IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ladysmith Maritime Society v. Ladysmith (Town),* 2023 BCSC 2285

Date: 20231227
Docket: S238066
Registry: Vancouver

Between:

Ladysmith Maritime Society

Plaintiff

And

Town of Ladysmith, the Ladysmith Harbour Economic Development Corporation and His Majesty the King in right of the Province of British Columbia

Defendants

- and -

Docket: S238084
Registry: Vancouver

Between:

Ladysmith Maritime Society

Petitioner

And

Town of Ladysmith

Respondent

Before: The Honourable Mr. Justice Milman

Oral Reasons for Judgment

Counsel for the Plaintiff:	K.G. O'Callaghan O. Verenca
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Counsel for the Application Respondents, Stz'uminus First Nation and Coast Salish Development Corporation:	K.D. Lee G. Hermansen
Place and Dates of Hearing:	Vancouver, B.C. December 21–22, 2023
Place and Date of Judgment:	Vancouver, B.C. December 27, 2023

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I. Introduction

[1] The Ladysmith Maritime Society ("LMS") is a not-for-profit society that has been operating a marina in the harbour adjacent to the town centre of Ladysmith in Oyster Bay on Vancouver Island since 1985. LMS is permitted to operate the marina at that location pursuant to a license (the "License") granted to it by the Ladysmith Harbour Economic Development Corporation, formerly known as DL 2016 Holdings Corporation ("DL 2016 Holdings"), a corporation wholly owned by the Town of Ladysmith (the "Town").

[2] The marina is located within a water lot (the "Water Lot") owned by the Crown in right of the Province of British Columbia (the "Province") and legally described as Block C of District Lot 2016, Cowichan District. On December 1, 1999, the Province granted the Town a 30-year lease of the Water Lot (the "Head Lease"), which the Town subleased to DL 2016 Holdings for the same period. Indeed, all of these arrangements were originally intended to continue in effect until November 30, 2029.

[3] LMS has initiated these proceedings because, unless this court intervenes, all of this is about to change.

[4] The Water Lot is within the traditional territory of the Stz'uminus First Nation ("SFN"). On March 31, 2022, the Province entered into a Reconciliation Agreement with SFN. One of the terms of that agreement calls for the Province to facilitate the transfer of freehold or leasehold title to provincially-owned lands within SFN's traditional territory that SFN considers to be of high priority. The Water Lot is one such property.

[5] As part of the process of implementing the Reconciliation Agreement, the Province has agreed to grant a new lease of the Water Lot to SFN's development company, with a term commencing on January 1, 2024. To clear the way for that to occur, on July 4, 2023, the Town's council, in a closed session, resolved to abandon the Head Lease with effect on December 31, 2023 (the "Abandonment Resolution"). The Town has since given formal notice to the Province of its intention to abandon the Head Lease. The directors of DL 2016 Holdings have in turn voted to terminate

its sublease and have demanded that LMS vacate the Water Lot by December 31, 2023.

[6] In an effort to prevent these changes from occurring, LMS has commenced an action against the Town, DL 2016 Holdings and the Province alleging, among other things, that:

a) the Town is in breach of contract for having improperly repudiated the Head Lease (a breach about which LMS is alleged to have standing to complain as a third-party beneficiary under the Head Lease);

b) DL 2016 Holdings is in breach of contract for having improperly repudiated the License; and

c) the defendants have engaged in a conspiracy to take those unlawful actions, knowing of the harm that they would cause to LMS.

[7] In addition, LMS has filed a petition seeking judicial review of the Abandonment Resolution, arguing that the Town's council, in passing it, breached the duty of procedural fairness that it owed to LMS.

[8] In both proceedings, LMS seeks, among other things, orders to reverse the steps that have been taken to cancel the License prior to the expiry of its term in 2029. Before the court today are applications by LMS for interlocutory relief pending final resolution of the litigation, as follows:

a) in the action, for an order enjoining the Town from abandoning the Head Lease and DL 2016 Holdings from terminating the License; and

b) in the judicial review application, for an order enjoining the Town from abandoning the Head Lease.

[9] LMS' applications are opposed by the defendants and SFN, to whom I will refer collectively as the "Respondents". Although it was not served with notice of the application or named as a party in either proceeding, SFN, together with its

development company, Coast Salish Development Corporation, has filed a response and made submissions at the hearing, primarily on the issue of the balance of convenience, without objection from the other parties.

[10] The Respondents argue that LMS has, for various reasons, failed to meet the test for an injunction of the kind sought.

[11] In the judgment that follows, I will first set out the facts in more detail. I will then set out the legal test to be applied in considering whether an injunction should be granted. I will then turn to each of the elements of that test and conclude with my decision as to the relief, if any, that should be granted in this case.

II. Facts

A. LMS and its Tenure at the Water Lot

[12] LMS was incorporated in 1985. Its constating documents describe its purposes as follows:

> To serve the community in the following ways:
>
> 1. Protecting and promoting Ladysmith's maritime heritage including;
>
> (a) the development and operation of a maritime museum,
>
> (b) fostering expertise in the construction, maintenance and restoration of heritage boats,
>
> (c) providing education, educational programs and educational materials to the public.
>
> 2. Promoting tourism activity in the harbour;
>
> 3. Protecting and promoting public access to the waterfront;
>
> 4. Operating a marina for the benefit of Ladysmith area residents including;
>
> (a) provision of moorage and services for local and visiting boaters,
>
> (b) provision of services for heritage and other vessels, including heritage vessels owned by the Society.

