed a Contract of Purchase and Sale for the purchase of a residential property in Saanich, British Columbia (the “Property”) for the price of \$1,659,000. Saanich is within a specified area where the ATT applies.

[15] On May 30, 2019, the transfer of the fee simple estate in the Property was registered in the Land Title Office in the name of 108. At the time of the registration, 108 filed a property transfer tax return declaring that basic property transfer tax of \$31,198 was payable. No ATT was declared payable. The property transfer tax return stated that 108 purchased the Property as trustee for Yi Sui. Ms. Sui is a permanent resident of Canada, and Mr. Oeri’s common law spouse.

[16] On October 28, 2019, the administrator under the *PTT Act* issued a Notice of Assessment to 108, indicating that 108 was liable for ATT of \$331,980 in relation to the transfer of the Property (the “Assessment”). The stated basis for the Assessment was that 108 was a taxable trustee.

**108’s appeal to the Minister of Finance**

[17] On November 15, 2019, 108 appealed the Assessment to the Minister of Finance under s. 19 of the *PTT Act*, arguing that it had purchased the Property as agent for Ms. Sui and not as trustee. On this basis, 108 argued that the true transferee was Ms. Sui rather than 108, and that 108 is not a taxable trustee.

[18] In support of its appeal, 108 relied on a “Declaration of Bare Trust and Agency Agreement” (the “Agreement”), dated May 29, 2019, that was signed by

Mr. Oeri on behalf of 108 and by Ms. Sui. The Agreement stated that 108 held title to the Property as “nominee, agent, and bare trustee” for Ms. Sui. The Agreement referred to Ms. Sui as the “Owner”, and described her as the “principal and beneficial owner”. 108 contended that under the Agreement, 108 acted as agent for Ms. Sui in relation to the purchase and ownership of the Property and, therefore, 108 was not a taxable trustee. 108 further argued that Ms. Sui was the transferee rather than 108.

[19] In a decision dated March 29, 2022, the Deputy Minister of Finance affirmed the Assessment. The Deputy Minister referenced 108’s admission that it is a foreign entity under the *PTT Act*. She found that “[o]n this basis alone, the additional tax applies” (emphasis added). However, she still went on to consider 108’s argument that it was not a taxable trustee because its role under the Agreement was limited to that of an agent. She found that the characterization of 108 as an “agent” of Ms. Sui did not mean that 108 was not also a bare trustee holding legal title to the Property on Ms. Sui’s behalf. The Deputy Minister concluded that the interest held by a bare trustee is an interest held as a “trustee of a trust” that falls within the meaning of the definition of “taxable trustee” in s. 2.01 of the *PTT Act*. Therefore, she found that 108 was a taxable trustee.

[20] The Deputy Minister separately addressed 108’s argument that Mr. Oeri intended to gift the Property to Ms. Sui. She found that, based on the available evidence, the intent of the parties was to create a trust and not a gift. Further, the Deputy Minister noted that under the Agreement it was 108 that held legal title to the Property. She found this had two implications: (1) the separation of legal and beneficial ownership created a trust; and (2) 108 is the legal owner of the Property, and is a foreign entity, which was sufficient to impose the ATT tax.

[21] On June 24, 2022, 108 filed a petition to commence an appeal to the Supreme Court of British Columbia pursuant to s. 21 of the *PTT Act*.

**The chambers judgment**

[22] In reasons for judgment indexed at 2023 BCSC 2013 (“Reasons”), the chambers judge allowed 108’s appeal, and set aside the Assessment.

[23] The chambers judge identified the issue on appeal as whether 108 was liable for the ATT, as assessed. She stated that this issue:

[18] ...will turn on whether 108, either on its own or as trustee, was the transferee of the property. If it was, 108 is liable for the ATT. If 108 was agent for Ms. Sui, then the ATT does not apply.

[Emphasis added.]

[24] The chambers judge reasoned that the Deputy Minister had based her decision on the following facts or assumptions: (1) that Mr. Oeri's intent was to create a trust and not a gift, as the property would have been put in Ms. Sui's name if it was a gift; and (2) that 108 is a taxable trustee. The chambers judge disagreed with the first assumption because she found the Deputy Minister failed to consider the evidence of Mr. Oeri and Ms. Sui, which demonstrated that Mr. Oeri gifted the Property to Ms. Sui. She found that the second assumption disregarded the impact of the Agreement.

