

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Coyle v. McGuire*,
2026 BCCA 70

Date: 20260220
Docket: CA50238

Between:

Marylou Coyle, Michael Brent Furdyk, and Charles Gorrie

Appellants
(Petitioners)

And

Roger McGuire, James Allard, Mark Stevens, Gerald Hauck

Respondents
(Respondents)

And

The Owners, Strata Plan VIS 962

Respondent
(Interested Party)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Grauer
The Honourable Justice Fleming

On appeal from: An order of the Supreme Court of British Columbia, dated
October 10, 2024 (*Coyle v. McGuire*, 2024 BCSC 1875, Victoria Docket 230970)

Counsel for the Appellants: T.W. Morley

Counsel for the Individual Respondents: K. Roemer
S.M. Lundy

Counsel for the Owners, Strata Plan
VIS 962: B. Scheidegger

Place and Date of Hearing: Victoria, British Columbia
April 7, 2025

Place and Date of Judgment: Vancouver, British Columbia
February 20, 2026

Written Reasons by:

The Honourable Mr. Justice Groberman

Concurred in by:

The Honourable Mr. Justice Grauer

The Honourable Justice Fleming

Summary:

The petitioners are owner-occupiers of units in a strata complex in Victoria, British Columbia. More than half of the units in the complex are owned by persons who have their units in a rental pool operated as a hotel. In 2019, the then-members of the strata council negotiated with the company administering the hotel to extend its lease over the strata's common property. The members of the council then resigned and were replaced by the four individual respondents in 2020. The new council concluded arrangements for a new lease and also negotiated an agreement with the former council members releasing them from liability for their actions in negotiating the lease extension. Some owner-occupiers objected to the lease and contended it was improperly entered into. Before the petitioners brought this proceeding to challenge the validity of the 2020 lease and the releases under s. 33 of the Strata Property Act, a separate group of owner-occupiers commenced similar proceedings. When the parallel proceeding was dismissed, the respondents successfully sought to have this proceeding struck on the basis of cause of action estoppel. The judge awarded the respondents special costs. Held: There is no live controversy that falls within the ambit of s. 33 of the Strata Property Act. The appeal from the dismissal of the petition is moot and is quashed. Appeal from the award of special costs dismissed. Having found the proceeding to be an abuse of process, the judge was entitled to exercise his discretion to award special costs.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] The petition in this matter was dismissed by the judge on the basis of cause of action estoppel. He held that the dismissal of a similar petition in *Rochette v. McGuire*, 2024 BCSC 112, barred the petitioners from advancing their arguments in this proceeding. He awarded special costs against the petitioners, holding that the proceeding was an abuse of process.

[2] The petitioners appeal, arguing the judge misapplied the law of cause of action estoppel. They also challenge the award of special costs against them, both on the basis that the judge erred in striking their petition and on the basis that he erred in characterising the litigation as an abuse of process.

[3] The respondents say the judge made no error in his application of the law, and that the award of special costs was within his discretion.

[4] The respondent Owners, Strata Plan VIS 962 (the "Strata Corporation"), brings a preliminary motion to quash the appeal on the basis that it is moot. We

elected to hear that application together with the appeal, and these reasons address both the preliminary motion and the appeal.

[5] A second preliminary motion has been filed with respect to the petitioners' desire to have the court consider additional evidence. In my view, the "fresh evidence" is directed to the mootness motion, not the appeal itself. The petitioners are entitled to adduce evidence on the motion, and it is unnecessary for them to meet the test for adducing fresh evidence: *Forjay Management Ltd. v. 625536 B.C. Ltd.*, 2021 BCCA 171, at para. 15. We have, therefore, considered the additional evidence on the mootness issue, and need not deal with the fresh evidence motion.

[6] For reasons that follow, I am persuaded the Strata Corporation's position on mootness is correct. The appeal from the dismissal of the petition is moot, and ought not to be entertained by this Court. The appeal from the award of special costs is not moot, but I am of the view that the award was within the discretion of the chambers judge, and this Court should not interfere with it.