[13] In furtherance of those purposes, LMS built the marina from scratch in 1985. Today, the marina provides moorage to annual, seasonal and visitor tenants. It is home to over 22 privately owned boathouses and 170 permanent boats. LMS

receives over 7,000 nightly visits annually at the marina. It also hosts a variety of community events and festivals there.

[14] Over the years, LMS has made various improvements to the marina. For example, it has:

a) refurbished and added to the docks;

b) acquired and converted boathouses, a workshop and a paddling centre;

c) created a breakwater outside the Water Lot to protect the marina from large waves; and

d) constructed several amenities in the marina, including a floating museum, a welcome centre (complete with offices, washroom and laundry facilities, a lounge and café), a sea life centre and a social dock.

[15] For the first few years of its existence, LMS operated in the Water Lot without any formal tenure. On December 1, 1999, the Province, as lessor, and the Town, as lessee, entered into the Head Lease pursuant to the *Land Act*, R.S.B.C. 1996, c. 245 and the *Land Transfer Form Act*, R.S.B.C. 1996, c. 252.

[16] Section 1.02 of that document states as follows:

> (1.02) The Lessee will use the land and the Improvements solely for the purpose of conducting the business of a marina, which business may include the provision of the following services and facilities:
>
> Mooring and storage of boats, and operation of the Ladysmith Marine Society.
>
> And the Lessee will not use or permit the Land and the improvements, or any part of them, to be used for any other purpose.

[17] Section 4.01(l) states that upon the expiration or earlier cancellation of the Head Lease, the Town would “peaceably quit and deliver quiet possession of [the Water Lot] and any improvements thereon to the Lessor”.

[18] Section 5.01 prohibits the Town from assigning, mortgaging, subletting or transferring the lease without the Province's prior consent.

[19] On June 30, 2000, the Town and LMS entered into a sublease agreement for a term of three years commencing April 1, 1999 and ending on April 2, 2002, subject to LMS' option to renew the agreement for a further term of two years, which option LMS exercised. After that second term expired in April 2004, LMS continued to occupy the Water Lot without any formal arrangement in place.

[20] On October 5, 2008, the Town and LMS entered into a Memorandum of Understanding setting out the terms that were intended to govern a new sublease between the Town and LMS. This time, rather than sublet to LMS directly, the Town opted to grant a sublease to DL 2016 Holdings, a wholly owned corporation that it caused to be incorporated for this purpose, which was to hold the sublease and borrow the funds to be used for the expansion of the marina.

[21] About nine months later, the Town, DL 2016 Holdings and LMS entered into a series of agreements, all dated July 1, 2009, with terms expiring on November 30, 2029, as follows:

a) the Town granted DL 2016 Holdings a sublease of the Water Lot;

b) DL 2016 Holdings granted LMS the License; and

c) DL 2016 Holdings and LMS entered into a management and operating agreement respecting the marina.

[22] The term of the License was stated to extend until November 30, 2029 "unless terminated sooner or unless extended pursuant to the terms of this agreement." The License is stated to be terminable by DL 2016 Holdings on any default by LMS, provided that DL 2016 Holdings gives LMS 30 days notice to cure the default. Section 39 of the License states that it was to "remain in full force and effect until terminated [in accordance] with the provisions contained herein …"

[23] On November 6, 2009, the Town sought the Province's consent in respect of the sublease it had granted on July 1, 2009 to DL 2016 Holdings. It appears that the Province never responded to that request.

B. The Reconciliation Agreement and its Aftermath

[24] On March 31, 2022, Province and SFN enter into the Reconciliation Agreement. The Reconciliation Agreement expresses the parties' intention that SFN would receive immediate benefits under the Agreement, including a series of land transfers. The Water Lot was among those Crown properties identified by SFN as being of high priority.

[25] Section 4.12 states that:

> Immediately upon the execution of this Agreement, the Parties will work together and with current tenure holders and additional provincial ministries, as required, to complete the due diligence, order the Tenure Parcels for priority, and complete the priority acquisition by Stz'uminus of as many interests in the Tenure Parcels as is possible. The Parties will use best efforts to expedite acquisition of interests in the Tenure Parcels by Stz'uminus, and resolve any issues that arise during the course of the priority transfer of any agreed Tenure Parcel interests.

[26] To that end, the Province and SFN approached the Town soon after the Reconciliation Agreement was concluded to discuss the option of transferring the Head Lease to SFN prior to the expiry of its term in late 2029.

[27] Following those discussions, the Town and DL 2016 Holdings presented LMS with draft termination agreements in respect of LMS' agreements with them. LMS refused to sign those drafts unless alternative arrangements were made with SFN to allow for LMS to continue to operate the marina after the transition.

[28] Despite LMS' refusal to sign the proposed termination agreements, on August 15, 2022, the board of DL 2016 Holdings voted to terminate the sublease unilaterally effective December 31, 2023.

[29] Between August and September 2022, discussions took place between LMS and SFN about the role that LMS would have at the marina after the transition. SFN

offered to give LMS a new three-year term with an option to renew. LMS says that SFN proposed new terms that LMS could not have complied without compromising its status as a not-for-profit society. In any event, the parties were unable to reach agreement and the negotiations ended abruptly soon after the initial exchange of drafts.

[30] In the meantime, the Town continued to assess its options in light of the proposed transfer of the Water Lot to SFN pursuant to the Reconciliation Agreement. In late October 2022, the Town asked the Province about the terms under which the Province would be willing to permit the Town to transfer the balance of the term under the Head Lease to SFN. The Province responded that because it never approved the arrangements that the Town had made with DL 2016 Holdings and LMS, fresh applications would have to be made and approvals granted for those existing arrangement to continue, failing approval of which, the non-compliant structures in and around the marina would have to be removed.