[25] The chambers judge held that the Agreement gave Ms. Sui complete control over 108. She found that 108 was "simply the holder of the property for Ms. Sui" and was "under her control": Reasons at para. 30. Therefore, she concluded there was no certainty of intention to create a trust. Instead, she found that the Agreement "created an agency relationship which does not attract ATT": at para. 34.

[26] The chambers judge also held, in the alternative, that even if the Agreement created a bare trust as well as an agency relationship, the principles of agency prevailed. She cited the decision of the Supreme Court of Canada in *Canada (Attorney General) v. British Columbia Investment Management Corp.*, 2019 SCC 63, in support of the proposition that a bare trust—where a trustee's only obligation is to convey property on demand—is generally ignored for tax purposes.

[27] In conclusion, the chambers judge held that, as 108 purchased the Property as Ms. Sui's agent, 108 was not the transferee under a taxable transaction and the ATT was inapplicable. Alternatively, the chambers judge held that, in the event that there was both a bare trust and an agency relationship between 108 and Ms. Sui,

the bare trust should be ignored for tax purposes and the ATT was therefore still inapplicable.

[28] In the result, the chambers judge allowed the appeal, and vacated the assessment of ATT.

**On appeal**

[29] The Province alleges that the chambers judge erred by:

- (a) finding that 108, despite being a foreign entity, was not liable for the ATT because an agent cannot be a “transferee” under the *PTT Act*;
- (b) finding that 108 was not a “taxable trustee” because:
  - (i) there was no trust relationship; or
  - (ii) any bare trust should be ignored for the purpose of the *PTT Act*.

[30] The Province says that the appeal can be resolved on the basis of the first alleged error alone. In that event, it would not be necessary to address the legal errors related to 108’s status as a taxable trustee, although the Province says that the Court’s guidance on these issues would be of assistance.

[31] The parties agree that the usual appellate standard of review principles apply on this appeal. To the extent that the appeal raises questions of law, the applicable standard of review is correctness. For findings of fact and mixed fact and law, the standard is palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33 at paras. 8, 25, 36.

## Analysis

### **Issue 1: Did the chambers judge err in finding 108 was not liable for the ATT because it was not the transferee?**

#### ***The Province's submissions***

[32] The Province submits that the chambers judge's analysis of whether the Agreement created a trust or an agency was irrelevant to 108's liability for ATT as a "foreign entity". The Province argues that a person to whom legal title is transferred is a "transferee" under the *PTT Act*, and a transferee is liable to pay ATT if it is a foreign entity, regardless of whether they are acting as a trustee, an agent, or both. The Province relies on case authority, including decisions of this Court, standing for the proposition that property purchase tax is intended to tax changes in the registration of legal title, and that beneficial ownership is not relevant to the application of the tax.

[33] The Province first cites *Shon Yee Benevolent Assn. of Canada v. British Columbia*, 55 B.C.L.R. (2d) 370, (*sub nom. R. v. Shon Yee Benevolent Association of Canada*) 1991 CanLII 2291 (S.C.) [*Shon Yee*], which addressed the question of whether property transfer tax was payable on the transfer of legal title from a trustee back to the beneficial owner. The taxpayer argued that this transfer did not meet the definition of a "taxable transaction" under the *Property Purchase Tax Act*, S.B.C. 1987, c. 15 (as it was then called), because the trustee did not own the land in fee simple, as that concept was understood at common law. Justice Huddart, as she then was, rejected this argument. She proceeded from the premise that the trustee, as bare legal owner, did not hold an estate in fee simple at common law. However, Justice Huddart found it did not necessarily follow that the transaction was not taxable under the *Property Purchase Tax Act*. She stated:

[29] When the legislature used the words "an estate in fee simple referred to in s. 23(1) [now s. 23(2)] of the *Land Title Act*," I do not think it intended to limit the tax to transfers of unrestricted interests in fee simple as defined at common law. The legislature meant that transfers of the estate or interest presumed to be in fee simple [were] taxable, unless the transfer was exempted from the tax by s. 5.

[30] ...Thus I conclude that the registered interest of [the trustee], although it falls short of an interest in fee simple at common law, is within the definition of “an estate in fee simple referred to in s. 23(1) of the *Land Title Act*.”

[Emphasis added.]

[34] Although Justice Huddart found that the transfer of legal title was subject to property purchase tax, she further held that the “fair market value” of the property had to be calculated subject to the trust. As the trustee, immediately prior to the transfer, was a bare trustee with no interest in the property other than the obligation to reconvey it to the beneficiary, Justice Huddart concluded that the tax should be assessed at “nil”: at para. 37.

