COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *1332404 B.C. Ltd. v. 1266685 B.C. Ltd.,* 2025 BCCA 46

Date: 20250211
Docket: CA49768

Between:

1332404 B.C. Ltd.

Appellant
(Plaintiff)

And

IMAX Ventures Ltd.

Appellant
(Defendant by way of Counterclaim)

And

1266685 B.C. Ltd. and 1317903 B.C. Ltd.

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Grauer
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated March 14, 2024 (*1332404 B.C. Ltd. v. 1266685 B.C. Ltd.*, 2024 BCSC 592, New Westminster Docket S250439).

Counsel for the Appellants:	G.J. Roper
Representative for the Respondent 1266685 B.C. Ltd., appearing in person (via videoconference):	K. Herian
Counsel for the Respondent 1317903 B.C. Ltd.	R.B. Fraser C.M. Tribe
Place and Date of Hearing:	Vancouver, British Columbia January 23, 2025
Place and Date of Judgment:	Vancouver, British Columbia February 11, 2025

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Justice Donegan

Summary:

The appellant appeals the chambers judge's cancellation of the certificate of pending litigation filed against the respondent's residential property. The certificate of pending litigation was based on the appellant's pleading of a claim to an interest in land, in the amount of the deposit paid to the respondent pursuant to the contract of purchase and sale, enforceable through a purchaser's lien over the property. The chambers judge relied on s. 215 of the Land Title Act in cancelling the certificate of pending litigation, finding that the appellant's pleading of a purchaser's lien was inconsistent with its pleadings of rescission and return of the deposit.

Held: Appeal allowed. The chambers judge erred in cancelling the certificate of pending litigation. In assessing the cancellation of a certificate of pending litigation under s. 215, courts may only consider whether the requisite material facts are pleaded to support a claim to an interest in land—not whether such claims are supportable on the merits. Purchaser's liens are rare, but do constitute an interest in land that can ground a certificate of pending litigation. Although the appellant's pleadings include alternative remedies, they represent distinct and not inconsistent forms of relief. In this case, the appellant properly pleaded all factual prerequisites for a purchaser's lien.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] This is an appeal from an order cancelling a certificate of pending litigation ("CPL") in a proceeding claiming, among other relief, a purchaser's lien arising out of a failed real estate transaction. The judge concluded that, although it was "at least conceivable" on the pleadings that the claim for a purchaser's lien was an assertion of an interest in land, there was a "clear inconsistency" between the primary remedy sought (rescission of the contract and a return of the deposit: a monetary remedy) and seeking an interest in land. Accordingly, the judge concluded that the plaintiff's claim had "nothing to do with asserting an interest in land" and the CPL was, therefore, improperly registered and should be cancelled.

[2] For the reasons that follow, I would allow the appeal. The pleadings advanced a claim for a purchaser's lien. A purchaser's lien is an equitable interest in land that arises when a deposit is paid directly to a seller. The claim for a purchaser's lien was adequately pleaded. The assertion of an interest in land is not defeated by the purchaser also or primarily seeking rescission or the return of the deposit. The

purchaser's lien, reflecting the purchaser's existing interest in land, provides additional security for the recovery of the deposit. There was nothing improper in claiming a purchaser's lien in these circumstances. Accordingly, the judge erred in cancelling the CPL.

Analytical Framework

[3] The parties agree that this appeal raises questions of law, which are reviewable on the standard of correctness. Accordingly, I will begin by explaining the status of a purchaser's lien as an equitable interest in land, after which I will outline the principles governing registering and cancelling CPLs. I will then turn to explain the application of those principles to the facts of this case.

[4] In this judgment, I refer to 1332404 B.C. Ltd. (the plaintiff in the Supreme Court) as "the appellant" and 1317903 B.C. Ltd. (one of the defendants in the Supreme Court) as "the respondent".

A purchaser's lien as an equitable interest in land

[5] The nature of a purchaser's lien was described by Madam Justice Newbury in *Pan Canadian Mortgage Group III Inc. v. 0859811 B.C. Ltd*, 2014 BCCA 113:

> [1] The purchaser's lien is a relatively obscure equitable remedy with roots dating back at least to the mid-19th century: see *Wythes v. Lee* (1855) 61 E.R. 954; *Rose v. Watson* [1864] 10 H.L.C. 672. The lien is available to a purchaser who has paid all or part of the purchase price to the vendor of real or other property pursuant to a valid contract. If the transaction "goes off" without fault on the part of the purchaser, the lien provides him or her with a security interest, or charge, against the property to the extent of the money paid, plus interest and costs. It exists even though specific performance may not be available (as in this case, which involves strata lots that were never created) and even though the purchaser may have (legally) rescinded the contract. The lien is said to have the same effect as if the vendor had executed a mortgage in the purchaser's favour in the amount covered by the lien; and comes into existence at the moment of payment by the purchaser. (See generally *Halsbury's Laws of England*, 4th ed., Vol. 28 at paras. 560-64; *Snell's Equity* (31st ed., 2005) at §42-25 to §42-32; C. Harpum, S. Bridge and M. Dixon, eds., *Megarry and Wade: The Law of Real Property* (7th ed., 2008) at §15-056; A. Warner La Forest, ed., *Anger & Honsberger: Law of Real Property* (3rd ed., looseleaf) at §34:80; and J.V. Di Castri, *The Law of Vendor and Purchaser* (3rd ed., looseleaf) at §781.) The Supreme Court of British Columbia has granted a purchaser's lien in at least one case, although the

> Court did not go on to consider how it might be affected by the land registration system: see *Lehmann v. B.R.M. Enterprises Ltd.* (1978) 88 D.L.R. (3d) 87.
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> [2] True to its equitable roots, the purchaser's lien is intended to do justice in situations in which the common law does not, or cannot, do so. Thus in *Whitbread & Co., Ltd. v. Watt* [1902] 1 Ch. 835, Vaughan Williams L.J. observed that the lien "is not the result of any express contract" but is a right that may be said to have been invented "for the purpose of doing justice" (at 838). In a similar vein, it is said that the lien "supplies a remedy where the law falls short of accomplishing full justice". (See Di Castri, *supra*, at §913.) [Footnote omitted.]

[6] In light of some of the submissions advanced by the respondent, it is worthwhile to expand somewhat on the principles summarized above.

[7] First, a purchaser acquires an equitable interest in land from the moment the land is validly contracted to be sold: see Stuart Bridge, Elizabeth Cooke & Martin Dixon, *Megarry and Wade: The Law of Real Property*, 9th ed. (London: Sweet & Maxwell, 2019) at 14-051. It is characterized as an equitable interest directly in *Kang v. Steveston Public Market Inc.*, 2017 BCSC 544 (Chambers) at para. 35, *1063418 B.C. Ltd. v. 1062111 B.C. Ltd.*, 2016 BCSC 741 (Chambers) at para. 126, and *Sandell Dev. Ltd. v. Boivin*, 1986 CanLII 1045 (B.C.S.C.) (Chambers) at para. 15 [*Boivin*] (the latter referring to it only as an "interest in land", not an "equitable interest"). The purchaser's lien arises from the moment money is advanced by the purchaser to the vendor. This, too, gives rise to an equitable interest in land, which continues even if the contract is lawfully rescinded by the purchaser: Anne Warner La Forest, *Anger & Honsberger: Law of Real Property*, (Toronto: Thomson Reuters) (loose-leaf updated 2021, release 2) §34:23 at 34–35. Contrary to the respondent's submission, the lien does not arise only as a form of remedial constructive trust in circumstances where there is no other adequate remedy.

[8] Second, the lien has the same effect as if the vendor had executed a mortgage in favour of the purchaser. The lien provides a security interest in the land. It subsists even if damages would otherwise be an adequate remedy, and it provides security for that claim. In short, the purchaser is regarded as a secured creditor for their deposit: *Halsbury's Laws of England*, 5th ed, vol. 68 (2021 release) at

para. 965, citing *Combe v. Lord Swaythling* [1947] Ch 625, [1947] 1 All ER 838. The equitable interest is a proprietary interest enforceable against third parties, though it may be necessary to register the interest or otherwise provide notice: Bridge at 14-051. It is helpful to note that, if a purchaser has paid a deposit to the vendor and has title deeds in their possession, then the purchaser has a legal lien; equity steps in where there is no legal lien to remedy that deficiency: Halsbury's at para. 965. That is one way in which an equitable lien does justice where the common law does not. Conversely, a vendor's lien in the amount of the contracted for purchase price arises when a purchaser has acquired an equitable interest in the land from the contract, but has not yet conveyed funds: Bridge at 14-052.

[9] Third, the lien arises if money is paid to the seller. No lien arises where the money is paid to a stakeholder: John McGhee & Steven Elliott, eds, *Snell's Equity*, 34th ed. (London: Sweet & Maxwell, 2020) at 44-014. As it is the standard practice in real estate conveying in B.C. to pay deposits to a stakeholder, purchaser's liens will rarely arise, though they will if money is paid directly to the seller or the seller's agent: *Pan Canadian* at para. 28. The lien will then reflect an interest in land equivalent to the moneys advanced, together with interest: McGhee at 44-014.