[31] Given that response, the Town decided not to pursue that option and instead, on November 17, 2022, sent a letter to LMS demanding that it vacate the Water Lot by the end of December 2023. It sent another such letter on March 1, 2023. Further, on November 25, 2022, the Town gave public notice of its intention to transfer the Head Lease to SFN. On February 17, 2023, the Town sent the Province a formal request to assign the Head Lease to SFN.

[32] On February 27, 2023, SFN wrote to LMS to advise that SFN was ending all discussions with LMS and was no longer willing to work with LMS after the transition.

[33] In April and May 2023, there was another exchange of correspondence among the Province, LMS and the Town.

[34] On May 16, 2023, the Province wrote to the Town stating that, in the Province's view, the sublease granted to DL 2016 Holdings in 2009 was void by operation of s. 99 of the *Land Act*, for want of consent by the Province to that

disposition. The letter added that the status of the License held by LMS was therefore “questionable”.

[35] The following week, on May 24, 2023, the Province wrote to LMS to advise that the Province was no longer contemplating a transfer of the Head Lease from the Town to SFN, but rather a new lease that the Province would grant to SFN directly, in place of the Head Lease. The Province added that LMS may yet have a role to play in the new regime, but this was to be at the discretion of SFN.

[36] On July 4, 2023, the Town’s council resolved in a closed session to abandon the Head Lease pursuant to s. 45 of the *Land Act*, effective December 31, 2023. On the following day, July 5, 2023, the Town formally notified the Province of that intention. On July 7, 2023, the Province advised LMS that the Province was in receipt of that communication from the Town.

[37] On July 11, 2023, LMS, through its counsel, wrote to the Province and the Town setting out LMS’ position, seeking clarification of their intentions and asking that LMS be given notice of any steps that either of them might take affecting LMS’ rights.

[38] On August 11, 2023, the Province responded by letter confirming that the Head Lease was being abandoned and that it was no longer considering granting approval for an assignment by the Town of the Head Lease. It also stated its preference not to be involved in any further discussions among LMS, the Town and SFN. LMS followed up with letters on September 5 and 28, 2023, asking for an update and again demanding the right to be heard before the abandonment of the Head Lease was formalised.

[39] On November 3, 2023, the Town posted the agenda for an upcoming council meeting. Among the agenda items listed was reference to a July 4, 2023 closed session during which council had discussed abandoning the Head Lease. After seeing this, LMS wrote again demanding to be heard by council at the meeting scheduled on the following day. In response, the Town wrote to advise that the

matter had already been decided at the closed meeting and that LMS could attend at the upcoming public meeting to ask questions, along with other members of the public.

[40] The Town publicly announced the abandonment of its interest in the Head Lease on November 7, 2023, by way of Notice of Disposition, and provided LMS with a copy of the Abandonment Resolution on the following day, November 8, 2023.

[41] On November 27, 2023, LMS' counsel wrote to the Town and DL 2016 Holdings demanding that they comply with their obligations to LMS under the Head Lease and the related agreements.

C. This Litigation

[42] On November 28, 2023, LMS commenced these two proceedings and filed an application for interlocutory injunctive relief in each. The applications were originally set down for hearing on December 8, 2023 but LMS agreed to adjourn the hearing for several days to allow the Respondents to prepare responding material.

III. The Injunction Test

[43] The test to be applied on an application for an interlocutory injunction is well-settled and was reiterated in *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5 [*CBC*]. That test requires that the applicant establish the following three elements:

a) there is a serious question to be tried (in the case of a prohibitive injunction) or a strong *prima facie* case (in the case of a mandatory injunction);

b) there is a risk of irreparable harm; and

c) the balance of convenience supports granting an injunction.

IV. Discussion

A. Is the proposed relief mandatory or prohibitive in nature?

[44] The first question to be resolved is the nature of the injunctive relief that is sought on these applications. LMS argues that what it seeks is a prohibitive order, namely, to enjoin the Town and DL 2016 Holdings from repudiating the Head Lease and the License, respectively. The defendants disagree. They argue that the relief sought is more in the nature of a mandatory order, insofar as they will be required to undo what has already been done and take positive steps to restore arrangements that have already been formally terminated, in part by operation of statute.

[45] I agree with the defendants that what is sought here is not entirely a *quia timet* injunction, in the sense that the conduct complained of has, at least in part, already occurred. However, the agreements that LMS seeks to preserve are still in effect and will remain so until at least December 31, 2023. What is really sought is more in the nature of a stay of the Town's decision to abandon the Head Lease and DL 2016 Holdings' associated notice of termination of the License, effective December 31, 2023.

[46] The distinction between a mandatory and a prohibitive injunction, and the policy rationales driving it, were explained by Brown J., writing for the Court, in *CBC*, as follows:

> [15] In my view, on an application for a mandatory interlocutory injunction, the appropriate criterion for assessing the strength of the applicant's case at the first stage of the *RJR—MacDonald* test is *not* whether there is a serious issue to be tried, but rather whether the applicant has shown a strong *prima facie* case. A mandatory injunction directs the defendant to undertake a positive course of action, such as taking steps to restore the *status quo*, or to otherwise "put the situation back to what it should be", which is often costly or burdensome for the defendant and which equity has long been reluctant to compel. Such an order is also (generally speaking) difficult to justify at the interlocutory stage, since restorative relief can usually be obtained at trial. Or, as Justice Sharpe (writing extrajudicially) puts it, "the risk of harm to the defendant will [rarely] be less significant than the risk to the plaintiff resulting from the court staying its hand until trial". The potentially severe consequences for a defendant which can result from a mandatory interlocutory injunction, including the effective final determination of the action