[35] *Shon Yee* was followed by this Court in *Simkin v. British Columbia*, 3 B.C.L.R. (3d) 222, 1995 CanLII 248 (C.A.) [*Simkin*], which similarly involved the question of whether property purchase tax was payable on the transfer of bare legal title from a trustee to a beneficiary. Applying the reasoning in *Shon Yee*, the Court in *Simkin* concluded that while the transfer was a taxable transaction, the tax payable was zero.

[36] In response to the *Shon Yee* decision, the Legislature enacted s. 1(3) of the *Property Purchase Tax Act* [now s. 1(3) of the *PTT Act*]. Section 1(3) provides that for the purpose of calculating tax payable under the Act, the registered owner “is deemed to be the legal and beneficial owner of a fee simple interest in the land, even if the person holds the land in trust”.

[37] Following the enactment of s. 1(3), this Court in *Diligenti v. HMTQ*, 2001 BCCA 640, dismissed an attempt by a taxpayer to avoid tax on a transfer of legal title where beneficial ownership had not changed. The chambers judge had held that the payment of property purchase tax in these circumstances would constitute “double taxation” because the taxpayer was at all times the beneficial owner of the property: *Diligenti* at para. 11. Justice Huddart, writing for this Court, expressed disagreement with this analysis, stating:

[12] I am persuaded beneficial ownership is not relevant under this taxing statute, whose scheme provides that every transfer of a legal interest in land

is taxable unless exempt. Moreover, the method the [taxpayer] chose to accomplish the sale of part of Lot 1 precludes her registration of a transfer from coming within section 5(2)(e). These conclusions flow naturally in my view from an ordinary reading of the relevant statutory provisions...

[...]

[14] The first question is whether the [taxpayer's] application on 7 October 1994 for registration of the transfer from the Buchs to herself was an application for registration of a taxable transaction under section 2(1). The document purported to transfer the fee simple to Lot B. That brings the transaction within the definition in section 1 of the [Property Purchase Tax Act] and thus within section 2(1), regardless of any equities as between the parties to the transaction.

[Emphasis added.]

[38] The Court in *Diligenti* also rejected the taxpayer's argument that even if property purchase tax was payable, it should be assessed at zero because of the limited nature of the interest held by the transferor. The Court held that such an argument was foreclosed by s. 1(3) of the *Act*, which deemed the registered owner to be the legal and beneficial owner of a fee simple interest in land.

[39] The Province submits that in light of these authorities, there can be no question that 108 must pay the ATT as a foreign entity who is a transferee applying to register the transfer of "an estate in fee simple referred to in section 23(2) of the *Land Title Act*": *PTT Act*, ss. 1(1), 2.02(3). Relying on *Diligenti*, the Province says that it is "well settled" that transfers of legal interests always attract tax under the *PTT Act* if they are not exempt, and that beneficial ownership is irrelevant: *Diligenti* at paras. 2, 12. Thus, it does not matter whether 108 acted as an agent, or trustee, or both because it is the registration of the transfer of legal title that triggers the tax. The Province says that the chambers judge cited no authority in support of the proposition that "if 108 was agent for Ms. Sui, then the ATT does not apply": Reasons at para. 18. Further, the Province argues, this proposition runs contrary to well settled law.

[40] The Province says that the appeal can be disposed of on this basis alone.

**108's response**

[41] In its factum on appeal, the respondent 108 submits that the “central finding” of the chambers judge—that 108 acquired the Property’s fee simple solely as Ms. Sui’s agent—is a finding of fact or mixed fact and law to which deference is owed. 108 says that that the Province has not demonstrated a palpable or overriding error that would justify appellate intervention.

[42] Furthermore, 108 argues that the Province is wrong to suggest that 108’s status as agent is irrelevant to its liability for tax. 108 says that it is the undertaking of the “taxable transaction”, and not the registration of title, that is the taxable event. Section 1(1) of the *PTT Act* defines the “transferee” as the person who receives the transfer of “land” under a taxable transaction. The land referenced in the definition of “taxable transaction” is “an estate in fee simple referred to in section 23(2) of the *Land Title Act*”: *PTT Act*, s. 1(1). 108 notes that in this case, the uncontradicted evidence is that 108 held title to the Property on behalf of Ms. Sui as her agent. Accordingly, the presumption of indefeasible title in s. 23(2) of the *Land Title Act* was rebutted, and Ms. Sui is the true owner of the legal and equitable estate. 108 says the same result would follow if 108 was a trustee because at common law a bare or simple trustee takes no interest in the land. Therefore, Ms. Sui is entitled not only to the equitable freehold estate in fee simple but also to the legal estate or title.