Nature of the Proceeding

[7] The petitioners are owners of two strata lots within a 57-unit residential strata project overlooking Victoria's Inner Harbour on Wharf Street (the "Strata Project"). The owners of more than half of the strata units are participants in a rental pool. The units that form the rental pool are administered as a hotel by Victoria Regent Hotel Ltd. (the "Hotel Company"). The rest of the units are either owner-occupied or leased by their owners to tenants on a long-term basis. The parties have referred to the units that are not in the rental pool as "owner-occupied". While that term may not be technically accurate for all the units, it is a useful shorthand, and I will adopt it in these reasons.

[8] For many years, the Hotel Company has used space and facilities in the Strata Project under a Common Area Use Agreement. As the parties have done, I will refer to that agreement as a "lease". It allows the Hotel Company to use the

third-floor lobby, the elevators, and two levels of parking for the purpose of operating the hotel.

[9] The basic theory of the petitioners is that the individual respondents (who were the members of the strata council in 2020) acted improperly in renewing the lease between the Strata Corporation and the Hotel Company in 2020.

[10] The petition was brought under the authority of ss. 32 and 33 of the *Strata Property Act*, S.B.C. 1998, c. 43:

Disclosure of conflict of interest

- 32 A council member who has a direct or indirect interest in
- (a) a contract or transaction with the strata corporation, or
 - (b) a matter that is or is to be the subject of consideration by the council, if that interest could result in the creation of a duty or interest that materially conflicts with that council member's duty or interest as a council member,
- must
- (c) disclose fully and promptly to the council the nature and extent of the interest,
 - (d) abstain from voting on the contract, transaction or matter, and
 - (e) leave the council meeting
 - (i) while the contract, transaction or matter is discussed, unless asked by council to be present to provide information, and
 - (ii) while the council votes on the contract, transaction or matter.

Accountability

- 33 (1) If a council member who has an interest in a contract or transaction fails to comply with section 32, the strata corporation or an owner may apply for an order under subsection (3) of this section to a court having jurisdiction unless, after full disclosure of the nature and extent of the council member's interest in the contract or transaction, the contract or transaction is ratified by a resolution passed by a 3/4 vote at an annual or special general meeting.
- (2) For the purposes of the 3/4 vote referred to in subsection (1), a person who has an interest in the contract or transaction is not an eligible voter.
- (3) If, on application under subsection (1), the court finds that the contract or transaction was unreasonable or unfair to the strata corporation at

the time it was entered into, the court may do one or more of the following:

- (a) set aside the contract or transaction if no significant injustice will be caused to third parties;
- (b) if the council member has not acted honestly and in good faith, require the council member to compensate the strata corporation or any other person for a loss arising from the contract or transaction, or from the setting aside of the contract or transaction;
- (c) require the council member to pay to the strata corporation any profit the council member makes as a consequence of the contract or transaction.

[11] The petitioners brought this proceeding within s. 33 by alleging that the individual respondents had conflicts of interest in respect of the lease renewal. In fact, two of those respondents are owner-occupiers and the two who placed their units in the rental pool depose that they did not play a role in the lease renewal discussions.

[12] The petitioners have added a number of other claims of impropriety to the petition, most of which are not connected with conflicts of interest. Proceedings by petition in British Columbia must be specifically authorized by statutory provisions. Section 33(1) of the *Strata Property Act* is exceptional in that it allows an individual owner to bring a proceeding against a council member by petition. The provision circumscribes both the types of allegations that will be considered in those proceedings and the remedies available.

[13] *Dockside Brewing Co. Ltd. v. Strata Plan LMS 3837*, 2007 BCCA 183, is the leading authority under s. 33. It carefully follows the provisions of the statute and clearly bases its analysis on those provisions.

[14] Unfortunately, the parties to this petition and the related petitions have ignored the narrow ambit of s. 33. The proceedings, in the result, are convoluted and unwieldy (and, in my view, improper).

[15] To understand the current proceeding, it is necessary to discuss the events that transpired in 2019 and 2020, and to describe the various petitions that have been filed.