[10] Fourth, the purchaser's lien, and corresponding equitable interest in land, continue even where specific performance is not possible, or where the contract has been lawfully rescinded. It is lost where the contract goes off through the fault of the purchaser, but not otherwise. It exists even prior to the completion date: McGhee at 44-014.

[11] It follows from all of this that a purchaser's lien constitutes an equitable interest in land that may exist if the conditions described in *Pan Canadian* are met. Contrary to the conclusion of the chambers judge, it is not simply conceivable that an assertion of a purchaser's lien is an assertion of an interest in land. A purchaser's lien is an interest in land, and is properly claimed when supported by pleadings of the requisite materials facts (i.e., the existence of a valid contract of purchase and sale between the parties, the payment of funds pursuant to that contract by the

purchaser to the vendor, and the contract having gone off through no fault of the purchaser).

Section 215 of the *Land Title Act* and cancellation of a CPL

[12] The right to register a CPL is found in s. 215 of the *Land Title Act*, R.S.B.C. 1996, c. 250 [*LTA*], which sets out the threshold requirements for registration. If those requirements are not met, the CPL may be cancelled. Section 215 provides:

> 215 (1) A person who has commenced or is a party to a proceeding, and who is
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> (a) claiming an estate or interest in land, or
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> (b) given by another enactment a right of action in respect of land,
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> may register a certificate of pending litigation against the land in the same manner as a charge is registered, and the registrar of the court in which the proceeding is commenced must attach to the certificate a copy of the pleading or petition by which the proceeding was commenced, or, in the case of a certificate of pending litigation under Part 5 of the Court Order Enforcement Act, a copy of the notice of application or other document by which the claim is made.

[13] It is clear, however, that a court may order the cancellation of a CPL where the pleadings fail to meet the threshold criterion of supporting a claim to an interest in land, as required by s. 215 of the *LTA*: *Bilin v. Sidhu,* 2017 BCCA 429 at paras. 54–56; *Berthin v. Berthin*, 2018 BCCA 57at para. 40. As stated in *Berthin*:

> [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:
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> > 254 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
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> > (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
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> (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
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> (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.
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> [Emphasis added by Madam Justice Fenlon in *Berthin*.]

[14] Accordingly, where the pleadings on which a CPL is claimed are incapable of supporting a claim to an interest in land, the CPL should be cancelled pursuant to s. 215. But, if a claim is supported by the pleadings, any cancellation of a CPL would need to rely on other sections of the *LTA*. In short, a CPL cannot be cancelled for failure to comply with s. 215 if the pleadings claim an interest in land. It is not for a judge, acting under s. 215, to assess the merits of a claim, or determine whether there is a triable issue, or, as here, to interpret pleadings that assert a claim to an interest in land and conclude that that is not the "true" nature of the claim.

[15] I acknowledge that in *Lipskaya v. Guo*, 2022 BCCA 118, this Court said the following:

> [64] The court has inherent jurisdiction to cancel a CPL that does not meet the preconditions for registration, that is, where no interest in land is claimed: *NextGen Energy Watervliet TWP, LLC v. Bremner*, 2018 BCCA 219 at para. 7; *Bilin v. Sidhu*, 2017 BCCA 429. An "interest in land" is claimed where title may change as a result of the proceedings: *V.B. v. K.B.*, 2013 SKQB 412 at para. 72. The court can cancel a CPL where damages would be adequate relief: *Wai v. Chung*, 2020 BCSC 34 at paras. 26–28. An application to cancel a CPL for non-compliance with s. 215 of the *LTA* does not involve a weighing of the evidence or an assessment of the strength of the claim—the court only considers whether such a claim is pleaded: *Yi Teng* at paras. 36–38.
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> …
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> [67] Further, Mr. Guo says that in framing the relief sought as restitution, constructive trust, resulting trust, and unjust enrichment, he is claiming an interest in the Property. However, it is unpaid child support (retroactive, ongoing, or increased) that underlies these claims. This alleged unpaid child support is the subject of the related appeal and as stated, I would dismiss

> that appeal. The claim for child support is untethered to the Property, so title could not change as a result of these proceedings.

[16] The suggestion that a court, in examining whether the preconditions for claiming a CPL have been met, may exercise a discretion to assess whether damages are an adequate remedy, is derived from a Supreme Court case that is not binding on this Court and is inconsistent with the law set out above.

