

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *9095900 Canada Ltd. v. Baikoghli*,
2026 BCSC 839

Date: 20260507
Docket: S255808
Registry: Vancouver

Between:

9095900 Canada Ltd., formerly EZ Etail Inc.

Plaintiff

And

Parham Baikoghli and Reza Baikoghli

Defendants

And

**9095900 Canada Ltd., formerly EZ Etail Inc., Mohammadreza Toupchinejad,
HRA Developments Inc., Vitality Construction Ltd.
and Remarto Enterprises Ltd.**

Defendants by Counterclaim

Before: The Honourable Justice Lachance

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.
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Place and Date of Judgment:

Vancouver, B.C.
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Overview

[1] This is an application by 9095900 Canada Ltd., formerly EZ Etail Inc., which is the plaintiff in the underlying main action and a defendant in a counterclaim filed on November 10, 2025. The counterclaim was filed by Parham Baikoghli and Reza Baikoghli, the defendants in the main action (plaintiffs by counterclaim). The plaintiff is joined in the application by all other parties named as defendants to the counterclaim. For simplicity, I will simply refer to the plaintiff and these other counterclaim defendants as the applicants, and to the Baikoghlis as the respondents.

[2] In their application, the applicants initially relied on Rules 9-5(1)(d) and 14 of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, as well as the inherent jurisdiction of the court as a basis for orders striking the following paragraphs from the counterclaim that they allege are an abuse of process:

- a. paras. 37–49 of Part 1;
- b. paras. 2–5 of Part 2; and
- c. paras. 7–13 of Part 3.

(collectively, the “Impugned Paragraphs”)

[3] Relying on the inherent jurisdiction of the court, the applicants also initially sought orders cancelling and discharging the following certificates of pending litigation (collectively, the “CPLs”) registered on the following properties (collectively, the “CPL Properties”):

- a. The Certificate of Pending Litigation (the “Lougheed CPL”) registered by Reza Baikoghli in the New Westminster Land Title Office on or about November 10, 2025, under Number CA 2445795 against title to LOT 1 DISTRICT LOT 464 GROUP 1 NEW WESTMINSTER DISTRICT PLAN EPP64922 EXCEPT PHASE 1, STRATA PLAN EPS7430, PID 029-920-396 (the “Lougheed Property”);
- b. The Certificate of Pending Litigation (the “Ottawa Avenue CPL”) registered by Reza Baikoghli in the Vancouver Land Title Office on or about November 10, 2025, under Number CA2445795 against title to LOT 2

BLOCK 2 DISTRICT LOT1082 PLAN 8964, PID 004-859-260 (the "Ottawa Avenue Property"); and

- c. The Certificate of Pending Litigation (the "Eyremount Drive CPL") registered by Reza Baikoghli in the Vancouver Land Title Office on or about November 10, 2025, under Number CA 2445795 against title to LOT 16 BLOCK 26 CAPILANO ESTATES PLAN 7896, PID O10-310-665, (the "Eyremount Drive Property").

[4] The applicants did not rely on any provision of the *Land Title Act*, R.S.B.C. 1996, c. 250 [LTA], under which the CPLs were registered and which provides its own provisions for cancelling and removing CPLs.

[5] Relying on s. 39(3) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253, the applicants also seek an order preventing the respondents from registering any further certificates of pending litigation on title to any real property owned by any of the applicants without leave of this Court.

[6] On March 2, 2026, after the trial had ended, I issued a memorandum to counsel granting the parties leave to file written submissions on an issue that I identified during my preliminary analysis of the case. In particular, I invited them to provide submissions about any implications that s. 254 of the LTA, and any relevant authorities (including but not limited to the decisions of the Court of Appeal in *Sood v. Hans*, 2023 BCCA 138; *Bilin v. Sidhu*, 2017 BCCA 429; *Berthin v. Berthin*, 2018 BCCA 57; and *Mott v. P.N.E.*, 2001 BCCA 731) has to the application to strike the CPLs. Some of these cases had been relied on by the parties for other purposes, but neither party had mentioned their implications regarding s. 254.

[7] In their written submissions on the point, the applicants acknowledged that s. 254 precluded me from *immediately* dismissing the CPLs even if I were to immediately strike the Impugned Paragraphs from the counterclaim. However, they argued that in such circumstances, the appropriate relief would be to order that the CPLs are to be cancelled if and when the applicants file proof that the remaining requirements of s. 254 are met, namely, that all appeals from my striking of the Impugned Paragraphs have been exhausted without success.

[8] The respondents raised various arguments as to why in the circumstances of this case – including because it had not been pleaded, but largely relying on earlier arguments about the importance of the issues raised in the Impugned Paragraphs – s. 254 could not, or alternatively should not, be applied to justify the revised order sought by the applicants.

[9] On my review of the record, I conclude that all but one paragraph of the Impugned Paragraphs are an abuse of process. They are explicit attempts to litigate, albeit under a different name and/or justification, the facts and legal issues that make up the causes of action resolved through a consent dismissal order issued in earlier proceedings. In all the circumstances, I find it appropriate to strike those paragraphs from the counterclaim, without leave to amend.

[10] I also find that the CPLs are an abuse of process and can only be supported through reliance on the Impugned Paragraphs that I am ordering struck. However, I am bound by Court of Appeal authorities that have concluded my inherent jurisdiction to immediately strike the CPLs in such a case has been tempered by s. 254 of the *LTA*. In such cases, the court can only cancel the CPLs after the earlier of the following events has occurred: (i) expiry of time for the respondents to appeal my order, or (ii) if such an appeal is filed, when/if such appeal is disposed of without overturning my judgment.

[11] Nevertheless, as I have made all of the factual and legal findings otherwise required to justify cancellation of the CPLs, it is not in the interests of judicial economy to require the applicant to file a further comprehensive application to cancel the CPLs after the appeal requirements of s. 254 are met. Rather, it is in the interests of justice that the cancellation of the CPLs should follow immediately upon proof of those remaining facts regarding any potential appeal. Accordingly, I will issue a version of the order sought by the applicants in their written submissions, which will dismiss the counterclaim upon proof in due course of those required facts. If my ruling on the Impugned Paragraphs is overturned, that part of my order will fall with it.

Background

The 2022 Action and original CPLs

[12] On January 20, 2022, the respondents commenced an action (Vancouver Registry No. S220311, referred to herein as the "2022 Action") against the applicants, alleging various causes of action in relation to what I will for simplicity refer to as an alleged failed joint effort to develop certain lands, including the CPL Properties. I will refer to the notice of civil claim the applicants filed in that proceeding as the "2022 NoCC". At the same time, the respondents filed certificates of pending litigation on the CPL Properties (the "Original CPLs"), relying on the claims made in the 2022 Action relating to those properties.

[13] On May 20, 2022, with the advice, guidance, and assistance of legal counsel, the parties settled the 2022 Action and entered into a formal settlement agreement (the "Settlement Agreement"). The Settlement Agreement contained broad, comprehensive releases of the applicants from all claims relating to facts that were raised or could have been raised in the 2022 Action.

[14] On June 28, 2022, pursuant to the Settlement Agreement, an order – endorsed by counsel for both sets of parties – was entered, dismissing the 2022 Action (the "Consent Dismissal Order"). In addition to being on a without costs basis, that order included the following express terms: "The said dismissal shall be for all purposes of the same force and effect as if judgment dismissing the proceedings had been pronounced after a trial on the merits".

[15] The Consent Dismissal Order does not order that the Original CPLs are cancelled, but clause 2 of the Settlement Agreement explicitly requires the respondents to discharge the Original CPLs. On or about June 24, 2022, the Original CPLs were cancelled by the respondent, Reza Baikoghli (presumably to satisfy the relevant obligation under the Settlement Agreement).

The current civil action upon which the CPLs are based

[16] On July 31, 2025, the applicants filed their notice of civil claim in the action in which this application is made. That pleading is a simple claim based on alleged breach of contract, namely, the Settlement Agreement. The applicants seek damages from the respondents due to the latter's failure to pay specified settlement funds they were explicitly obliged to pay under the agreement.

[17] On November 10, 2025, the respondents filed a response to civil claim in which they do not deny having failed to pay any of the settlement funds. However, they allege a variety of wrongs have been committed by the applicants against them, including breaches of the Settlement Agreement by the applicants. They seek damages and claim a set-off of those damages against anything they might owe under the agreement.

[18] They further allege that the applicants' conduct and/or the surrounding circumstances amounted to undue pressure and duress warranting rescission of the Settlement Agreement.

[19] As I noted above, the response to civil claim does not seek an order setting aside the Consent Dismissal Order, nor does it claim any defect in that order that would undermine its enforceability.

[20] On November 10, 2025, the respondents also filed the counterclaim that is the primary subject of this application. Aside from identifying the additional parties as counterclaim defendants (i.e. in addition to the respondents), the counterclaim initially only repeats the details set out in the response to civil claim.

[21] However, it then adds the Impugned Paragraphs. Through paras. 38–48 of Part 1, the counterclaim expands the underlying proceedings, repeating largely verbatim the factual allegations in the 2022 NoCC. It lays out an alleged basis for the respondents' action against the applicants for "recovery and indemnification for losses" not in relation to the Settlement Agreement, but rather, in relation to the failed joint venture to purchase and develop the CPL Properties.