The 2020 Lease Renewal

[16] In 2017, the Strata Corporation and the Hotel Company entered into a three-year lease that was due to expire in early 2020. It appears that, in February 2019, the Strata Corporation authorized the strata council to enter negotiations for a lease renewal. As I understand it, council was authorized to enter into a one-year extension of the existing lease without any change in the payment amounts if it was unable to negotiate a suitable three-year agreement with an appropriate increase in payments.

[17] In the spring of 2019, there was serious conflict between some of the owner-occupiers and those whose units were in the rental pool. The four owner-occupier members of the strata council were removed from the council at a special general meeting held in June 2019. The three remaining council members were all persons who participated in the rental pool.

[18] In September 2019, three owners commenced a petition against the three remaining council members and against the Strata Corporation. As originally drafted, its main goal was reinstatement of the council members who were removed in the June 2019 meeting. While the petition purported to be brought under s. 33 of the *Strata Property Act*, many of the allegations and the relief sought in the petition as originally filed appear to go well beyond that section of the statute.

[19] I will refer to the petition commenced in 2019 as “Petition No. 1”, as have the parties. Its importance to the current litigation is limited. I observe that proceedings under Petition No. 1 continue, but it has been substantially modified and converted to an action. It is now a claim against the Strata Corporation alone rather than against individual council members. The relief claimed is no longer confined to relief available under s. 33 of the *Strata Property Act*.

[20] Shortly after Petition No. 1 was filed, the Strata Corporation held a special general meeting to deal with the renewal of the lease. There is dispute as to what occurred at the meeting. It is clear the owners directed the council to consult with an expert on the issue of the fair market rent under the lease, and that the council complied with that direction. The minutes of the meeting also record unanimous approval for a three-year extension to the lease without an increase in payments. The evidence indicates the minutes may be inaccurate on that score. Surrounding events suggest it was unlikely that such instructions were given to the council.

[21] In October and November 2019, the remaining three members of the strata council engaged in some negotiations with the Hotel Company, but it is not clear whether they reached any agreement with it. The three councillors all resigned in November 2019, and there was, effectively, no strata council until five councillors were elected in January 2020. One of them chose to resign shortly afterwards. The four members who remained are the individual respondents in these proceedings.

[22] According to the petitioners, the respondent councillors, on behalf of the Strata Corporation, purported to enter into an agreement in July 2020 with the Hotel Company for a 3-year lease renewal, on the same terms as the 2017 lease. Again, the materials before the courts are not completely consistent on the issue, with some suggesting that the parties understood, from the outset, that the payments would be adjusted upwards once the consultant's report on fair market rent was produced.

[23] In any event, the consultant's report was delivered in November 2020. It indicated that a fair market rent was substantially higher than the amounts set out in the 2017 lease. In November 2020, the Hotel Company and the council agreed to terms with a sharp increase in the rental payments to an amount approximating the consultant's figures. The increase was retroactive to the beginning of the lease period. The Hotel Company waived any claim against the Strata Corporation arising out of the negotiations.

[24] In January 2021, in exchange for \$10,000, the strata council agreed to provide a release to the three members of the 2019 council for any claims the Strata

Corporation might have against them as a result of their negotiations over the lease renewal.

[25] In March 2021, the petitioners in Petition No. 1 applied to transfer the proceedings to the trial list, file a notice of civil claim, and add the members of the 2020 council (*i.e.*, the individual respondents in these proceedings) as defendants. The application was argued in June 2021, and reasons (indexed as *Rochette v. Bradburn*, 2021 BCSC 1752) were pronounced in September of that year. The judge ordered the proceedings transferred to the trial list and granted leave to file a notice of civil claim. She dismissed the application to add the members of the 2020 council to the litigation, finding that the allegations against them did not conform with s. 33 of the *Strata Property Act*.

[26] As I have indicated, the litigation commenced in Petition No. 1 remains active, but a consent dismissal order was entered in March 2024, dismissing the claim as against the 2019 council members. The claim has been transformed into a civil action in negligence against the Strata Corporation seeking to recover, as damages, the legal costs incurred investigating and pursuing remedies. In *Rochette v. The Owners, Strata Plan 962*, 2025 BCSC 1078, the Strata Corporation's application to strike the remaining claim was dismissed. An appeal to this Court from this latter decision was heard on February 3, 2026, and the decision of this Court is reserved.