[17] Furthermore, the reference to an interest in land being claimable where title to land may change is derived from a Saskatchewan case that, in turn, relied on a different statutory scheme, and in which the claim to a CPL was based on a claim for child support arrears, as indeed was the claim in *Lipskaya*. These claims clearly do not support a pleaded claim for an interest in land. The suggestion that a precondition for claiming an interest in land is that title may change is *obiter dicta*. This court had previously made it clear that an interest in land may be claimed even where specific performance is not available, and, hence, title may not change (at least directly as a result of relief claimed). I, therefore, do not read the statement by this Court at para. 64, cited above, as purporting to offer an exhaustive definition of what constitutes an "interest in land" for the purpose of claiming a CPL.

[18] It is also worth pointing out that *Lipskaya* involved a *Family Law Act* proceeding. Although it was not explicitly considered in that case, s. 215(6) of the *LTA* provides that: "A party to a proceeding for an order under the *Family Law Act* respecting the division of property may register under this section a certificate of pending litigation in the form approved by the director in respect of any estate or interest in land the title to which could change as an outcome of the proceeding."

Should the CPL have been cancelled on these pleadings?

[19] The remaining issue on appeal is simply whether the pleadings support a claim to an interest in land. In my opinion, it is evident that they do.

[20] The pleadings claim a contract of purchase and sale for fully-serviced lots to be created through subdivision. The original contract contemplated payment of

deposits to the buyer's solicitor to be released on terms. The original contract of purchase and sale was assigned to the plaintiff. The pleadings allege that the contract was amended so that the deposits would be paid to the seller, and that, on receiving the assignment, the plaintiff paid these deposits to the seller (who is the respondent on appeal).

[21] The plaintiff pleads that it purchased the subdivision lots that were intended to be of certain minimum dimensions, but, unbeknownst to them, the defendant amended the subdivision application so that the lots as subdivided were too small to be developed in the manner contemplated by the plaintiff. The plaintiff also pleads a variety of breaches of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, which it asserts entail that the contract is not enforceable against it.

[22] The plaintiff pleads an interest in land, and a purchaser's lien equivalent to the deposit it paid to the defendant. Additionally, the plaintiff claims a resulting trust enforceable through a purchaser's lien, and unjust enrichment grounding a trust interest in the land proportionate to the amount of the deposit paid.

[23] The relief sought within the pleadings includes rescission of the contract, the return of the deposit, and a purchaser's lien against title, as well as a CPL.

[24] The chambers judge only considered whether the CPL should be cancelled pursuant to s. 215—not s. 256—which allows for cancellation on the basis of hardship and inconvenience. She properly instructed herself on the applicable law: that when a CPL is challenged under s. 215, a court must only consider whether the pleadings establish a claim for an interest in land (*Xiao v. Fan*, 2018 BCCA 143 at para. 27).

[25] The chambers judge, as noted above, accepted that it was conceivable that the pleadings assert an interest in land, but determined that was not the end of the inquiry. She reasoned:

> [27] However, this is not the end of the inquiry. If the plaintiffs have simply asserted a purchaser's lien or claimed unjust enrichment and sought a remedial constructive trust, while pleading facts and seeking other remedies

> that are inconsistent with an assertion of a proprietary interest in land, they cannot be found to have genuinely asserted an interest in land. The facts pleaded in the claim must support an assertion of a proprietary interest in land, and they must not be inconsistent with one. To hold otherwise would be to encourage parties to simply add inconsistent assertions of liens or of trust interests to otherwise straightforward monetary claims as a way to obtain a CPL to gain financial leverage, which is an improper use of this important litigation tool. As Justice Macintosh noted in *Drein v. Puleos*, 2016 BCSC 593, the parties must not be allowed to use CPLs as:
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> > A bargaining tool to extract prejudgment payment for financial claim. That is not what CPLs are intended to protect. They are designed to preserve land claims pre trial by preventing the land from passing to innocent third parties pre trial, thereby undermining the claim. If the claim is essence is not for an interest in land, CPLs are not intended to be one of the weapons in the claimant's war chest.
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> [28] In this case, the facts pled in the notice of civil claim, if proven, will establish that the plaintiff and defendant disagreed about a particular term in the October 2021 Contract. Specifically, 131 asserts that the parties contemplated and indeed anticipated changes to the individual lot sizes as the development plans for the Property worked their way through the municipal approval process. 133 asserts that properly construed, the October 2021 Contract and Addendum bound 131 to ensuring that the individual lot sizes as set out in the drawings attached to the October 2021 Contract would not significantly change. 133 says that 131 fundamentally breached the contract, and it wishes to have the October 2021 Contract rescinded and its deposit returned.
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> [29] There is a clear inconsistency between the primary remedy sought in this lawsuit, namely rescission and return of deposit, and the notion that the plaintiff seeks an interest in land.
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> [32] In this case, I need not determine whether a pleading of a purchaser's lien could in certain circumstances ground the filing of a certificate of pending litigation. In this case, it appears clear that the plaintiff's claim has nothing to do with asserting an interest in land. 133 seeks to rescind its contract and get its deposit money back. Such a claim is inconsistent with the assertion of an interest in land.
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> [33] As such, I find that the CPL was improperly registered, and it must be cancelled without conditions.