[22] In paras. 2–5 of Part 2, under the Relief Sought heading, the counterclaim adds requests for the same orders sought in the 2022 NoCC in relation to the failed joint venture, namely:

2. A declaration that Reza holds an equitable interest in the form of a constructive trust over the Loughheed Property, the Eyremont Property, and the Ottawa Property, and the Suffolk Properties.
3. An order that Toupchinejad disgorge any profits resulting from his breach of fiduciary obligations owed to Reza.
4. In the alternative, an order for restitution on a quantum meruit basis for the Services that Reza performed on the Other Properties.
5. An order for punitive damages in favour of Reza against the Defendants, jointly and severally.

[23] In paras. 7–13 of Part 3, under the Legal Basis heading, the counterclaim adds the same bases set out in the 2022 NoCC:

7. Fiduciary obligations can be owed by a director to a shareholder when the shareholders and director of a closely held company have a special relationship of trust and dependency.

Valastiak v. Valastiak, 2010 BCCA 71 at para 51.

8. Reza placed an extraordinary amount of trust in Toupchinejad and relied on him to prepare and keep accurate and up to date accounting for all of the various interests that Reza had for the various Projects. This level of trust and dependency amounted to a fiduciary relationship, which was breached by Toupchinejad when he refused to properly compensate Reza or provide him with accurate accounting.

9. Punitive damages may be awarded in situations where the defendant's misconduct is so malicious, oppressive and highhanded that it offends the court's sense of decency.

H.O. v. MacDougall, 2006 BCSC 180 at para 63.

10. Punitive damages may be awarded in circumstances where there is an independent "actionable wrong," for example a breach of the contractual duty of fair dealing and good faith.

Fidler v. Sun Life Assurance Co. of Canada, 2004 BCCA 273 at para 60.

11. Toupchinejad's deliberate misrepresentation of the value of Reza's entitlement to compensation through the intentional production of inaccurate accounting for his own benefit, amounts to a breach of the obligation of fair dealing and good faith, and caused hardship to Baikoghli [sic]. These acts took place over an extended period of time, and Toupchinejad knew, or ought to have known, that his actions were wrong. These acts are offensive to the courts sense of decency, warranting punitive damages.

12. In the alternative, Reza seeks to be compensated for the Services he performed on the Other Properties on a quantum meruit basis for unjust enrichment.

13. Reza performed the Services on the Eyremont Property, the Lougheed Property, and the 1280 Ottawa Property, thereby increasing the value of those properties, and without being compensated for those efforts. He therefore claims an equitable interest in the form of a constructive trust over those properties.

This Application

[24] In the instant application, the applicants assert that the above noted and related paragraphs in the counterclaim are an abuse of process because they attempt to relitigate some of the disputes in the 2022 Action that were resolved through the Consent Dismissal Order.

[25] Specifically, the applicants assert that Part 1 (Facts) paras. 37–49, as well as Part 2 (Relief Sought) paras. 2–5 and Part 3 (Legal Basis) paras. 7–13, of the counterclaim should be struck. The applicants argue those paragraphs are an abuse of process as they are “either identical, nearly identical, or premised on the same factual basis as” Part 1 paras. 9–13 and 15–20, Part 2 paras. 3–9, and Part 3 paras. 10–15 and 17, respectively, of the 2022 NoCC.

[26] The respondents’ counsel acknowledged in oral submissions that the alleged facts and claims in the Impugned Paragraphs that form the basis of the respondents’ claim to an interest in the CPL Properties are in fact duplicative of some of the facts and claims set out in the 2022 NoCC.

Issues

[27] There are numerous issues before me, but due to their intricacies and overlapping nature, I will address them in relation to two discrete questions:

- (1) Are some or all of the Impugned Paragraphs an abuse of process, and if so, should they be struck from the pleadings?
- (2) Are the CPLs an abuse of process, and if so, can and should I order them cancelled and removed from the Land Titles registry?

(1) Should the Impugned Paragraphs be Struck as an Abuse of Process?**Applicants' Position**

[28] The applicants rely on R. 9-5(1)(d) and the court's inherent jurisdiction to ask that I strike the Impugned Paragraphs of the counterclaim as an abuse of process.

[29] They do not take issue with the balance of the counterclaim, namely, those parts that repeat the alleged wrongdoing set out in the respondents' response to civil claim. Those allegations all relate to impugning the Settlement Agreement and seeking damages for alleged actionable misrepresentations that induced them to enter into that agreement as well as damages for the plaintiffs' alleged breaches of the agreement and alleged breach of trust in relation to it. For simplicity, I will loosely categorize these as the "Contractual Counterclaims" because of their direct source relationship to the Settlement Agreement itself.

[30] The applicants argue that in contrast, the Impugned Paragraphs are not related to – or at least do not find their source in – the Settlement Agreement itself. Rather, the Impugned Paragraphs relate exclusively to, and almost identically reflect, the legal proceedings that were at issue that led to the agreement, namely, the 2022 Action.

[31] The applicants note that the Consent Dismissal Order dismissed that action, and that dismissal therefore applied to the entire content of the 2022 NoCC. They argue the Impugned Paragraphs are therefore nothing more than an attempt to relitigate those claims. They point out the order says such claims were dismissed "as if tried on the merits" and argue that such matters are *res judicata* and barred by the principle of cause of action estoppel, regardless of the respondents' efforts to recategorize them.

[32] Finally, they argue the court's authority to strike claims as an abuse of process in this context is broad, and that it has been found to encompass claims that are *res judicata* and, in particular, those subject to cause of action estoppel. They

added that such estoppel can apply “even if the second litigation is based on a different legal description or conception of the case”.

[33] Accordingly, they argue I should strike the Impugned Paragraphs as an abuse of process.

Respondents’ Position

[34] The respondents deny they are re-litigating the same claims. While the submissions were varied, they essentially suggest the Impugned Paragraphs are appropriate – and not an abuse of process – for two reasons.

[35] First, they assert that the Impugned Paragraphs are the particulars essential to the damages they are claiming in the Contractual Counterclaim provisions, which include the “loss of the released claims” that resulted from them entering into the Settlement Agreement. They argued before me that, for example, if the court eventually finds the applicants committed actionable wrongs that induced them to enter into the Settlement Agreement, the court will have to assess the financial value of what they gave up (i.e. what they “lost”) through that agreement. That, they argue, would require the court to hear and consider the merits of those released claims and assess potential damages they could have received through them.

[36] Second, they assert the Impugned Paragraphs are essentially claims they have a new contractual right to advance due to the indemnity and “hold harmless” clause in the Settlement Agreement.

Discussion

The Legal Foundation for Abuse of Process Findings

[37] The applicants’ legal argument to strike the Impugned Paragraphs cited from and relied largely on Justice Wolfe’s statements of the law found in *Klassen v. Epp*, 2025 BCSC 1056. In that decision, Wolfe J. extensively canvassed the appellate authorities and laid out the applicable principles in considerable detail. While I have considered them all, in the interest of time, I will not canvass every one of them in these reasons.

[38] Rule 9-5(1)(d) of the *Supreme Court Civil Rules*, relied upon by the applicants, reads:

- (1) At any stage of a proceeding, the court may order to be struck out or amended the whole or any part of a pleading, petition or other document on the ground that
...
(d) it is otherwise an abuse of the process of the court,

[39] On an application under R. 9-5(1)(d), including based on *res judicata*, evidence is permitted because the application is contextually driven and context must be provided to establish the required findings.

[40] In *Klassen*, Justice Wolfe relied on Justice Douglas' decision in *McCann v. Barens*, 2023 BCSC 2000, for its summary of the applicable principles for determining if a civil claim for damages arising from a tort should be struck as an abuse of process because it was relitigating issues previously raised in the family law proceedings:

[29] Abuse of process is a broad and flexible doctrine, grounded not only in R. 9-5(1)(d) but also in the court's inherent jurisdiction to prevent abuses of the court's process; it allows the court to strike a claim where to do otherwise would violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice: *Krist* at para. 52; *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 at para. 22.

[30] Claims that are *res judicata* are encompassed by the concept of abuse of process and may be properly struck pursuant to R. 9-5(1)(d): *Boyd v. Cook*, 2016 BCCA 424 at para. 16, citing *Chapman v. Canada (Minister of Indian and Northern Affairs)*, 2003 BCCA 665 at para. 14. The doctrine of *res judicata* has two aspects: cause of action estoppel and issue estoppel: *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 12.

[31] Cause of action estoppel bars proceedings that allege the same cause of action between the same parties, if that cause has been determined by the courts. It also bars subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even if the second litigation is based on a different legal description or conception of the case: *Chancery Estate Holdings Corp. v. Sahara Real Estate Investment Inc.*, 2011 BCSC 1067 at para. 85, aff'd *Chancery Estate Holdings Corp. v. Jetha*, 2013 BCCA 145 [*Chancery Estate*], citing *Royal Bank of Canada v. United Used Auto & Truck Parts Ltd. et al.*, 2006 BCSC 1192, aff'd *Mott v. United Used Auto & Truck Parts Ltd. (Trustee of)*, 2007 BCCA 111 at para. 38.

[Emphasis added.]