> in favour of the plaintiff, further demand what the Court described in *RJR—Macdonald* as "extensive review of the merits" at the interlocutory stage.
>
> [16] A final consideration that may arise in some cases is that, because mandatory interlocutory injunctions require a defendant to take positive action, they can be more burdensome or costly for the defendant. It must, however, be borne in mind that complying with prohibitive injunctions can also entail costs that are just as burdensome as mandatory injunctions. While holding that applications for mandatory interlocutory injunctions are to be subjected to a modified *RJR—MacDonald* test, I acknowledge that distinguishing between mandatory and prohibitive injunctions can be difficult, since an interlocutory injunction which is framed in prohibitive language may "have the effect of forcing the enjoined party to take ... positive actions". For example, in this case, ceasing to transmit the victim's identifying information would require an employee of CBC to take the necessary action to remove that information from its website. Ultimately, the application judge, in characterizing the interlocutory injunction as mandatory or prohibitive, will have to look past the form and the language in which the order sought is framed, in order to identify the substance of what is being sought and, in light of the particular circumstances of the matter, "what the practical consequences of the ... injunction are likely to be". In short, the application judge should examine whether, in substance, the overall effect of the injunction would be to require the defendant to *do* something, or to *refrain from doing* something.
>
> [Original emphasis. Citations and footnotes omitted.]

[47] In those paragraphs, Brown J. identified what appear to be two main rationales for drawing a distinction between mandatory and prohibitive orders. First, it is seen as potentially unfair to resolve the action at an interlocutory stage and grant relief tantamount to a final judgment on the merits when the plaintiff can obtain adequate relief later, after both parties have had discovery and the opportunity to present their cases more fully at trial. Second, forcing the defendant to take positive action, such as restoring the *status quo ante*, may, for that reason or otherwise, be unduly burdensome for the defendant.

[48] Both factors are said to militate in favour of conducting a more extensive review of the merits at the interlocutory stage before granting a mandatory order.

[49] Granting the order sought here would not be equivalent to "a final determination of the action in favour of the plaintiff." That element of the rationale is therefore missing in this case. In this case, the positive action that the defendants would be required to take in order to comply with the order is not the relief that LMS

is ultimately seeking in the claim. It will not give LMS what it wants at the end of the trial or prevent the defendants from later carrying on with the transfer of title if they ultimately succeed at trial in defeating the claim. In summary, it will not lead to a premature resolution of the merits, which is one of the potential sources of unfairness in a mandatory order that was said in *CBC* to justify the distinction.

[50] Rather, the "overall effect" of the proposed order sought here would be to postpone the abandonment of the Head Lease and its replacement with the new Crown lease to SFN. It is true, as the defendants argue, that the proposed order may have a mandatory aspect to it, insofar as they would be compelled to take steps to undo what has been done until the matter is resolved. However, it is the *relative* significance of what the defendants would have to "do" as compared to what they would have to "refrain from doing" that is determinative in this regard. I find that the significance of the latter clearly outweighs that of the former.

[51] The defendants cite *Queen Elizabeth Annex (QEA) Parents' Society v. Vancouver School District No. 39*, 2023 BCSC 990, as an example of a case, said to be similar to this one, in which an application for an interlocutory injunction to prohibit a school board from following through on its decision to close a school in the following academic year was held to be a request for a mandatory order, attracting a requirement to show a strong *prima facie* case. In my view, that case is distinguishable from this one. The school board would have been required to actively reinstate the school and then administer it during the coming academic year and possibly beyond, until the action was resolved. In this case, LMS seeks, on an interim basis, to enforce its right to quiet enjoyment, or in other words, to be left alone. The defendants would not need to do very much, if anything at all, in order to comply with such an order.

[52] I have therefore concluded that the proposed order sought here is more properly classified as a prohibitive one. It follows that, to justify such an order, LMS must show only that it has raised a fair question to be tried. I turn to that question next.

B. Has LMS made out a fair question to be tried?

i. Breach of Contract

[53] The first cause of action that LMS advances against the Town is in breach of contract. LMS contends that it has the requisite standing, as a third-party beneficiary, to obtain relief against the Town for having improperly repudiated the Head Lease.

[54] In response to the defendants' argument that LMS cannot properly maintain an action to enforce a contract to which it was not privy, LMS invokes the principled exception to the privity rule first recognised *in London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd*., [1999] 3 S.C.R. 108. In those cases, the Supreme Court of Canada held that a stranger to a contract can be entitled to the benefit of the contract terms, despite the privity rule, if the following questions are answered affirmatively:

a) did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision; and

b) are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular?

[55] LMS argues that, in specifying that the Town's permitted use of the Water Lot was to include the operation of "Ladysmith Marine Society" at that location, the parties to the Head Lease signalled their intention to confer the benefit of the demise on LMS (leaving aside the misnomer), giving it standing to sue under that test.

[56] The defendants disagree. They argue that, even assuming, as seems fair, that the reference to the "Ladysmith Marine Society" was indeed a misnomer, the exception is still inapplicable here, inasmuch as the Head Lease states only that the Town "may" (not must) permit LMS to operate a marina in that location. In addition, the defendants rely on a number of British Columbia authorities, both of this court

and the Court of Appeal, holding that the principled exception to the privity rule can properly be invoked only as a shield (that is, as a defence to an action), not as a sword (that is, as a means to confer standing on a stranger to a contract to sue on it). Those authorities include: *Kitimat (District) v. Alcan Inc*., 2006 BCCA 75; *Price Security Holdings Inc. v. Klompas & Rothwell*, 2019 BCCA 36; *Virk v. Sidhu*, 2010 BCSC 369; and *0980131 B.C. Ltd. v. The Owners, Strata Plan KAS2615*, 2019 BCSC 913.