[27] Following the dismissal of the application to add the members of the 2020 strata council as respondents to Petition No. 1, the petitioners in that litigation commenced a new petition against them ("Petition No. 2"). Petition No. 2 challenged the validity of the 2020 lease and the releases given to the members of the 2019 strata council.

[28] The petition in the current proceeding ("Petition No. 3") was filed in March 2023. Again, it is directed primarily at challenging the validity of the 2020 lease and releases given to the members of the 2019 strata council. The allegations against the respondents are somewhat more pointed than the allegations in Petition No. 2, in that the individual respondents are alleged to have conspired

with the Hotel Company and to have acted corruptly. The petitioners in Petition No. 3 are different from the petitioners in Petitions Nos. 1 and 2, but they are similarly situated, and they are represented by the same counsel who represents the petitioners in those matters.

[29] About a week after the filing of Petition No. 3, the Strata Corporation entered into a new lease with the Hotel Company. The validity of the new lease is, as far as I am aware, not being challenged.

[30] In June 2023, the parties to Petition No. 2 and Petition No. 3 reached an agreement whereby the petitioners withdrew their challenges to the validity of the 2020 lease.

[31] With the hearing date for Petition No. 2 approaching, the respondents requested a consolidation of Petition No. 2 and Petition No. 3, but the petitioners in Petition No. 3 (*i.e.*, this proceeding) were not agreeable. The respondents sought to have a case management judge appointed, but the court did not accede to the request. Unfortunately, no application to have the two petitions heard together was ever made.

[32] In August 2023, Petition No. 2 was heard in Supreme Court. A judgment, indexed as *Rochette v. McGuire*, 2024 BCSC 112, was pronounced in January 2024. It struck portions of the petition and dismissed the remaining parts. The judgment unequivocally finds that the allegations of collusion and bad faith against the respondents were not proven.

[33] The petitioners in Petition No. 2 appealed from that judgment. This Court dismissed the appeal as moot in reasons indexed as *Rochette v. McGuire*, 2025 BCCA 149.

The Judgment Appealed From

[34] After Petition No. 2 was dismissed (but before the appeal from that decision was quashed), the respondents in this petition applied in Supreme Court chambers

to have this petition struck. The chambers judge found the proceeding to be an abuse of process. He considered that the dismissal of Petition No. 2 founded a cause of action estoppel, precluding the petitioners from proceeding with Petition No. 3. He dismissed the petition and awarded the respondents special costs.

[35] The judge's reasons are brief. The substantive reasoning on cause of action estoppel is as follows:

[20] Both the allegations in Petition #3 as it is currently framed, and those set out in the proposed amendments, are barred through cause of action estoppel. Petitions #2 and #3 are so closely related that they ought to have been litigated in the same forum. The fact that the Coyle Petitioners were not parties to Petition #2 is irrelevant. They are in privity of interest with the Rochette Petitioners. Both sets of petitioners are unit owners in the Strata. The causes of action advanced by those two sets of petitioners do not arise out of injury or loss personal to them, but derive solely from the right they all have in common under s. 33, as unit owners, to bring a claim based on alleged breaches of duties that strata council members owe to the strata corporation and the unit owners as a whole.

[21] The Coyle Petitioners knew that Petition #2 was extant prior to it being heard by Harvey J. They could have taken steps to have their petition heard at the same time. Through their failure to do so, they have put the 2020 Council to the burden of defending themselves a second time. This is an abuse of process.

[22] The petition is dismissed.

[36] The reasons on special costs are also brief:

[23] As stated by Justice MacKenzie in *Hollander v. Mooney*, 2017 BCCA 238 at para. 79:

... Conduct that is an abuse of process is, by its nature, reprehensible and deserving of rebuke.

On that basis, I award special costs to the respondents, McGuire, Allard, Stevens, and Hauck.

[24] The Corporation also seeks an award of special costs.