[43] 108 maintains, accordingly, that the chambers judge correctly held that Ms. Sui rather than 108 was the “transferee” because “based on the underlying equities, it was she rather than 108 who had received the estate in fee simple”.

[44] In oral submissions in the course of the appeal hearing, counsel for 108 further argued that if a different result was mandated by the cases cited by the Province, then this Court should decline to follow them. 108’s submission, as I understand it, is that these cases did not consider the rebuttable nature of the presumption of indefeasible title in s. 23(2) of the *Land Title Act*, and that this provides a basis for this Court to depart from them.

### Discussion

[45] As a starting point, I do not agree with 108's submission that the Province's appeal challenges findings of fact or mixed fact and law by the trial judge. Rather, the Province's position is that even if one accepts the chambers judge's characterization of the relationship between 108 and Ms. Sui as one of agent and principal, her conclusions cannot stand in light of the relevant provisions of the *PTT Act*, and the case law interpreting the provision. The appeal therefore raises issues of law that are reviewable on a standard of correctness.

[46] The first issue raised by the Province is easily decided by the application of the principles set out in the cases cited by the Province, including the decisions of this Court in *Simkin* and *Diligenti*. These cases establish that, subject to statutory exemptions, property transfer tax is payable by the person to whom the legal estate is transferred (the "transferee"), regardless of whether another person has beneficial ownership. 108's argument that Ms. Sui was the true transferee in this case "based on the underlying equities" is directly contrary to the holding in *Diligenti* that the transfer of the legal estate triggers the property purchase tax "regardless of any equities": *Diligenti* at para. 14.

[47] I note, parenthetically, that 108's argument that it is not the transferee is also inconsistent with its acknowledgment in its property transfer tax return that it owed general property transfer tax. If, as 108 now maintains, Ms. Sui was the transferee, then 108 should not have owed either general property transfer tax or the ATT.

[48] 108's argument that common law definitions of fee simple ownership ought to govern in interpreting the scope of the property purchase tax under the *PTT Act* was directly addressed, and rejected, in *Shon Yee*. As I have reviewed, in *Shon Yee*, Justice Huddart concluded that the legislative intent was to capture the transfer of an estate that is presumed to be in fee simple under what is now s. 23(2) of the *Land Title Act*, and not to limit the tax to transfers of unrestricted interests in fee simple as defined at common law. Thus, in *Shon Yee* the responsibility to pay the property transfer tax arose on the transfer of bare legal title to the taxpayer, even though

there was no change in beneficial ownership. This reasoning was adopted and applied in *Simkin*. By the time of the subsequent decision of this Court in *Diligenti*, the principle that a transfer of a legal interest, unless exempted, always attracts tax under the *PTT Act* was “well settled”: *Diligenti* at para. 2.

[49] I also see no basis upon which this Court could simply decline to follow *Simkin* and *Diligenti*. As a matter of judicial comity, this Court is bound to follow its previous decisions absent exceptional circumstances. Otherwise, it is the long-established policy of the Court that a decision by a three-justice division can only be overruled by a five-justice division: *Bell v. Cessna Aircraft Co*, 46 B.C.L.R. 145, 1983 CanLII 303 (C.A.). In the present case, no exceptional circumstances have been demonstrated, and 108 did not request a five-member division.

[50] For these reasons, I conclude that the chambers judge erred in finding that if 108 was agent for Ms. Sui, then the ATT does not apply. She cited no authority for this proposition, and her conclusion is contrary to authority that was binding on her and is binding on this Court. Regardless of whether 108’s relationship with Ms. Sui could be characterized as an agency or a trust, or both, 108’s liability to pay the ATT arose on the registration of the transfer of the legal estate to 108. There is no dispute that 108 was a “foreign entity” and that the Property was residential property located within a specified area. Therefore, 108 is liable for the ATT.

**Issue 2: Did the chambers judge err in finding that 108 was not a “taxable trustee”?**

[51] The Province acknowledges that if the Court decides the first ground of appeal in the Province’s favour, it is unnecessary to address the second ground. Nevertheless, the Province invites the Court to address the alleged legal errors in the chamber’s judge’s reasoning with respect to 108’s status as a “taxable trustee” in order to provide direction in future cases. Specifically, the Province wishes this Court to address its arguments that the chambers judge erred in concluding: (1) that a relationship in which an agent holds legal title for a principal cannot also be a trust

relationship, and (2) that bare trusts should be ignored for the purpose of the *PTT Act* provisions in issue.