[41] At para. 59 of her decision, Wolfe J. thereafter summarized the criteria necessary to establish cause of action estoppel as follows:

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

[42] She went on to adopt a conclusion of significance here to assessing the implication of the different context in which the Impugned Paragraphs are being relied on in the counterclaim compared to the 2022 Action:

[60] As explained in *Re Cliffs*, “[i]n this context, ‘cause of action’ does not refer to the name or classification given to the wrong or remedy, but to a factual situation which entitles one to a remedy” (at para. 28, citations omitted, emphasis added).

[43] The recent Court of Appeal decision in *Martyn v. Walton*, 2025 BCCA 223, further explains *res judicata* and its relationship to the court’s power to strike pleadings as an abuse of process, noting that the latter is broader in application than the former:

[59] The doctrine of *res judicata* has two aspects, issue estoppel and cause of action estoppel. Briefly, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent re-litigation: *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 12.

[60] The doctrine of abuse of process has expanded beyond the strict boundaries of *res judicata*, though it borrows much of its rationale and some of its constraints: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 38. Although the specific facts that may give rise to an abuse of process vary, they can include circumstances in which the court must exercise its discretion to prevent the misuse of its procedures in order to avoid the administration of

justice being brought into disrepute: Toronto at para. 37. It also offers the discretion to prevent re-litigation, for the purpose of preserving the integrity of the court's process (Toronto at para. 42; Behn v. Moulton Contracting Ltd., 2013 SCC 26 at para. 40), but is not restricted to preventing re-litigation of issues or addressing issues that could have been raised in previous proceedings. It is a broad, flexible doctrine that “serves as an adaptable judicial tool to address circumstances that threaten the fairness and integrity of the court’s process and the administration of justice”: *La Française IC 2 v. Wires*, 2024 ONCA 171 at para. 8.

[Emphasis added.]

[44] I interpret these authorities as confirming my jurisdiction, under R. 9-5(1)(d) and the court’s inherent jurisdiction, to find some or all of the Impugned Paragraphs are an abuse of process even if I am not satisfied that they meet the strict requirements to be deemed *res judicata*.

Consent Order versus Final Order

[45] At para. 30 of their notice of application, the applicants argue that “[a] consent dismissal order, undischarged by mutual agreement and unreduced by court order, is as effective as an order of the court made otherwise than by consent and not discharged on appeal”.

[46] While I acknowledge the quote accurately paraphrases the cited para. 110 of Justice Dickson’s reasons in *Esteghamat-Ardakani v. Taherkhani*, 2023 BCCA 290, I caution that it must be considered in context, which shows a consent order is actually not as effective in all respects. There, the Court of Appeal was addressing whether courts can reopen a consent dismissal order to reconsider the underlying dispute, or whether courts in such circumstances are *functus*, just like they would be if the matter had been dismissed by a final order after trial. In its entirety, para. 110 of that decision is the Court’s explanation of why the effects of such an order are different, and why/how the Court was not *functus* because the order at issue was only a consent order – not a final order after trial.

[47] Nevertheless, while making its finding, the Court provided guidance about the application of *res judicata* based on consent judgements that provides compelling

authority for me to find that cause of action estoppel likely applies to some or all of the Impugned Paragraphs:

[110] In my view, this Court's judgment in *Prairie Hydraulic* does not stand for the proposition advanced by Mina and Francis, namely, that when a cause of action is dismissed by consent it is finally extinguished and can never be revived by subsequent order. On the contrary, as I read it, *Prairie Hydraulic* simply affirms that a consent judgment, undischarged by mutual agreement and unreduced by court order, "is as effective as an order of the Court made otherwise than by consent and not discharged on appeal": at para. 34. Accordingly, such an order must be obeyed, and further litigation concerning the same matter is impermissible. As the following passages show, this Court's reasons in *Prairie Hydraulic*, read as a whole, express little more than these well-established principles:

[32] *Res judicata* and its two related doctrines of issue estoppel, and the rule in *Henderson v. Henderson* (1843), 3 Hare 100, which generally limits a litigant to one action founded on a particular set of facts, are founded upon two principles usually stated by their Latin maxims: (1) *Interest reipublicae ut sit finis litium* [it is in the government's interest that there be an end to litigation]; and (2) *Nemo debet bis vexari* [no one should be tried twice in the same matter].

[33] The essence of the first doctrine is that upon judgment the cause of action merges into the judgment and thus ceases to exist and cannot be revived. It applies as much to consent judgments as to judgments upon a contested action.

[34] As Lord Blanesburgh put it in *Kinch v. Walcott*, [1929] 3 W.W.R. 13 at 20:

First of all their Lordships are clear that in relation to this plea of estoppel it is of no advantage to the appellant that the order in the libel action which is said to raise it was a consent order. For such a purpose an order by consent, not discharged by mutual agreement, and remaining unreduced, is as effective as an order of the Court made otherwise than by consent and not discharged on appeal. A party bound by a consent order, as was tersely observed by Byrne, J., in *Wilding v. Sanderson* [1897] 2 Ch. 534, at 544, 66 L.J. Ch. 684 "must when once it has been completed, obey it, unless and until he can get it set aside in proceedings duly constituted for the purpose." In other words the only difference in this respect between an order made by consent and one not so made is that the first stands unless and until it is discharged by mutual agreement or is set aside by another order of the Court; the second

stands unless and until it is discharged on appeal. And this simple consideration supplies at once the answer to this appeal. The consent order in the libel action has neither been abandoned nor set aside. Accordingly it stands at this moment as an order effective to prevent the appellant from setting up against the two respondents parties to it the charges against them thereby withdrawn. Nor is it any answer for the appellant to say that by his amended reply he has alleged, and he asks to be allowed to prove that the consent order was and is a nullity. It is, first of all, in no sense true that the order is a nullity. At the best, so far as the appellant is concerned, the order embodies an agreement which possibly may still remain voidable at his instance. But that means that the order stands until it has been effectively set aside. And such an order, where the objection taken to it is of the character here set up by the appellant can only be so set aside in an action or proceeding directed to that special end.

[35] No action has been brought to set aside the consent judgment in issue here.

[Emphasis added.]

[48] These passages provide authority for the applicants' assertion that the respondents are – unless and until the Consent Dismissal Order is set aside – precluded from maintaining the Impugned Paragraphs in the counterclaim due to the principles of estoppel.

[49] I acknowledge, however, that estoppel is an equitable principle. Further, at para. 92 of the Court's reasons in *Esteghamat-Ardakani*, Dickson J.A. also explicitly noted that while "[a] consent order is a formal expression of an agreement between the parties...it is not a judicial determination of the merits of a case" (emphasis added). The Court repeats that statement in paras. 114 and 117.

[50] The Court of Appeal relied on that very distinction – i.e. that consent dismissal orders are not judicial determinations of the merits of a case – as a basis to find courts have jurisdiction to reopen them, even though no such ability exists to reopen final orders made after a trial. I do not see how the fact that the Consent Dismissal Order includes the words "as if tried on its merits" can change that reality; it remains

simply a reflection of the parties' agreement and it remains factually undeniable that there has never been a judicial determination of the merits.

[51] For similar reasons, I question whether – and if so how – cause of action estoppel would preclude all reference to facts or allegations set out in prior proceedings in any future litigation even though there has never been a judicial determination of the merits of that case.

[52] I find that the better view is that the issue of whether reliance on such facts in a subsequent proceeding is an abuse of process remains a discretionary determination based on all of the circumstances, as does the question of what the court should do about it in any given situation.

[53] To be clear, I accept that attempts by a party to relitigate a claim covered by a settlement agreement, particularly when the same party instituted the original claim and agreed to its dismissal, *can* amount to an abuse of process. It is simply inaccurate to say that is always the automatic result.

[54] For example, at Part 3, para. 31 of the notice of application, the applicants point to para. 72(c) of this Court's decision in *Bagha Enterprises Ltd. v. Nijjar*, 2022 BCSC 1717, for the proposition that attempts to relitigate claims covered by a settlement agreement *amount to* an abuse of process. However, a closer read of that decision reveals it was a very fact-specific finding that relied on a variety of factors not analogous to the case at bar.

Application to the Facts

[55] In the circumstances, I find that most of the Impugned Paragraphs are inadequately tied to anything arising in the main proceedings and that they constitute an explicit attempt to re-litigate the matters explicitly dismissed through the Consent Dismissal Order.

[56] Paragraph 37 of Part 1 of the counterclaim implies that the subsequent paragraphs describe the losses the respondents allege they suffered from breaches

of representations and warranties they allege the Toupchinejad applicant committed. However, the facts that follow in paras. 38 and 49 undeniably lay out the same factual foundation at issue in the 2022 Action and effectively mirror the facts section of paras. 9, 10(h)–(j), 11–13, 15, 16, 17(a)–(c) and (f)–(g), and 18–20 of the 2022 NoCC.

[57] This repetition continues in Part 2 of the counterclaim. Paragraphs 2–5 of that part of the pleading – ostensibly relying on the impugned facts noted above – indicates the respondents seek a declaration that the respondents hold a constructive trust over the CPL Properties (para. 2), an order that Toupchinejad disgorge profits from breach of the alleged fiduciary duties explained in the facts portion (para. 3), in the alternative, an order for restitution on a *quantum meruit* basis for services the respondents allege they performed on some of the properties (para. 4), and punitive damages against the applicants, jointly and severally (para. 5). This relief was requested in the 2022 Action and was set out in paras. 3–4, 7, 8, and 9 of the 2022 NoCC.