[57] In response to that latter argument, LMS refers to a more recent line of authority in Ontario holding that the principled exception can indeed be invoked to permit a third-party beneficiary to sue on the contract, see: *Brown v. Belleville (City)*, 2013 ONCA 148; *Seelster Farms et al. v. Her Majesty the Queen and OLG*, 2020 ONSC 4013; and *Gilani v. BMO Investments Inc*., 2021 ONSC 3589.

[58] It is not necessary to resolve the issue definitively on this application. This is a developing area of the law. There has been a trend in the case law over the years to relax the strict application of the privity rule. LMS' burden is to show only that it has raised a serious question to be tried. Although certainly questionable, it is at least arguable that the parties to the Head Lease intended to confer the benefit of the demise on LMS, so as to engage the principled exception to the privity rule.

[59] Moreover, there are unusual features in this case that could be seen to justify widening the principled exception to the privity rule to protect LMS in these circumstances. In particular, the Town arranged for LMS to receive a right of quiet enjoyment to operate the marina for a term of 30 years ending in late 2029, provided LMS abided by its obligations under the relevant agreements. There is some dispute about whether LMS has done so. For example, it appears that some of the improvements on the site, such as the breakwater, were installed outside the boundaries of the Water Lot and therefore in breach of the Head Lease, which would, as such, be a breach of the License as well. Nevertheless, LMS was not given formal notice to cure any such default before the License was terminated,

notice to which it would have been entitled under these agreements before they could properly be terminated.

[60] In any event, the Town granted a 30-year sublease to DL 2016 Holdings, its own wholly owned subsidiary, and caused it to grant a 30-year License to LMS. The Town knew that LMS was making significant improvements to the Water Lot, relying on the security of its tenure until late 2029. Having made that commitment, or caused DL 2016 Holdings to do so, the Town then failed to secure the Province's approval for those dispositions under s. 99 of the *Land Act* and then, when that lack of approval was first raised by the Province many years later, the Town did not make any serious effort to regularise LMS' tenure, as it could have, but instead chose to abandon the Head Lease altogether and then demanded that LMS vacate the Water Lot by the end of the current year, some six year before the License was supposed to have expired.

[61] Although I accept that the Town took these steps not out of malice, with a view to harming LMS specifically, but rather to advance the cause of reconciliation with SFN, an important and laudable objective, the effect on LMS was the same. If there ever was a case in which an incremental expansion of the principled exception to the privity rule was called for, this one would certainly be a good candidate.

[62] The privity rule is not engaged in LMS' claim as against DL 2016 Holdings, since both are parties to the License. However, the defendants raise another defence to that aspect of the claim. In particular, they say that the sublease and the License are both void by operation of s. 99 of the *Land Act*.

[63] That provision states as follows:

> Assignment of disposition
>
> 99 (1) An assignment, quit claim or other transfer of land for which an application for a disposition has been filed under this Act is not valid until after a certificate of purchase, a lease or licence has been issued.
>
> (2) A person may not dispose of or deal with an interest in Crown land held under a disposition, other than a Crown grant, unless
>
> (a) the disposition under which the interest is held expressly allows it, or

> (b) the minister approves in writing the disposition or dealing.
>
> (3) A purported disposition made in contravention of this section is void and the minister may, if the minister considers it advisable, cancel the disposition.
>
> (4) As a condition precedent to an approval under subsection (2) (b), the minister may require the applicant to carry out and perform, in respect of the land, additional terms, covenants or stipulations that are to be binding on every successor in title to the land.

[64] The term disposition is defined in s. 1 to mean "the act of disposal or an instrument by which the act of disposal is effected or evidenced, or by which an interest in Crown land is disposed of or effected, or by which the government divests itself of or creates an interest in Crown land."

[65] Although the Town, apparently after the fact, sought the minister's approval to enter into the sublease and grant the License to LMS, no such written approval appears to have been forthcoming. It follows, the defendants say, that both of those purported dispositions are void and, as such, cannot be enforced by LMS in this action.

[66] In response, LMS argues that the "disposition" referred to in s. 99(3) is not void, but only voidable because the minister is given the discretion to cancel it if the minister considers it advisable to do so, and the minister took no such step in this case. In my view, however, that interpretation is, at best, a strained one.

[67] I appreciate that s. 99 uses the term "disposition" ambiguously. At times, the term appears to connote the Head Lease (see, e.g., the first two occurrences of that term in ss. 99(2), particularly the second one in ss. 99(2)(a)). On the other hand, in ss. 99(2)(b), the "disposition or dealing" referred to can only be that for which ministerial approval is said to be required (in this case, the sublease and License).

[68] The ambiguity does not appear to carry forward into ss. 99(3), however. That provision appears to distinguish between the "*purported* disposition made in contravention of this section" (in this case, the sublease and License, which are said to be void) and the original "disposition" by the Crown (in this case, the Head Lease, which is said to be rendered voidable as a result of the failure of the original grantee

to obtain the requisite ministerial approval). Were it otherwise, the provision would, in the same sentence, describe the same disposition as both void and voidable, a nonsensical result that is to be avoided.

[69] Apart from the ambiguity in the language of ss. 99(3), it is also possible that the Head Lease itself "expressly allows" the Town to transfer an interest in the Water Lot to LMS, so as to satisfy ss. 99(2)(a), although it is difficult to see how the sublease to DL 2016 Holdings, upon which the License depends, could be preserved on that basis.