[52] While there is considerable substance to the Province’s arguments on the second ground, I decline to reach any firm conclusions when it is not necessary to do so in order to decide the appeal. Final resolution of these issues should await a case in which they directly arise.

**Application for leave to raise a constitutional question**

[53] Finally, I will briefly address 108’s application for leave to raise a constitutional issue for the first time on appeal. At the hearing of the appeal, the Court indicated that it would not grant leave to raise a new constitutional issue, and that reasons would be provided in the judgment.

[54] 108’s proposed constitutional challenge focusses on ss. 2.02(2)(b) and 2.02(5) of the *PTT Act*. 108’s position is that these provisions impose an indirect tax to the extent they apply to a foreign entity acting as an agent or to a taxable trustee. The argument, in brief, is that because a trustee or agent will inevitably pass any liability imposed on it to the beneficiary or principal, the ATT imposes an indirect tax in this context. This is said to be invalid on division of powers grounds because a province is only constitutionally competent to impose a direct tax under s. 92(2) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.

[55] Appellate courts generally do not entertain new issues for the first time on appeal. There may be exceptions to this general rule in rare cases, including where a party wishes to raise a new constitutional issue. The circumstances relevant to the Court’s discretion to entertain new issues include “the state of the record, fairness to all parties, the importance of resolving the issue, its suitability for decision and the broader interests of the administration of justice”: *R. v. Alfred*, 2020 BCCA 384 at para. 7. This discretion will be exercised “sparingly and only where the interests of justice require it”: *R. v. Trieu*, 2010 BCCA 540 at para. 56.

[56] 108 suggested that leave to raise a new issue will be granted where there is no evidentiary prejudice to the other party. 108 characterized its proposed constitutional challenge as “solely an issue of law”, which does not depend on evidence. There are at least two difficulties with this argument.

[57] First, the test for leave to raise a new issue does not rest solely on the question of evidentiary prejudice. The state of the record is only one of a number of factors for this Court to consider in deciding whether to hear a constitutional issue for the first time on appeal, with the overarching question being whether the interests of justice require it. Here, 108 provides no explanation for its failure to raise what is apparently a constitutional challenge to provisions of a provincial statute in the court below. I say “apparently” because the notice of constitutional question is not in the record before us, and the nature of the remedy sought by 108 is not set out in its factum on appeal. At the hearing of this appeal, 108’s counsel advised that what it sought was a declaration that ss. 2.02(2)(b) and 2.02(5) of the *PTT Act* are constitutionally invalid. It is unclear why the relief sought is so restricted since, on 108’s argument, other provisions of the *PTT Act* are also constitutionally suspect to the extent that they impose basic property purchase tax on an entity holding legal title as a trustee or agent.

[58] In any event, the circumstances relevant to the question of leave in this case include: (1) the new issue is a constitutional challenge to legislation, with potential implications that have not been clearly defined; (2) this Court has no reasons from the court below to ground the exercise of its appellate function; and (3) the party seeking leave to raise the issue has provided no explanation for their delay in doing so. This is a case, therefore, in which an appellate court would be forced to sit as a court of first instance entertaining a constitutional challenge to legislation that could have been raised in the court below, but which was apparently not pursued “for reasons of professional judgment, efficiency or tactics”: *Trieu* at para. 56.

[59] Second, I do not agree with 108 that the constitutional issue it wishes to raise can fully, effectively, and fairly be decided in the complete absence of an evidentiary

record. By way of example, one question that would have to be answered on 108's constitutional challenge is whether the general tendency of the tax establishes its nature as a direct tax, as opposed to whether the tax was (or could be) passed on by the taxpayer in any particular case: *Ontario Home Builders' Association v. York Region Board of Education*, [1996] 2 S.C.R. 929, 1996 CanLII 164 at para. 41 [*Ontario Home Builders*]. In determining the general tendency of the tax, the Court would have to consider the context and purpose of the tax: *Ontario Home Builders* at para. 43. Evidence would be required to allow for proper consideration of the context and purpose of the provisions of the *PTT Act* that impose the ATT, and perhaps also basic property transfer tax, on entities that hold bare legal title.

[60] For all of these reasons, it was not in the interests of justice to grant 108 leave to argue a constitutional issue for the first time in this Court.

**Disposition**

[61] I would allow the appeal, and reinstate the Assessment of the ATT.

“The Honourable Madam Justice Horsman”

I AGREE:

“The Honourable Mr. Justice Abrioux”

I AGREE:

“The Honourable Justice Fleming”