[58] Using similar repetition, paras. 7–13 of Part 3 of the counterclaim repeat and rely on nearly identical recitations of the legal basis for the claims as articulated by the respondents in the 2022 Action and set out in paras. 10–15 and 17 of the 2022 NoCC.

[59] There is no denying that through the Impugned Paragraphs of the counterclaim, the respondents ask the trial court to determine the same claims and requests for relief that were resolved in the Settlement Agreement. More significantly, those are matters that were dismissed as a result of the Consent Dismissal Order, which as of now remains in force and effect.

[60] The Impugned Paragraphs are, in that regard, an abuse of process. I find that they are attempts to relitigate causes of action dismissed in the Consent Dismissal Order, and which are now subject to cause of action estoppel. Even if for any technical reason they would fall short of meeting the test for such estoppel, I find they nevertheless constitute an abuse of process.

[61] As Douglas J. noted in *McCann*, above:

[29] Abuse of process is a broad and flexible doctrine, grounded not only in R. 9-5(1)(d) but also in the court's inherent jurisdiction to prevent abuses of the court's process; it allows the court to strike a claim where to do otherwise would violate principles of judicial economy, consistency, finality, and the integrity of the administration of justice...

[62] To permit the Impugned Paragraphs to be relitigated in the face of the Consent Dismissal Order would undermine the principles of judicial economy, consistency, finality, and the integrity of the administration of justice. Among other things, it would require production of documents and examinations for discovery on the very matters that were already dismissed by order of the court. Allowing these paragraphs to remain would render what is otherwise a final order entirely ineffective, which is contrary to all of the principles noted above.

[63] The fact that the respondents wish to set aside the Settlement Agreement through this proceeding does not change anything, just as it would not change anything if the instant action sought to set aside the Consent Dismissal Order. To borrow the words of Lord Blanesburgh, “[n]or is it any answer for [a party] to say that by his amended reply he has alleged, and he asks to be allowed to prove that the consent order was and is a nullity”: *Esteghamat-Ardakani* at para. 110, quoting *Kinch v. Walcott*, [1929] 3 W.W.R. 13 at 20, 1929 CanLII 516 (U.K.P.C.).

[64] Even without the Impugned Paragraphs, the respondents can still pursue their request to set aside the Settlement Agreement. If successful, I doubt they will have difficulty setting aside the Consent Dismissal Order as it was premised on the agreement. However, that is not the case I have before me today, and as of today, the order is still final, binding, and of full force and effect. As such, I find the Impugned Paragraphs constitute an abuse of process. The respondents' two arguments to the contrary do not survive scrutiny.

The Impugned Paragraphs as particulars of the respondents' losses

[65] The first argument the respondents advance as to why the Impugned Paragraphs are not an abuse of process is that they are not included as requests to

relitigate the causes of action at issue in the Consent Dismissal Order, but rather are merely particulars of their alleged losses in the Contractual Counterclaims.

[66] I find that an immediate problem with that assertion is that it is not accurate on the face of the pleadings. In particular, the impugned “Relief Sought” paragraphs bear this out as they reveal the respondents are using the instant action to seek the same orders of declaratory and proprietary relief as sought in the 2022 Action. They are not simply seeking compensation for the loss of the potential to obtain such relief.

[67] Further, and in any event, classifying the Impugned Paragraphs as particulars of the loss is, in law, a distinction without a difference. It is simply an example of the principle noted in *Klassen* at para. 58, that even where a second litigation is based on a different legal description or conception of the case, it can nevertheless be barred by the application of cause of action estoppel. Accordingly, the respondents’ first argument fails to persuade me that the Impugned Paragraphs are not an abuse of process.

The “Hold Harmless” Provisions

Respondents

[68] The respondents’ second argument against any finding that the Impugned Paragraphs are an abuse of process is that the claims therein are authorized by the indemnity and hold harmless provisions of the Settlement Agreement. In oral argument, the respondents conceded that their entire argument on this point rested on the appropriate scope and meaning of the term “hold harmless”. They argue the only way they can be “held harmless” is if they have the ability to pursue all the claims they could have pursued if not for the Settlement Agreement, including the claims for property rights.

[69] At the conclusion of the oral hearing, I invited the parties to provide additional authorities and limited supporting argument on whether similar “hold harmless” clauses in settlement agreements have ever been interpreted as revitalizing claims

otherwise released in such agreements. In summarizing the parties' respective positions below, I will combine both their oral and written submissions.

[70] The respondents' written submissions include a redacted version of the Settlement Agreement term:

Each of [the Applicants] hereby agrees to defend, indemnify and hold harmless each of [the Respondents] from and against any claim,...loss,...of any nature or kind, whether under applicable law or pursuant to contract, or in any court or before any other body, board or tribunal of competent jurisdiction arising from, connected with or relating to any of the following: (a) a breach of any of their representations and warranties given under this Agreement.

[71] At para. 3 of their written submissions, they note that Black's Law Dictionary defines "indemnify" as: "v. To make good the loss which someone suffered through another's act or default; to grant an indemnity, to agree to indemnify". Further, they argue that contractual interpretation is a "contextual and holistic exercise", where all the terms should be taken together to consider the meaning of individual words, all of which should be given their own meaning.

[72] In essence, their position rests on the nature of the litigation resolved through the Settlement Agreement. In particular, they assert that holding harmless must go beyond monetary relief and extend to the right to pursue property-related claims because their original claims extended that far. Since their original claims included claims for interest in land, they cannot be "held harmless" unless they can pursue those original claims.

Applicants

[73] The applicants urge me to take a narrower view of the term that would limit the indemnification and hold harmless phrase to providing financial compensation; they point to various positions in support.

[74] First, they point to the Supreme Court of Canada's interpretation of the phrase at issue in *Salmon River Co. v. Burt Bros.*, [1953] 2 SCR 117 at 120, 1953 CanLII 36:

To indemnify and save harmless is to protect one person against action in the nature of claims made or proceedings taken against him by a third person, and it would distort that plain meaning to attribute any other signification to it.

[75] The applicants argue that the clause could be interpreted as only applying to situations where the respondents require indemnity and/or to be held harmless to claims from others. They add, however, that even if the hold harmless words themselves were broader, they would still be limited to monetary claims. In support, like the respondents, they too rely on Black's Law Discitionary, albeit indirectly.

[76] More precisely, they rely on the Court of Appeal decision in *Arklie v. Haskell*, 33 D.L.R. (4th) 458, 1986 CanLII 1273 (B.C.C.A.), where McLachlin J.A. (as she then was) cited from the definition of "indemnify" in Black's Law Dictionary and noted that "the concept of indemnity has central to it the idea of compensation, of making good, of paying moneys to a person to reimburse them for losses sustained": at para. 26.

[77] They further argue that the fact "indemnify" and "hold harmless" are merely alternative expressions of the same concept was expressly recognized in the Ontario case of *Genak Enterprises Inc. v. Lake Shore Gold Corp.*, 2022 ONSC 2981. The paragraph they cite from that decision reads as follows:

[27] Third, the "notwithstanding" language at the end of each Indemnity refers only to "this indemnity" and "such indemnity", referring back to the indemnity in the first paragraph. This language is designed, under the *Income Tax Regulations* set out above, to ensure that the Indemnities do not cause the flow-through shares to be characterized as prescribed shares. Given that the contract and the Indemnities were drafted in the context of this known risk, there is no basis to interpret the words "hold harmless" as having any separate meaning from the word "indemnify", whether on timing of the payment or otherwise.

[78] By citing and relying on the quotes above from *Salmon River* and *Genak Enterprises*, I do not take the applicants to be saying that those words must have that meaning in all cases. Rather, the applicants were directly addressing my request for any authorities interpreting the words in the manner they propose it be done here. While in both of those decisions, the interpretation was clearly driven by the contexts, they are at least examples of how some courts have interpreted the

words. The respondents have provided no similar authority supporting their significantly broader interpretation, which, while not determinative, speaks volumes to the extremely unique interpretation they are proposing. It is simply not one that would logically flow from the use of those terms that are close to, if not in the realm of, specialized legal language.

[79] I agree with the respondents that contractual interpretation is a contextual and holistic exercise, and that contracts must be interpreted as a whole – rather than interpreting individual words or parts – and in context with the history of the proceedings. However, such a broader review in many respects weighs against the respondents and supports a narrower reading of the terms.

[80] First, a review of the clause at issue, after re-inserting the portions redacted by the respondents in their written submissions, begins to undermine their position that the clause was meant to go beyond indemnifying and holding them financially harmless, let alone from claims or demands by third parties [*italics represent the previously redacted portions*]:

Each of [*the Applicants*] hereby agrees to defend, indemnify and hold harmless each of [*the Respondents*] from and against any claim, loss, *fine, administrative monetary penalty, financial sanction, interest payment, expense, disbursement, proceeding or hearing* of any nature or kind, whether under applicable law or pursuant to contract, or in any court or before any other body, board or tribunal of competent jurisdiction arising from, connected with or relating to any of the following: (a) a breach of any of their representations and warranties given under this Agreement.