[26] With respect, the judge erred by concluding that the plaintiff's pleading of rescission precluded it from also pleading a purchaser's lien or, more generally, from asserting an interest in land. For the purpose of assessing whether a CPL should be cancelled pursuant to s. 215 of the *LTA*, the only issue is whether the material facts pleaded support claiming an interest in land by way of a purchaser's lien.

[27] The circumstances of this case do not give rise to the concern articulated in *Drein v. Puleo*, 2016 BCSC 593—and reiterated by the chambers judge—of a CPL being used as a "bargaining tool to extract prejudgment payment of a financial claim": at para. 10. A purchaser's lien is an obscure, but clearly defined, doctrine, which can constitute a claim to an interest in land. Moreover, *Drein* was decided before *Bilin*, and it is not obvious that the case would be decided the same way today.

[28] In this case, the facts pleaded include a valid contract, the plaintiff's provision of moneys to the seller, and that the contract "went off" for reasons not involving fault on the part of the plaintiff. There is nothing inconsistent in pleading rescission and the return of the deposit, as well a purchaser's lien. The claim to a lien is to provide security for return of the deposit moneys. The facts pleaded are supportive of the existence of a proprietary interest in the land, to the extent of the moneys advanced.

[29] Justice Macintosh's warning about the risk of misuse of CPLs in *Drein* should not be read as granting a licence to courts to assess whether relief sought in a pleading is sought "genuinely", as the chambers judge did in this case. To do so is to delve into the merits of a claim, in precisely the manner that is cautioned against in *Bilin* (at paras. 52–55; see also *Xiao* at para. 27). Even if there were an inconsistency in the claims advanced, the most one could say is that the plaintiffs seek alternative remedies: an approach that was found to be acceptable in *Boivin*, a case with facts very similar to those alleged in this proceeding (at paras. 14–15). While this approach might require that the plaintiff ultimately make an election, that is not required at this stage of the proceeding.

[30] Nothing in the law governing purchaser's liens prevents a plaintiff from asserting such a lien, even after lawfully rescinding a contract, or where specific performance is neither sought nor available. As the authorities discussed above make clear, a party's right to a purchaser's lien is only lost if the contract goes off through their own fault—not through the conduct of another party. Contrary to the respondent's submission, a purchaser's lien does not arise only when there is no

other remedy available to the plaintiff. Even if this were so, until this matter is heard on its merits, it remains possible that a purchaser's lien could be the only remedy that is truly available to the plaintiff. To preclude the plaintiff's reliance on it at this stage would be premature.

[31] The respondent refers to *Persad v. Chahal*, 2024 BCSC 728, as an authority for the proposition that a party may only claim a purchaser's lien if they plead that they have no other way to recover funds paid as a deposit, except through a purchaser's lien (at paras. 20–21, citing *1305788 B.C. Ltd. v. Sodhi Dream Homes Ltd.*, 2023 BCSC 445 at para. 42). Respectfully, the commentary in *Persad*, which was *obiter dicta*, misconstrues the holding in both *Sodhi* and *Pan Canadian*. While a purchaser's lien may be available to a purchaser who has no other means to recover a deposit, it is not only available when no other remedy is available. To hold otherwise would contravene the balance of authorities reviewed above.

[32] In sum, the judge erred in embarking on an analysis of the true nature of the claim advanced, as well as in her conclusion that the pleadings were inconsistent, and that this inconsistency compelled cancelling the CPL for failing to meet the threshold requirements for registering a CPL under s. 215. The analysis should have begun and ended with an examination of whether the pleadings were capable of supporting a claim to an interest in land. Given this, any consideration of cancelling the CPL would have had to be undertaken pursuant to other sections of the *LTA*.

Disposition

[33] I would allow the appeal and set aside the order below. As the chambers judge did not consider other bases on which it was alleged the CPL should be cancelled, I would refer the matter back to the Supreme Court.

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Donegan"