[70] In summary, LMS' claim in contract is burdened with significant problems. Given the low threshold that LMS must meet to satisfy this branch of the test, however, I accept that it raises at least a fair question to be tried.

ii. Conspiracy

[71] LMS argues that the defendants in the action are liable for the tort of conspiracy, particularly an "unlawful means" conspiracy. The elements of that tort were recently set out in *Baring v. Grewal*, 2022 BCCA 42 as follows, at para. 52:

> 1. An agreement between two or more persons;
> 2. Concerted action taken pursuant to the agreement;
> 3. The conspirators:
>   (a) intended to cause damage to the plaintiff, if the action is lawful, or
>   (b) knew or ought to have known that their action would injure the plaintiff, if the action is unlawful; and
> 4. Actual damage suffered by the plaintiff.

[72] LMS says that the defendants agreed with one another to terminate LMS' tenure at the Water Lot prematurely, without lawful justification, in order to facilitate the transfer of tenure to SFN. LMS also says that the defendants carried out overt acts directed at LMS, and which could reasonably be foreseen to result in injury to LMS, particularly the repudiation of the Head Lease and the License, causing harm to LMS.

[73] As a preliminary matter, the defendants argue that the conspiracy claim is improperly pleaded, because it is merged with the claim in contract. In *Waters v. Michie*, 2011 BCCA 364, the Court had occasion to consider the circumstances in which a conspiracy claim may be struck on that ground. In that case, an unlawful act conspiracy claim was found to have been appropriately struck on the basis of merger, despite the refusal of the Court to strike a similar kind of claim in *Hunt v. Carey Canada Inc*., [1990] 2 S.C.R. 959. In explaining that result, Levine J.A., writing for the Court, stated as follows:

> [60] Despite these comments in *Hunt*, many Canadian courts have applied the doctrine of merger to strike conspiracy claims at the pleading stage, including this Court in the recent case of *Bank of Montreal v. Tortora*, 2010 BCCA 139.
>
> [61] In *Tortora*, the Court struck conspiracy claims against two former employees of the plaintiff bank on the basis of merger. The Bank alleged that the defendants split commissions on mortgages, which conduct amounted to breaches of their employment contracts, breaches of their fiduciary duties, and conspiracy by unlawful conduct. Mr. Justice Chiasson, writing for the Court, rejected the view that *Hunt* stood for the proposition that a conspiracy claim could never be struck at the pleadings stage on the basis of merger. He distinguished *Hunt* on the basis that in that case the plaintiff had pleaded no claim against Carey other than the conspiracy claim, which had been pleaded on the basis of both lawful and unlawful acts. As a result, the plaintiff might have succeeded in its conspiracy claim even if he failed to establish any tortious conduct on the part of any of the defendants. He concluded (at para. 53):
>
> > In a case like this, where the unlawful acts alleged to constitute the conspiracy are breach of contract and breach of fiduciary duty which are advanced as claims in the proceeding, in my view, a claim for unlawful act conspiracy is merged with those causes of action.
>
> [62] Framed in more general terms, the Court held that merger precludes a claim of unlawful act conspiracy where the alleged unlawful acts are torts or other independently actionable claims that have also been pleaded, such that the conspiracy claim adds nothing.

[74] In this case, I am not persuaded that the conspiracy claim adds nothing. If successful, it would render each of the defendants, including the Province, jointly and severally liable to LMS for the harm caused by the alleged wrongful conduct. The prospect of joint and several liability has been held to be sufficient to overcome a pleadings challenge to a claim in conspiracy, particularly where it may be the only

means to render one or more of the defendants liable: *Pearce v. 4 Pillars Consulting Group Inc.*, 2019 BCSC 1851; *West Moberly First Nations v. British Columbia*, 2021 BCSC 828.

[75] Turning then to the merits of the conspiracy claim, the defendants argue that the claim also fails because LMS has failed to show that the defendants engaged in any unlawful conduct. I agree that the same frailties that undermine the strength of the claim in contract apply equally to the claim in conspiracy, inasmuch as the unlawful conduct complained of is the alleged breach of contract, or the wrongful inducement of that breach. For that reason, the claim in conspiracy can be no stronger than the claim in contract, and must be seen as equally problematic.

[76] Nevertheless, having found that LMS has raised a serious question to be tried on the contract claim, I find the same is true for the conspiracy claim.

iii. Procedural Fairness

[77] In the petition, LMS alleges that the Town breached a duty of procedural fairness that it owed to LMS in passing the Abandonment Resolution without affording LMS with notice of the meeting or an opportunity to be heard.

[78] In its response, the Town asserts that no such duty was owed, because the Abandonment Resolution was not an exercise of statutory power within the meaning of s. 1 the *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, or otherwise imbued with a sufficiently public quality so as to lend itself to judicial review.

[79] The Town cites *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall*, 2018 SCC 26 and *The Redeemed Christian Church of God v. New Westminster (City)*, 2021 BCSC 1401 (rev'd in part in 2022 BCCA 224) [*Redeemed Christian Church*], as examples of cases, said to be similar to this one, in which a local government, by terminating certain agreements, was found to be exercising purely private contractual rights that were not, as such, amenable to judicial review.

[80] LMS argues that those cases are distinguishable, on the basis that, in abandoning the Head Lease, the Town was acting in a public capacity. LMS also relies on s. 623 of the *Local Government Act*, S.B.C. 2015, c. 1 [*LGA*], which gives a person interested in a "municipal instrument" (defined to include, among other things, a resolution of a municipal council) a right of review of the instrument, regardless of whether it was public in nature. The Town responds that s. 623 of the *LGA* is no longer available to LMS because the petition was filed beyond the prescribed statutory timelines for such a review. To this, LMS responds that the deadlines were missed only because the Town refused to disclose to LMS that the Abandonment Resolution was being considered, despite repeated requests by LMS to be advised when that would happen so that it could make submissions in opposition to it.