[81] Reading the words “claim” and “loss” in this context leads me to find that the provision was meant to apply to proceedings by the parties, and in no way does it give the respondents new rights to sue the applicants. Even if I were wrong in that, I further find that they create nothing more than a right to claim monetary relief, not to pursue any right to the properties at issue in the 2022 Action.

[82] I note that the broader context includes that the Settlement Agreement was intended to resolve the dispute by substituting the respondents’ various claims for property rights and other relief, with very clearly defined monetary and/or conduct

obligations on both sides. It is clear the intent of the parties was to use the Settlement Agreement to remove the property rights disputes. That goal would not be furthered by an interpretation of the indemnity and hold harmless clauses that would unilaterally allow the respondents to reassert them at any time; as such, I reject the respondents' assertion.

[83] In oral submissions, the respondents' counsel argued that as the Settlement Agreement was drafted by the applicants' counsel, the *contra proferentem* principle required that any ambiguity of this term should be interpreted against them.

[84] In all the circumstances, I find that this is *not* one of the situations where I should apply the *contra proferentem* principle. While the respondents state that the applicants' counsel drafted the agreement, they do not dispute it was sent to them for editing. It appears they chose not to seek any amendments to the release clause that contained the indemnity and hold harmless language. They did, however, draft one of the annexes to the document, and sent it to the applicants. Both sides were represented by competent counsel, were open to and did share roles in drafting of parts of the agreement as a whole, and both ultimately could have made changes to any part of it. Therefore, I find on the evidence before me that it was more of a joint drafting exercise and in any event, the aforementioned principle does not apply.

[85] Even if I were wrong in that regard, I would still not apply the principle in this case because the clause at issue does not have the inherent ambiguity necessary to do so. Just because a party can come up with a different interpretation of a term does not render it ambiguous. Counsel are well adept at proposing all kinds of contradictory meanings to terms after the fact where it suits their clients' needs, but such arguments are not proof of ambiguity. I do not accept that the term "hold harmless" has the requisite vagueness to trigger the principle.

[86] In the further and final alternative, even if I accepted it had some vagueness, I find that no proper interpretation of the term would include it giving the respondents the right to revive the claims otherwise released in the Settlement Agreement. To do so would be a radical departure from the norm when parties are settling cases. It

would effectively remove from one party the largest benefit received from a settlement, namely relief from having to litigate the matters therein, and such a loss would arise simply upon the other party unilaterally alleging some subsequent breach of the agreement. That would be a remarkable clause, and it would require very clear language. No such language exists here.

[87] As a final matter, while I do not have to decide the matter given my earlier findings, I am doubtful that any contractual provision would remove the court's discretion to bar, as *res judicata*, proceedings dismissed through a Consent Dismissal Order. The better theoretical implication of such a term – which was not raised but I address it for completeness – would be that the applicants might be estopped from arguing those claims are *res judicata*. The court would retain the discretion to dismiss such proceedings as an abuse of process, as such authority cannot be removed by contract.

[88] The only exception to my findings that the Impugned Paragraphs are an abuse of process is the plea requesting punitive damages, namely Part 2, para. 5. Given that the surviving elements of the counterclaim include a breach of trust claim, it is not impossible for such a claim to give rise to punitive damages. The fact that they were sought in the 2022 Action cannot foreclose a claim for such damages if the right to it can be established based on the pleadings that survive this strike out application.

[89] However, I find the balance of the Impugned Paragraphs should be struck as an abuse of process given the entirety of the circumstances. As noted in the authorities above, abuse of process is a broad, flexible doctrine that is a judicial tool to address circumstances that threaten the fairness and integrity of the court's process and the administration of justice.

[90] In these circumstances, I find it is appropriate to exercise my discretion to dismiss all of the Impugned Paragraphs, except for para. 5 of Part 2.

[91] As final words of clarity, I wish to confirm that I have not found that the Impugned Paragraphs are *res judicata* due to the defence of issue estoppel. During oral submissions, the applicants' counsel explicitly acknowledged the applicants were not making that assertion or relying on that defence, and I have not applied it in this case.

Conclusion re: The Impugned Paragraphs

[92] In the circumstances, for the reasons noted above I find that the Impugned Paragraphs of the counterclaim excepting para. 5 of Part 2 are an abuse of process and must be struck. I will now turn to that part of the application seeking to strike the CPLs.

(2) Striking the CPLs

[93] The applicants argue that as the CPLs are supported only by the Impugned Paragraphs, I should exercise my inherent jurisdiction to cancel and discharge the CPLs on the basis that they too amount to an abuse of process. In this part of my analysis I must therefore first determine whether the CPLs can be struck in such circumstances before deciding whether to exercise my discretion to do so.

Can I strike the CPLs?

[94] Because of nuances in the law discussed below, I must first examine whether the counterclaim constituted a claim for an interest in the relevant lands as required to support filing of the CPLs under s. 215 of the *LTA*. If so, that will be the end of the matter and I must leave the CPLs in place. Put another way, it is only if I find that the counterclaim does not assert a sufficient interest in land that I can go further and consider whether I can cancel the CPLs now, or in the future.

Did the Counterclaim Support the CPLs at the time they were filed?

[95] Section 215(1)(a) of the *LTA* permits a party to a proceeding who is claiming an estate or an interest in land to register a CPL against that land. It is settled law that if that party's pleadings disclose no such interest, the court has inherent jurisdiction to cancel the CPL: *Yi Teng Investment Inc. v. Keltic (Brighthouse)*

Development Ltd., 2019 BCCA 357 [*Yi Teng*]. The test to be applied is whether the pleadings, assuming them to be true, are capable of supporting a claim to an interest in land.

[96] Unlike an application to strike pleadings or a cause of action, when reading the pleadings for the purposes of cancelling and discharging a CPL under s. 215, the pleadings are not read broadly: *1267070 B.C. Ltd. v. 1208471 B.C. Ltd.*, 2021 BCSC 2310 at para. 47.

[97] While no evidence is typically to be considered, in *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2023 BCSC 1257, Justice Majawa noted that the court can refer to a document, including a contract, incorporated by reference in the pleadings.

[29] I was not directed to any decision where this has occurred when the court has definitively decided the matter. However, in *Yi Teng*, at paras. 45 to 47, the Court of Appeal considered whether the court could have reference to a contract to “illuminate the substance of the pleadings” in an application under s. 215. Referring to the Supreme Court of Canada's decision in *Monenco Ltd. v. Commonwealth Insurance Co.*, 2001 SCC 49, at para. 39, MacKenzie J.A., writing for the court, appears to suggest that doing so, i.e., considering the evidence, would be permitted as long as the contract was explicitly referred to in the pleadings. However, in *Yi Teng*, the Court of Appeal expressed reservations about whether the contract was specifically referred to in the pleadings and found it unnecessary to determine because it would not have assisted in the determination that it had to make in any event.

[30] In light of this, I agree with counsel for the applicant that the JVA may be referred to as it was specifically incorporated into the ANOCC by reference.

[31] These circumstances are analogous to the situation where the court is permitted to refer to documents incorporated by reference in a pleading when considering an application to strike under Rule 9-5(1)(a) of the *Rules*.

[32] In those applications, Rule 9-5(2) prohibits the admission of evidence. However, the court has determined that it may refer to documents incorporated in the pleadings by reference to them: *Shoppers Drug Mart v. Mang*, 2021 BCSC 928, at para. 14, and the many cases that are referenced therein.

[33] Reference to documents specifically incorporated in the pleadings may assist the court in ensuring that a party who registered a CPL does not use “artful” pleading in support of its claim for an interest in land or such documents can be used to “illuminate the substance” of the pleading.

[34] Consequently, I have decided that I may have limited reference to the JVA in my determination of whether the pleadings support an interest in land. However, reference to the JVA does not detract from the requirement that the pleadings are not to be read broadly, nor does it permit me to weigh the merits of Montaigne's case.

Analysis re: The CPLs

[98] As noted above, the respondents argue that their counterclaim is “for the loss of the released claims”, which the respondents say was caused by or related to the applicants’ breach of representations and warranties provided by the applicants either before or as part of the Settlement Agreement. I have rejected that argument and am striking the Impugned Paragraphs that might have otherwise supported the CPLs.

[99] That is not the end of it, however, as the respondents further argue that even if their counterclaim were merely a breach of contract claim – namely, based on breach of the Settlement Agreement – it could still support and ground the CPLs because of its relationship to the CPL Properties. This is presumably directly through the counterclaim references or indirectly through the Settlement Agreement that was itself the product of litigation surrounding those properties.

[100] I have already concluded that the indemnity and hold harmless provisions are only contractual provisions for monetary amounts and do not give rise to any claims for property. The question remains whether they or any aspect of the Contractual Counterclaims could support the CPLs.

[101] In support of the position that they can, the respondent points to para. 35 of this Court’s decision in *Montaigne Group Ltd.* for the proposition that pleadings can support an interest in the land arising from a claim in contract. A closer read of that case, however, demonstrates that the Court was relying on the existence of explicit terms in the contract that provided the party with an interest in the lands. The case is therefore of no assistance to the respondents.

[102] I agree with the applicants that, outside of the Impugned Paragraphs, the indirect relationship to the CPL Properties as having been within the subject matter

of the 2022 Action that was resolved through the Settlement Agreement does not meet the s. 215 *LTA* threshold for maintaining the CPLs.