[25] The remedies sought by the Coyle Petitioners in Petition #3 as originally filed included the setting aside of both the common area use agreement between the Corporation and VRH, and the Corporation's release of strata council members. Given the Corporation's interest in those remedies, the Corporation filed a response to this petition as an interested party. The amendments to the petition sought by the Coyle Petitioners on the present application would have withdrawn the claims for those two forms of relief. The Corporation participated in this hearing, supporting the 2020 Council's application to strike, and opposing certain of the amendments

sought. The Corporation submits that it continues to have an interest in the within proceedings on the basis that the 2020 Council have sought indemnity from the Corporation under the Corporation's bylaws. The Corporation's submissions at the hearing were of value.

[26] The Corporation's filing of a response to petition and its participation in the hearing were reasonably necessary to advance its interests. The Corporation, though not a party of record, is a party entitled to costs: *Manufacturers Life Insurance Company v. Dahl*, 2005 BCSC 1800. To further serve as denunciation of the Coyle Petitioners' conduct, those costs shall also be assessed as special costs.

Mootness

[37] The petition, as originally framed, challenged the validity of the July 2020 lease and the revised lease entered into in November 2020. It also challenged the validity of the 2021 releases given to the last three members of the 2019 strata council.

[38] Those issues are no longer live ones. In June 2023, the parties reached an agreement that the petitioners were no longer attempting to invalidate the 2020 lease. In March 2024, the petitioners discontinued Petition No. 1 as against the members of the 2019 council. That proceeding was the only proceeding in which the releases could possibly have been relied upon.

[39] It seems clear that the issues raised in the petition are now moot, and that an appeal will serve no purpose. Indeed, what was said by this Court in *Rochette v. McGuire*, 2025 BCCA 149, is entirely applicable to the current litigation. The issues that the petitioners wish to address are precisely the same as in *Rochette*, and they are of no moment for the reasons set out in that decision. I need not repeat what was said in that judgment but would fully adopt the reasoning.

[40] The petitioners suggest that because the Strata Corporation intends to indemnify the individual respondents for their legal expenses in defending these proceedings, this Court should entertain the appeal. In particular, they point to the bylaws of the Strata Corporation, which include the following provisions:

- 22(4) (a) Each council member shall be indemnified and saved harmless by the Strata Corporation against any and all liability and

costs, including legal costs as between a solicitor and his/her own client, for any acts or omissions while he or she was carrying out his or her duties as a member of the council.

(b) Notwithstanding subsection (4), there shall be no indemnity if a council member is adjudged guilty of wilful misconduct, fraud, theft or wrongful exercise of authority in the performance of his or her duties.

[41] The petitioners say they should be afforded an opportunity to have the individual respondents “adjudged guilty of wilful misconduct, fraud, theft or wrongful exercise of authority in the performance of [their] duties”. They want to continue the petition proceedings in order to press for such a judgment.

[42] The petitioners, unfortunately, have treated this litigation throughout as a flexible proceeding that can be endlessly adapted to meet their changing views of the case. They have continually adjusted their allegations and alleged a wide variety of violations of the *Strata Property Act*. They seem to be under the impression that, having commenced summary proceedings under s. 33 of the *Strata Property Act*, they can now treat the proceedings as if they were a roving public inquiry into the conduct of the business of the Strata Corporation.

[43] Sections 32 and 33 of the *Strata Property Act* are narrowly directed to conflicts of interest, and not to other errors or omissions in a councillor’s work for the Strata Corporation. The Court should not accede to a proposal to expand the proceedings beyond their proper scope under the statute.

[44] In my view, s. 22(4)(b) of the Bylaw does not contemplate stand-alone inquiries by the courts to determine whether the indemnity provision applies. Rather, it is designed to ensure that, where legal proceedings have, in their ordinary course, resulted in findings of culpable misconduct, the Strata Corporation will not indemnify individuals in respect of those proceedings.

[45] It would be counterproductive to expose the parties (including the Strata Corporation) to what could be massive additional legal expenses simply to determine whether or not they are entitled to an indemnity. It is time that this litigation was brought to a close.

[46] I would reiterate what was said in *Rochette v. McGuire*, 2025 BCCA 149, about this (and the related) litigation:

[3] Suffice it to say that the dispute has consumed an inordinate amount of time, energy, and resources, and has become unduly complex, factually and procedurally.