[81] In *Redeemed Christian Church*, Morellato J. set out the test to be applied in determining whether a decision lends itself to judicial review for this purpose, stating as follows:

> [54] Relationships that are in essence private in nature are best redressed by private, not public law: *Air Canada v. Toronto Port Authority*, 2011 FCA 347 at para. 53, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9. However, the public versus private distinction is multi-faceted and context-specific.
>
> [55] In *Air Canada*, Stratas J.A. identified a number of factors that may be relevant to the inquiry of whether a public authority's decision has a sufficiently public character to engage judicial review remedies. As noted by Groberman J.A. in *Strauss*, these factors were reduced to a list in *Setia v. Appleby College*, 2013 ONCA 753, at para. 34, as follows:
>
> i. the character of the matter for which review is sought;
>
> ii. the nature of the decision-maker and its responsibilities;
>
> iii. the extent to which a decision is founded in and shaped by law as opposed to private discretion;
>
> iv. the body's relationship to other statutory schemes or other parts of government;
>
> v. the extent to which a decision-maker is an agent of government or is directed, controlled or significantly influenced by a public entity;
>
> vi. the suitability of public law remedies;
>
> vii. the existence of a compulsory power; and

> viii. an "exceptional" category of cases where the conduct has attained a serious public dimension.
>
> [56] Our Court of Appeal has clarified that these factors should not be used as a checklist or examined point-by-point; rather, it is appropriate to use them as guidelines in discerning whether the decision of a public official or tribunal has a sufficiently public character to engage a judicial review. In *Strauss*, Groberman J.A. reasons (at para. 42):
>
> > [T]he [*Air Canada*] factors are merely guidelines in deciding whether a decision made by a public official or tribunal has a sufficiently public character to be amenable to judicial review. Some will be applicable and important in particular contexts while, in those contexts, others may be irrelevant and unhelpful.
>
> Whether one or more of these factors tips the balance either way is a context-dependent question: *Air Canada*, at para. 60.

[82] I am satisfied that LMS has made out at least a serious question to be tried on the issue of the availability of judicial review. It is at least arguable that there is a strong public dimension to the question of who, as between LMS and SFN, may lawfully occupy the Water Lot and operate the marina there after December 31, 2023. That being so, I am also satisfied that LMS has raised a serious question to be tried as to whether it was entitled to receive notice and a hearing before the Abandonment Resolution was considered and passed, under the test set out in *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[83] On the other hand, there are other reasons to question whether LMS will be successful with the petition in setting aside the Abandonment Resolution. Even if the Abandonment Resolution is found to be properly subject to judicial review, and a duty of fairness is found to have been owed, it does not follow that the duty was breached in this case. There is evidence that LMS, although not informed in advance of the council meeting that took place on July 4, 2023, had received notice before then of the Town's plan to abandon the Head Lease and had already provided the Town with its position on that issue (as it did, for example, in the letter of April 11, 2023 that counsel for LMS sent to the Province, copied to counsel for the Town).

[84] Nevertheless, I am satisfied that the petition raises a fair question to be tried.

C. Will LMS suffer irreparable harm in the absence of an injunction?

[85] LMS argues that if the injunction it seeks is not granted, then it will suffer irreparable harm because the right to operate the marina lies at the core of its mandate as a society. Without it, LMS says, its continued existence will be in jeopardy. In this regard, LMS relies heavily on *Hastings Community Association v. The Vancouver Board of Parks and Recreation*, 2014 BCSC 80. In that case, the pending termination of an agreement that allowed the applicants, who were not-for-profit societies like LMS, to operate a community centre, was enjoined on the basis that, among other things, the loss of the community centre "would appear to end the reason for [the applicants'] existence" (at para. 46), a result which an award of damages could not cure.

[86] The defendants argue that LMS has failed to demonstrate that it would suffer irreparable harm without an injunction. They say that LMS has overstated the consequences of the loss of the right to operate the marina inasmuch as there are other purposes in its mandate that it could continue to pursue elsewhere in the harbour after the termination comes into effect at the end of the year. To that end, the Town has offered to provide moorage for the museum and the dragon boat society. The defendants say that the loss of moorage fees and other benefits derived from the License can be compensated in damages if LMS succeeds in its claims. Moreover, they say that, even in the absence of the pending termination, the License would be due to expire in 2029, at which point LMS would have forfeited all of the improvements that it has made to the marina in any event.

[87] I agree with LMS that this case bears many similarities to *Hastings Community Association*. Although there are other purposes within its mandate that LMS could continue to pursue after losing the right to operate the marina, those functions are peripheral and depend to a large extent on LMS' presence at the marina with its associated infrastructure. I agree with LMS that the loss with which it is threatened is not one that could readily be compensated in damages. Although the term of the License was due to expire in 2029 in any event, the value that LMS will lose over the next six years in the absence of an injunction goes beyond the

moorage fees and any other revenue streams that would be lost during that period. LMS will effectively be gutted and its centrepiece asset will be lost.

[88] In short, I am satisfied that LMS has shown that it is very likely to suffer irreparable harm without an injunction.

D. Does the balance of convenience favour an injunction?

[89] I have found that LMS is very likely to suffer irreparable harm without an injunction. I have also found that LMS has demonstrated a serious question to be tried on each of its claims. Those factors weigh in favour of the injunction sought.

[90] However, I have also found that none of those claims are particularly strong. The strongest of them is that advanced in the petition. If LMS succeeds there, the result would be a new hearing before council, at which LMS would be permitted to make further submissions in favour of its position, but it is unlikely that, having been heard again, LMS would be permitted to retain the License until late 2029. In the meantime, the present confusion over the fate of the marina will only have been prolonged.