[103] The mere fact that a claim “relates” to land is not sufficient, although pleadings that support either legal or equitable interests in land can be sufficient to ground a CPL: see *Reum Holdings Ltd. v. 0893178 B.C. Ltd.*, 2015 BCSC 2022 at para. 74.

[104] As the applicants note in their written submissions, the CPL is an extraordinary remedy that prevents the rightful landowner from passing the lands to innocent parties pending judicial determination of a legal proceeding that implicates those lands. More particularly, it is intended to protect a valid claim to an interest in land until the issues in dispute can be resolved: *Mushy Roomy Products Inc. v. JACP Holdings Ltd.*, 2025 BCSC 345 at para. 35.

[105] The applicants are also correct in noting that an essential requirement for a valid CPL is that it must be filed to protect an interest in land that is implicated in the underlying action, not simply as a means of obtaining security for eventual judgment: *Drein v. Puleo*, 2016 BCSC 593 at para. 8; *Water Street Profile Services Inc. v. Kelowna Sustainable Innovation Group Ltd.*, 2018 BCSC 925 at para. 46.

[106] Conversely, I also agree with the respondents that, in the appropriate circumstances – such as where it includes a claim for specific performance – a breach of contract claim can involve an interest in land that must be maintained pending trial, thus supporting registration of a CPL. However, I agree with the applicants that a claim solely for damages for breach of contract cannot provide such support.

[107] Since I find that the surviving paragraphs of the counterclaim are just that, claims for monetary relief, I find they cannot support the existing CPLs. I now have to consider the implications of the Impugned Paragraphs.

[108] I find that when the CPLs were filed on or about November 10, 2025, the counterclaim upon which they were based included the Impugned Paragraphs. I find

those paragraphs included allegations and material facts to support equitable if not legal interests sufficient to meet the s. 215 threshold at the time the CPLs were filed. For example, paras. 38 and 39 of Part 1 allege the parties entered into a joint venture to purchase and develop the CPL Properties together. Paragraph 40 alleges the joint venture agreement required that while legal title to the lands would be held by corporate entities, the respondents would hold ownership interests in those companies.

[109] Paragraph 41 also alleges the agreement required the respondents to provide various services to further the joint venture – and that they did in fact provide such services – without pay, and in return they were to be provided full accountings of and share in the profits from eventual sales of the properties. Paragraph 47 alleges that the services the respondents provided increased the value of the properties, causing an unjust enrichment to the applicants.

[110] Finally, in para. 48, the counterclaim pleads that a monetary award would be inadequate to satisfy the respondents' claims related to the CPL Properties due to a variety of factors, including that they had a partnership interest (implicitly, an equitable interest) in those properties. The Impugned Paragraphs that are from Parts 2 and 3 (Relief Sought and Legal Basis), build on those factual allegations to lay out legal and equitable interests in the CPL Properties.

[111] In summary, I find that the Impugned Paragraphs are sufficient pleading of an interest in land to satisfy the requirements of s. 215 for grounding the CPLs. However, I also find that without them, the balance of the pleadings would not meet that threshold and do not support the CPLs. More to the point for the next part of the analysis, I find that but for existence of the Impugned Paragraphs in the counterclaim, the CPLs would not have been validly filed (i.e. the pleadings would not satisfy the requirements of s. 215 of the *LTA*) and thus the inherent jurisdiction affirmed by the Court of Appeal in *Yi Teng* would have permitted me to cancel the CPLs at this time.

[112] However, we are in a different circumstance than in *Yi Teng*. Where the defect in the claim (i.e. why it does not adequately meet the test under s. 215) stems from my striking of portions of the claim upon which CPLs were originally filed, s. 254 of the *LTA* comes into play, and the Court of Appeal has confirmed that section overrides my inherent jurisdiction by removing my jurisdiction to “immediately” cancel the CPLs.

[113] Under the heading of “Cancellation of certificate of pending litigation if action dismissed”, s. 254 states:

If an action in respect of which a certificate of pending litigation is registered has been dismissed, the registrar must cancel the registration as provided in the regulations, or, on

(a) application, and

(b) production of a certificate of the registrar of the court that issued the certificate of pending litigation, endorsed by the registrar of the Court of Appeal, certifying that

(i) the action has been dismissed and that the time limited for appeal has expired and no notice of an appeal has been filed with the registrar of the Court of Appeal, or

(ii) a notice of appeal has been filed and has been finally disposed of, and the dismissal of the action has not been set aside by the Court of Appeal or the Supreme Court of Canada.

[114] In their notice of application, the applicants recited paras. 30 and 31 of the Court of Appeal’s decision in *Sood* as authority for some of the bounds of the Supreme Court’s inherent jurisdiction to prevent abuses of process, even where it requires filling gaps in legislation.

[115] However, their request for *immediate* cancellation of the CPLs ignores earlier passages in *Sood*, which acknowledge that the Courts in *Bilin* and *Berthin* clarified how the various routes – and timelines – for cancelling CPLs based on the inherent jurisdiction of the court will vary depending on the grounds raised.

[116] The scope of the court’s jurisdiction to *immediately* cancel a CPL depends on whether the application to do so is premised on (i) alleged inadequacy in the pleading to properly support an interest in land (i.e. failure to meet the s. 215

requirements in the first place), or (ii) the striking of pleadings upon which the CPL is based. The following passage of *Sood* is instructive:

[25] In *Bilin*, however, this Court held that a judge of the Supreme Court of British Columbia had the jurisdiction to cancel a CPL where the pleadings filed in support of the CPL are incapable of supporting a claim to an interest in land, notwithstanding that there is no explicit statutory authority for such an order. Justice Kirkpatrick, writing for the Court, contrasted this scenario with the circumstance where there is no triable issue to support the claim for an interest in land. In that situation, the proper approach is to bring an application under Rule 9-6(4) for the summary dismissal of the part of the claim that relates to land.

[26] In *Berthin v. Berthin*, 2018 BCCA 57, Justice Fenlon confirmed that the court had jurisdiction to cancel a CPL immediately for failure to meet the threshold requirements of s. 215, or for hardship and inconvenience pursuant to ss. 256–257, but the court did not have the jurisdiction to cancel a CPL immediately when the underlying claim was dismissed (at para. 44). In that circumstance, s. 254 requires a property owner to wait until the appeal period has expired or until the final disposition of any appeal that has been filed.

[27] The effect of *Bilin*, *Berthin* and subsequent decisions of this Court is that there are three principal means by which a CPL may be cancelled. In order of their utility for an applicant, they are as follows:

- (i) An applicant may apply for immediate cancellation of the CPL without security for failure to comply with the preconditions of s. 215(1) of the *LTA*;
- (ii) An applicant may apply for immediate cancellation of the CPL with security on grounds of hardship and inconvenience, pursuant to ss. 256 and 257 of the *LTA*; and
- (iii) An applicant may apply for cancellation of a CPL if either the action in which it was obtained or the part of the action in which an interest in land was claimed has been dismissed, and either the time limited for appeal has expired and no notice of appeal has been filed or a notice of appeal has been filed and has been finally disposed of, pursuant to s. 254 of the *LTA*.

[Emphasis added.]

[117] In *Berthin*, the Court of Appeal overturned the chambers judge for doing essentially what the applicants initially asked of me, namely to immediately cancel the CPLs if I were to dismiss the claims on which the interest in property was based.

[118] Writing for the Court, Fenlon J.A. explained how s. 254 of the *LTA* continues the extraordinary pre-judgment protections intended by a CPL throughout any appeal processes related to the striking of pleadings that otherwise grounded the CPL:

[32] A CPL is an extraordinary pre-judgment mechanism intended to protect a valid claim to an interest in land until the issues in dispute can be resolved. It prevents a plaintiff's claim from being defeated by the defendant transferring the property in dispute to a third party. Section 254 of the *Land Title Act* continues that protection throughout the appeal process, thereby ensuring the property remains available in the event an appeal is successful. Section 256 protects the interests of the defendant property owner by providing for removal of a CPL if it is causing hardship or inconvenience. Section 252 provides a further avenue for removal where the plaintiff fails to pursue a claim diligently.

[Emphasis added.]

[119] Justice Fenlon also noted that the extent of the court's inherent or common law jurisdiction to cancel CPLs given the express provisions in the *LTA* "has proved a vexing question" until the law was clarified by *Bilin* in 2017: *Berthin* at para. 33. She went on to note that in *Bilin*, the Court of Appeal conclusively affirmed the court's inherent jurisdiction to immediately cancel a CPL for failure to meet the requirements of s. 215, but it also distinguished that from situations where the underlying basis for the CPL had been struck under Rule 9-5. Justice Fenlon found that s. 254 of the *LTA* governed these latter situations:

[40] *Bilin* stands primarily for the principle that the court has jurisdiction to cancel a CPL which fails to meet the threshold criterion of a pleading claiming an interest in land as required by s. 215 of the *Land Title Act*. But it also stands for the principle that where an interest in land is claimed, but the claim is contended to be without merit, the proper approach is to apply under the summary judgment rule to dismiss the claim, in which case the CPL may only be cancelled in conformity with s. 254 of the *Land Title Act*, which provides...[reproduction of s. 254 omitted].