[47] I note, as well, that in the parallel proceedings in *Rochette v. McGuire*, 2024 BCSC 112, the judge found the respondents had acted reasonably and with a genuine belief that they were properly exercising their authority. There is no reason for that conclusion to be revisited.

[48] The appeal is moot, as there is no live legal issue that is properly raised in the petition. I am not persuaded there is any basis upon which this Court should entertain the appeal notwithstanding its mootness.

The Costs Award

[49] The appeal of the award of special costs is not moot and must be considered separately. As I understand the judge's rationale for awarding special costs, it is based on the inefficient use of the legal system to the point where there has been an abuse of process.

[50] As I have indicated, s. 33 of the *Strata Property Act* is a limited exception to the usual rule that a strata owner is not entitled to bring a direct action against a member of the strata council. Rather, the statute contemplates that, where owners are aggrieved, their remedy will ordinarily lie only against the Strata Corporation.

[51] The petitioners have expanded their allegations far beyond what is contemplated in s. 33. The award of special costs is, in part, a rebuke for abusing that limited procedure to air the petitioners' broader grievances against the members of the strata council and the Strata Corporation.

[52] The judge was also troubled by the petitioners' resistance to having their case heard together with the *Rochette* litigation. The two cases ought to have been

consolidated, particularly given that all of the petitioners had engaged the same counsel.

[53] I acknowledge the petitioners do not, alone, bear responsibility for the inefficient use of the legal system. The respondents could also have made greater efforts to have the two matters heard at the same time. But it must be remembered that, unlike the other parties, the petitioners actually opposed consolidation of the claims.

[54] Finally, I note the allegations in the petition are both serious and personal. They amount to claims that the respondents conspired together to act in a corrupt manner. At best, the claims in the petition are speculative: the affidavits filed with the petition do not demonstrate the petitioners had any solid evidence to support them. Courts expect parties to exercise greater caution when using litigation to attack the integrity of others. This factor also weighs in favour of leaving the special costs award in place.

[55] A judge in the Supreme Court has broad discretion in making costs awards, and, absent errors in principle, this Court will defer to the exercise of that discretion. I am not convinced that the judge made any error in coming to the conclusions he reached.

The Substantive Appeal

[56] In light of my conclusions on mootness and what I have said on the costs issue, it is not, strictly speaking, necessary to consider the substantive appeal in detail. I accept, though, that if the substantive appeal were a strong one, the award of special costs against the petitioners might be seen as inappropriately punitive. I will, therefore, briefly consider the substantive appeal.

[57] The petitioners contend the judge erred in finding the four requirements for cause of action estoppel were established. Those four requirements were described in the decision of the trial court in *Bjarnason v. Manitoba* (1987), 38 D.L.R. (4th) 32,

1987 CanLII 993, at para. 6, cited with approval by this Court in *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180, at para. 28:

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of “finality”];
2. The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action [the requirement of “mutuality”];
3. The cause of action and the prior action must not be separate and distinct; and
4. The basis of the cause of action [in] the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[Emphasis by the Court in *Cliffs Over Maple Bay (Re)*.]

[58] The petitioners argue that the finality criterion was not satisfied in this case because the decision at the trial level in *Rochette v. McGuire* was under appeal. It is not at all clear that an outstanding appeal prevents a decision from being “final”. This Court commented on that issue in *Pereira v. UNITE HERE Local 40*, 2024 BCCA 27, a case where the trial court had dismissed a claim as being *res judicata* despite the existence of ongoing appeals:

[6] ... There are authorities suggesting that a matter may be *res judicata* notwithstanding that appeal rights remain (see *Minott v. O’Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321 (C.A.) at 334–35; *Re Winnipeg Motor Express Inc.*, 2009 MBCA 30 at para. 23) but the matter is complex and cannot be said to be completely free from doubt (see *R. v. Mahalingan*, 2008 SCC 63 per Justice Charron (minority judgment) para. 134; Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 5th ed. (Toronto: LexisNexis Canada), 2021, at Chapter [2.5.B]).

[7] In the circumstances, it might be argued that the decision to strike the notice of civil claim was premature, and that it should not have been made until appeal rights were exhausted in respect of challenges to the Labour Relations Board decisions. I accept that it might have been preferable for the judge to stay these proceedings pending the conclusion of the judicial review appeals rather than striking the claim.

[59] While the weight of authority supports the idea that a determination qualifies as *final* even though it may be under appeal, there are cases that adopt a contrary approach. It seems to me that the caution expressed in *Pereira* is salutary. It may have been appropriate for the judge below to have stayed the proceedings on the basis of cause of action estoppel rather than dismissing them. If he had done that,

the dismissal would have occurred when this Court dismissed the appeal in *Rochette* as moot. As in *Pereira*, however, now that the appeal in *Rochette* has run its course, the Court can unequivocally treat that decision as final.

[60] With respect to mutuality, the petitioners say the judge erred in finding that the petitioners were in privity with the petitioners in *Rochette*. They say that, as the petitioners here are individuals independent from the petitioners in *Rochette*, privity is not established.

[61] The doctrine of mutuality is not that simple. It was explored by my colleague, Justice Grauer (then of the BC Supreme Court) in *J.R.T. Nurseries Inc. v. 0843374 B.C. Ltd.*, 2016 BCSC 501. He began at para. 23 of his reasons by quoting the *obiter* observation of Justice Binnie in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44:

[60] The concept of “privity” of course is somewhat elastic. The learned editors of J. Sopinka, S.N. Lederman and A.W. Bryant in *The Law of Evidence in Canada* (2nd ed. 1999), at p. 1088 say, somewhat pessimistically, that “[i]t is impossible to be categorical about the degree of interest which will create privity” and that determinations must be made on a case-by-case basis.

[62] Justice Grauer then considered the relationship between the parties that were said to be privies, their commonality of interest, and their connections to the jurisdiction in which the previous case was decided.

[63] In the case before us, there was ample evidence on which the judge could consider the petitioners to be in privity with the petitioners in *Rochette*. First, the relationship of the petitioners to the matter in issue was identical — both were owner-occupiers who considered they were being treated unfairly by the Strata Corporation because of the amenities provided to the Hotel Company.

[64] Further, the parties were both involved in ongoing litigation with the same respondents and were represented by the same counsel. The petitioners were well aware of the *Rochette* litigation. They were in a position to help formulate the petitioners’ strategy and to lend their resources to the litigation. The inference is

almost inescapable that the petitioners chose not to participate directly in *Rochette* for strategic reasons rather than from a lack of privity.

[65] Given the flexible approach that courts now apply to the doctrine of privity, I would not interfere with the judge's conclusion on this issue.

[66] With respect to the requirement that the cause of action and the prior action must not be separate and distinct, it seems to me that in this case, the legal and factual bases for the two pieces of litigation are identical. Both rely on s. 33 of the *Strata Property Act*, and say that, because some of the respondents had a financial interest in the rental of their properties, they were in a situation of conflict. The judge accepted that position, but specifically found that those who had such a conflict did not participate in the impugned decisions. This is not a case where the petitioners' "theory" of the case can be said to differ from that of the petitioners in *Rochette*.

[67] With respect to the *basis* for the claims, the petitioners argue only weakly that there is a meaningful difference between this action and the action in *Rochette*. I am not convinced that such a difference exists. I am particularly drawn to this conclusion by the several references to the *Coyle* proceeding in Justice Harvey's decision in *Rochette*. He makes it clear that, even where subtle differences existed in the pleadings of the two cases, the arguments put forward by counsel converged to a single theory: see, for example, paras. 87–89 and 129.

[68] In my view, there is no unfairness in the judge's conclusion that cause of action estoppel was made out in this case.

Conclusion

[69] For these reasons, I would quash the appeal from the finding of cause of action estoppel on the basis that it is moot.

[70] On the appeal from the award of special costs, I would find that there is no merit in the petitioners' contention that the judge should have found the appeal to be a meritorious one. Further, the judge's finding that the petitioners litigated in an

inefficient manner and that their approach abused the process of the court was well founded. I would, therefore, dismiss the appeal from the award of special costs.

“The Honourable Mr. Justice Groberman”

I AGREE:

“The Honourable Mr. Justice Grauer”

I AGREE:

“The Honourable Justice Fleming”