[41] In my view, s. 254 also applies to removal of a CPL following dismissal of a claim to an interest in land under R. 9-5. In effect, s. 254 requires a CPL to remain on title until the plaintiff exhausts his

or her avenues of appeal, with one exception: it remains open to the defendant under s. 256 of the *Land Title Act* to apply at any time to remove the CPL due to hardship or inconvenience.

[Emphasis added.]

[120] If that were the end of the authorities, I still might have thought an exception could exist where the dismissal of the claim was based on Rule 9-5(1)(d), as an abuse of process. That sub-section invokes different concepts and concerns than others in Rule 9-5. For example, an argument might be made that the Impugned Paragraphs were an abuse of process from the start, and thus any ruling affirming they are abusive acts retroactively as grounds for cancelling the CPLs due to the balance of the pleading having failed to meet the s. 215 threshold at the outset.

[121] However, in *Berthin*, Fenlon J.A. specifically notes that in *Mott*, the Court of Appeal affirmed that dismissal of pleadings for abuse of process does not take the matter outside of the s. 254 mandated process:

[42] I note that this approach has been followed by two judges of this Court in chambers. In *Mott v. P.N.E.*, 2001 BCCA 731, the defendant had in the court below brought an application for an order dismissing the action as an abuse of process under R. 19(24) (now R. 9-5), and in the alternative for an order cancelling the CPL on the basis that it caused hardship under ss. 256 and 257. The judge in that case had dismissed the plaintiffs' action as an abuse of process under R. 9-5. The plaintiffs appealed that order. In considering the effect of striking the claim, Justice Levine said:

[20] Section 254 of the *Land Title Act* provides that a certificate of pending litigation must be cancelled if the action in respect of which it is registered has been dismissed. The applicant for cancellation must produce a certificate of the registrar of the court that issued the certificate of pending litigation, endorsed by the registrar of the Court of Appeal, certifying that the action has been dismissed and no notice of appeal has been filed, or if a notice of appeal has been filed, that the appeal has been finally disposed of, and the dismissal of the action has not been set aside by the Court of Appeal or the Supreme Court of Canada. Thus, as a result of the appeal of Allan J.'s order dismissing the action, the certificate of pending litigation cannot be cancelled until this Court disposes of the appeal and either no appeal is taken to the Supreme Court of Canada, an application for leave to appeal is refused, or the Supreme Court disposes of the appeal. [Emphasis added in original.]

Ultimately, the CPL was ordered to be removed on the basis of hardship, but the comments of Justice Levine are of assistance. They were quoted by Justice Hinkson, as he then was, in *Lindberg v. Lindberg*, 2011 BCCA 318. In that case, Justice Leask had ordered a CPL to be cancelled immediately. The plaintiff appealed and filed a fresh CPL on the basis of the notice of appeal claiming an interest in land. The issue in chambers primarily concerned the validity of a fresh CPL being issued by the Court of Appeal: *Ravnyshyn v. Drys*, 2006 BCCA 20 at paras. 25-27.

[43] After declaring the certificate issued by the Court of Appeal registry a nullity, Justice Hinkson went on to consider whether the order of Justice Leask alone was sufficient to remove the CPL. He concluded that it would be sufficient if the order was made under s. 256, but not otherwise, since s. 254 requires a certificate of the registrar of the Supreme Court to be endorsed by the registrar of the Court of Appeal certifying that the action has been dismissed and no notice of appeal has been filed. As it was unclear on the record before him whether the order had been made under s. 256, further clarification from the judge was required.

[44] I conclude that a judge has jurisdiction to make an order immediately cancelling a CPL when the claim does not meet the threshold requirements of s. 215, or when the property owner affected by the CPL establishes hardship or inconvenience under s. 256. A judge does not have jurisdiction to make an order cancelling a CPL when a claim is dismissed under Rules 9-5, 9-6, 9-7, or following a full trial. In those circumstances, s. 254 of the Land Title Act governs and an order purporting to immediately cancel a CPL cannot be given effect and should not be made. In short, when a claim underpinning registration of a CPL is dismissed, the CPL must remain on title until the requirements of s. 254 are satisfied or a subsequent application under s. 256 establishes hardship or inconvenience.

[Emphasis added.]

[122] The applicants' initial reliance on *Davis v. Archibald*, 2025 BCSC 2095, for the proposition that I could immediately cancel the CPLs was therefore misplaced. The decisions that Court cited may well be examples of the confusion in the law that existed before being clarified in *Bilin* and in *Berthin*. For example, in *Davis* the Court stated:

[28] Prior jurisprudence has also repeatedly confirmed that the court will exercise its discretion to cancel a CPL where it is plain and obvious that the plaintiff's claim is an abuse of process: *Reum Holdings Ltd. v. 0893178 B.C. Ltd.*, 2015 BCSC 2022 at paras. 88-89 citing *Aviawest Resorts Inc. et al v. Memory Lane Development Inc. et al.*, 2004 BCSC 999 at para. 8.

[29] This court has inherent jurisdiction to prevent abuse of its process by regulating the practice of the court. This jurisdiction may be used to fill gaps in statutorily granted powers, including the gap in the statutory provisions of

the LTA that can lead to abuse of the CPL procedure: *Sood v. Hans*, 2023 BCCA 138 at paras. 30-31.

[123] The statement in para. 29 regarding the court's ability to fill in gaps is accurate. However, the statement in para. 28 must be considered a generalization – not an endorsement of “immediate” cancellation – as it otherwise fails to address the implications of s. 254 and the appellate authorities above.

[124] I note that in *Davis*, the Court ultimately found that the underlying proceedings were *not* an abuse of process and only cancelled the CPL because the pleadings did not claim an interest in land sufficient to meet the test under s. 215.

[125] In *Reum Holdings*, the Court also never had to broach the issue of whether s. 254 of the LTA precluded immediate cancellation of the CPL because that Court found the pleadings met the s. 215 threshold. In *Reum Holdings*, the Court relied on the decision in *Youyi Group Holdings (Canada) Ltd. v. Brentwood Lanes Canada Ltd.*, 2014 BCCA 388. However, there, the Court of Appeal was dealing with an appeal from a decision on an application to strike a CPL explicitly based on the requirements of s. 256 of the LTA, not based on the court's inherent jurisdiction.

[126] In *Aviawest Resorts Inc. v. Memory Lane Developments Inc.*, 2004 BCSC 999, the Court was considering the court's inherent jurisdiction, but only when assessing whether the pleadings supported a claim for an interest in lands. The Court found in those circumstances, including the existence of a plea for specific performance of the contract at issue, the pleadings were sufficient to meet the s. 215 threshold requirement:

[2] The defendants' application is brought pursuant to ... the inherent jurisdiction of this court on the grounds that the plaintiffs cannot succeed in their claim for specific performance of an agreement to purchase the strata lots...

[Emphasis added.]

[127] These cases may well be more examples referred to by Fenlon J.A., noted above, of confusion in the law that existed before being clarified by the Court of Appeal in *Bilin*. In any event, it now appears settled law (based on *Bilin*, *Berthin*,

Mott, and Sood) that in cases where the fatal flaw in the CPL comes from a ruling to strike certain parts of the claim, s. 254 governs.

[128] In that respect, the respondents' written submissions regarding s. 254 rely on the fact that the provision only explicitly provides the power to cancel the CPLs (after the appeal period) if the action has been dismissed. The respondents argue that here, since only the Impugned Paragraphs might be struck in this motion, not the entire action, s. 254 precludes any cancellation of the CPLs even if the Impugned Paragraphs are struck.

[129] With respect, that result would lead to absurd, and potentially abusive results. The argument also fails to account for the wealth of caselaw noted above regarding both the court's inherent jurisdiction to fill gaps in legislation and how that jurisdiction has already been applied to allow courts to cancel CPLs upon finding that the requirements under s. 215 have not been met.

[130] Further, as noted above, when summarizing the three ways a CPL can be cancelled, para. 27 of the Court of Appeal's decision in *Sood* explicitly reads into s. 254 that provision's application where merely the relevant part of the claim that supported the CPL – as opposed to the entire pleading – was dismissed:

[27] The effect of *Bilin*, *Berthin* and subsequent decisions of this Court is that there are three principal means by which a CPL may be cancelled. In order of their utility for an applicant, they are as follows:

(i) ...

(ii) ...

(iii) An applicant may apply for cancellation of a CPL if either the action in which it was obtained or the part of the action in which an interest in land was claimed has been dismissed, and either the time limited for appeal has expired and no notice of appeal has been filed or a notice of appeal has been filed and has been finally disposed of, pursuant to s. 254 of the *LTA*.

[Emphasis added.]

[131] In their written submissions on s. 254, the applicants argue in support of the same reading in that has already been applied by the Court of Appeal in *Sood*. While that Court's authority stands on its own, I add the following comments since no

specific explanation in regard to this particular issue was provided by the Court in *Sood* or in the other authorities upon which it relied.

[132] The applicants argue this is an appropriate filling in of the legislative gaps pursuant to the court's inherent jurisdiction. Even without the Court of Appeal authority from *Sood*, I would agree based on consideration of the interests at stake, not to mention an assessment of the legislature's intent.

[133] The ease at which CPLs can be registered (and the resulting prejudice to the landowner) is only balanced by the prerequisite for CPLs to be grounded in pleadings of a sufficient interest in land. This supports the notion that an overly prescriptive reading of s. 254 could create a nonsensical gap that could lead to abuses. In particular, given the balancing of interests intended by that provision, it would be absurd if s. 254 was interpreted as completely overriding the court's inherent jurisdiction to cancel a CPL even after appeals or relevant orders striking the relevant pleadings had proved fruitless simply because other parts of the pleadings remained. A party could easily defeat the s. 215 requirements simply by ensuring that its pleading also included other, non-land related claims.

[134] One option would be to interpret s. 254 as putting no restrictions on applying to strike the CPLs where only the relevant portions of the pleading were dismissed: arguably, because such a scenario is not explicitly addressed in s. 254, that section was not meant to limit the court's inherent jurisdiction. However, that would result in a situation where dismissal of the entire pleading is less advantageous than dismissal of only the relevant parts of it.

[135] The other option is to read this scenario of partial dismissal into s. 254, or alternatively, interpret the appeal provision elements as an implicit limitation in the court's inherent discretion in these situations, just like if the entire action were dismissed. Either way, the relevant appeal periods would have to be exhausted before the CPL could be formally cancelled. Arguably, this is also the only interpretation that could have been intended by the legislature in drafting this section.

[136] In any event, the Court of Appeal in *Sood* acknowledged that gaps in the *LTA* that could lead to abuses may be filled through the exercise of the court's inherent jurisdiction:

[31] In the case of cancellation of a CPL for failure to comply with the provisions of s. 215, there is a gap in the statutory provisions of Part 16 of the *LTA* which, if not addressed through the court's inherent jurisdiction, could lead to abuse of the CPL procedure. Inherent jurisdiction was the basis of the Court's judgment in *Bilin* and is the basis for any application to cancel a CPL for failure to comply with the requirements of s. 215.

[137] Whether achieved through statutory interpretation that implicitly reads the current situation into s. 254, or through treating the instant scenario as a legislative gap that can be filled by the court's inherent jurisdiction, the result is the same.

[138] I adopt the language used by the Court of Appeal in para. 27 of *Sood*, but will restate them in a manner more directly on point to my reasons.

[139] I find that where a court dismisses parts of a notice of civil claim that initially supported a claim for an interest in land required to meet the requirements under s. 215 of the *LTA* for grounding a CPL, and leaves intact only pleadings that do not meet those requirements, the court has inherent jurisdiction to cancel that CPL. However, that cancellation cannot take effect until and unless any permitted appeal does not materially overturn the dismissal order. In particular, the cancellation can only take place if the balance of the process requirements under s. 254 are met, namely, either (i) after the time for appeal of the dismissal has expired and no notice of appeal has been filed, or (ii) any appeal has been finally disposed of without any resultant overturning of the initial dismissal order, whichever comes first.

[140] In that regard, the appeal exhaustion requirements inform the timing and process pre-requisites for carrying out the cancellation, not the jurisdiction. However, if any of the appellate courts overturn any part of the dismissal order in a manner that re-applies any of the struck pleadings, the court's jurisdiction to cancel the CPL will have been removed. A new application would be required, wherein the court could determine if the remaining pleadings – as confirmed by the appellate decision – meet the requirements of s. 215 of the *LTA*.

Ruling on the CPL

[141] In light of my findings and statutory interpretation above, the applicants are entitled to have the CPL removed when either the period to appeal my order striking out the Impugned Paragraphs has expired or any appeals of it have been dismissed without overturning the relevant parts of my order.

[142] I could dismiss as premature that part of the application that requests immediate cancellation of the CPLs. This would leave it for a new application to be filed once any appeal has been disposed of or the time for it has expired. However, that would leave open some uncertainty as to the scope of the application that would have to be made in due course and whether any of the analysis above had to be repeated. It would also run the risk of duplication, inconsistent findings, and unnecessary expenses.

[143] I could alternatively adjourn that part of application for similar reasons, but that could simply complicate matters for the same reasons as with a dismissal of that part of the application. It could also delay things even further if I had to be seized of the matter in order to maintain efficiencies gained from my disposition of the other issues.

[144] I find the better route is to exercise my discretion to grant a version of the order sought by the applicants. That will be an order for the prompt cancellation of the CPL if any appeal is resolved in their favour or the period for appeal expires without one being filed. In that way, the CPLs will expeditiously be cancelled upon application to the *LTA* registrar if there is no successful appeal (or time expired), but the CPLs will have remained in force, and will continue to do so if such an appeal is filed and succeeds in any material way.

[145] This result limits any prejudice to the respondents while appeal rights are sorted out. Conversely, if the applicants believe this delay will cause them any significant prejudice, they are still free to apply to have the CPLs removed under s. 256, if they can establish the requisite elements of that provision.

[146] In conclusion on the point, while I find that in all the circumstances the CPLs – like the Impugned Paragraphs of the counterclaim – are an abuse of process, I also find that I do not have jurisdiction to immediately strike them on such a basis. To be clear, if I had that jurisdiction, I would have found this to be an appropriate case in which to exercise it and I would have cancelled the CPLs forthwith.

No Further CPLs

[147] The applicants seek an order preventing the respondents from filing any further certificates of pending litigation against the CPL Properties without leave of the court.

[148] Section 39(3) of the *Law and Equity Act* has been interpreted to provide courts with the discretion to make such orders:

(3) If an injunction is requested either before, at or after the hearing of a cause or matter, to prevent any threatened or apprehended waste or trespass, the injunction may be granted if the court thinks fit, whether the person against whom the injunction is sought is or is not in possession under any claim of title or otherwise or, if out of possession, does or does not claim a right to do the act sought to be restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable.

[149] The applicants correctly note that in *Johnson v. Johnson*, 2025 BCSC 337 at paras. 55–59, after cancelling a certificate of pending litigation upon finding that the underlying claim did not contain the requisite claim for an interest in land, the Court relied on s. 39(3) of the *Law and Equity Act* as authority to restrain any further certificates of pending litigation being filed on the relevant property.

[150] Due to my order striking the Impugned Paragraphs as an abuse of process, there is similarly no longer any proceeding by the respondents that asserts a valid interest in the CPL Properties. While I have found that in these unique circumstances I cannot immediately cancel the existing CLPs, since there is no longer any outstanding cause of action against the applicants in regard to the CPL Properties, there should be no further certificates of pending litigation filed by the respondents against the properties.

[151] However, as my order striking the Impugned Paragraphs is grounded on my finding that they are an abuse of process – and thus never should have been filed in the first place – this appears to be an appropriate situation where I should remove any risk of further abuses in that regard. Accordingly, I find it appropriate to exercise my discretion to issue an order prohibiting the respondents from filing any further certificates of pending litigation against the CPL Properties without leave of the court, regardless of whether they would wish to do so by relying on the instant proceeding or any other they may commence.

[152] Of course, if my order striking the Impugned Paragraphs of the counterclaim is set aside, this part of my order will automatically be revoked.

Costs

[153] The general rules on costs were summarized by Justice Wolfe in *Klassen v. Epp*, 2025 BCSC 2148:

[9] The general rule is that, unless the Court otherwise orders, the successful party is entitled to their costs of a proceeding, assessed as party and party costs in accordance with Appendix B to the *Supreme Court Civil Rules [Rules]*: R. 14-1(1) and R. 14-1(9). Rule 14-1(12) addresses costs of applications. In relevant part, it provides that unless the Court otherwise orders, a party who successfully brings an application is entitled to costs of the application if ultimately awarded costs of the proceeding. Under R. 14-1(1)(b), the Court may order that costs of a proceeding, or of an application or step in the proceeding, be assessed as special costs.

[154] The applicants' materials assert that while they believe they would have been entitled to special costs in the circumstances, they were forgoing them and sought instead an order for regular costs and an order precluding any further CPLs being issued in regard to the CPL Properties. I am granting those orders.

[155] The applicants have satisfied me that almost all of the Impugned Paragraphs and the CPLs are abuses of process and that the CPLs cannot stand without those paragraphs. Barring a successful appeal, they will have received all they sought in this application. In these circumstances, it is appropriate that the applicants have their costs of the application in any event of the cause.

Orders

[156] I hereby order and declare that:

1. Paragraphs 37–49 of Part 1, paragraphs 2-4 of Part 2, and paragraphs 7-13 of Part 3 of the counterclaim are struck, without leave to amend.
2. All claims in the counterclaim as to the lands in respect of which certificate of pending litigation number CA 2445795 is registered have been dismissed.
3. Pursuant to s. 254 of the *Land Title Act*, R.S.B.C. 1996, c. 250, the registrar appointed under the *Land Titles Act* shall cancel and discharge certificate of pending litigation number CA 2445795 upon any application to it that is accompanied by a certificate of the registrar of the Supreme Court of British Columbia, endorsed by the registrar of the Court of Appeal, certifying that the Impugned Paragraphs were dismissed by me pursuant to paragraphs 1 and 2 of this Order, and either:
 - a. the time limited for appealing my Order has expired and no notice of an appeal has been filed with the registrar of the Court of Appeal, or
 - b. a notice of appeal has been filed and has been finally disposed of, and my Order has not been set aside by the Court of Appeal or the Supreme Court of Canada.
4. Pursuant to s. 39(3) of the *Law and Equity Act*, the respondents are prohibited from filing any further certificates of pending litigation against the CPL Properties without leave of the court.
5. The applicants are entitled to costs in any event of the cause.

“Lachance J.”