[91] LMS argues that the proposed injunction will at least preserve the *status quo*. That too is questionable. In this case, the *status quo* includes an abandoned Head Lease and a terminated sublease and License, each of which is, in the absence of an injunction, due to expire at the end of this week. It has been held that, in considering the balance of convenience, the *status quo* is to be determined as of the date of the injunction application, not when the original cause of action accrued: *Pacific Northwest Enterprises Inc. v. Ian Downs & Associates Ltd*. (1982), 42 B.C.L.R. 126, at para. 27 (C.A.); *Burquitlam Care Society v. Fraser Health Authority*, 2015 BCSC 1343, at para. 30; *Sunshine Logging (2004) Ltd. v. Prior*, 2011 BCSC 1044, at para. 37; *British Columbia Hydro and Power Authority v. Boon*, 2016 BCSC 355.

[92] The Respondents also argue that LMS has been dilatory in bringing these applications forward, thereby adding needlessly to their urgency and compounding

the level of uncertainty for all of the stakeholders. The Respondents say that it should have been clear to LMS by no later than the spring of 2023 that it would need injunctive relief if it wanted to preserve its tenure at the Water Lot beyond the end of the year. In response, LMS argues that it was not in a position to commence proceedings until it learned in early November that Town council had passed the Abandonment Resolution back in early July, a fact that had been concealed from LMS for many months.

[93] Although I accept that both the Province and the Town have been less than entirely transparent with LMS, the Town had given LMS notice on November 17, 2022 that it intended to abandon the Head Lease and that it considered the sublease to DL 2016 Holdings and the License to be void by operation of s. 99 of the *Land Act*. LMS had also received notice at the end of February 2023 that SFN was unwilling to work with LMS after the transition. By April 2023, LMS had, according to one of its letters, already instructed its counsel to pursue litigation. I therefore agree with the Respondents that LMS bears a degree of responsibility for the last-minute timing of the applications.

[94] At this stage, the parties, as well as the public, would benefit from having the issue settled now rather than later. Public access to the marina is not at stake on these applications. SFN has made it clear that it will continue to operate the marina after the transition, although there has been some suggestion that moorage rates will increase under the new regime. The Town or SFN will be offering moorage for some LMS facilities at the marina, including the museum and the dragon boat society.

[95] In opposing the applications, the Respondents place particular emphasis on the public interest in promoting reconciliation, an interest that arises squarely in this case through the need to ensure that the Reconciliation Agreement is implemented without further delay, according to its terms. In his affidavit, SFN's Chief John Elliot has deposed as follows:

> Any delay to plans for Ladysmith Harbour will be an enormous setback to reconciliation efforts. The Reconciliation Agreement was supposed to result

> in immediate benefits to the SFN community. That includes financial benefits but separate from any dollar amounts, there is tremendous importance within the SFN community for us to regain control of additional parts of our territory. Our members have been waiting for decades for the return of the land and water areas in Oyster Bay. The Reconciliation Agreement was supposed to ensure real action without further delay.

[96] LMS argues that the Reconciliation Agreement does not specify a particular date for the transfer of the Water Lot and therefore that the proposed injunction will not significantly impede the process of reconciliation. Further, it argues that the cause of reconciliation will not be meaningfully advanced if the rights of innocent third parties like LMS are ignored in the process.

[97] Although I accept that the rights of third parties must be considered, the status of LMS' License is uncertain. In the circumstances, I accept that any further delay of the scheduled transition would undermine the integrity of the reconciliation process, a factor which, I agree, weighs heavily in the balance of convenience against an injunction.

[98] A related concern is that SFN and its development company have already taken several steps in preparation for the transition. In particular, they have:

a) set up a subsidiary company to hold the sublease;

b) made plans for a partnership to serve as the management company;

c) negotiated the terms of the new lease with the Province;

d) contacted moorers to discuss SFN's plans for the marina, while seeking to avoid any conflict until matters are resolved for the transition from the plaintiff's marina operation;

e) contracted engineers to study the marina infrastructure;

f) arranged for insurance coverage;

g) acquired a point-of-sale system for accepting payments that will tie into their web-based booking system for both annual renters and visitors; and

h) negotiated terms for a service agreement for the marina with the Town for water, sewage and electricity.

[99] Although these steps will not have been wasted if an injunction were to be granted, the resulting uncertainty would complicate the transition when it finally does occur. Another feature of the reconciliation process involves plans to revitalise the waterfront area and remediate contaminated sites in and around the Water Lot. LMS argues that those plans can proceed even if the injunction is granted, but I accept that the resulting uncertainty would at least complicate those plans and may have the affect of postponing that and other urgent work that needs to be done in and around the Water Lot.

[100] Overall, I am satisfied that granting the injunction would also cause significant and irreparable harm. Although LMS has offered an undertaking as to damages in the event that an injunction is granted and its claims are unsuccessful, it is unlikely that the harm caused by the proposed injunction would be readily compensable in damages, whether through that undertaking or otherwise.

[101] Having weighed all of those considerations, I have concluded that balance of convenience does not favour the granting of the injunction sought.

V. Summary and Conclusion

[102] I have found that LMS has failed to satisfy the third element of the injunction test, involving the balance of convenience. It follows that the applications must be refused.

[103] Normally, costs would follow the event. In this case, however, I have found that LMS had good reason to complain about how it has been treated, leaving aside the legal footing for its claims. I have also found that LMS has demonstrated a fair question to be tried on all of its claims and that it is likely to suffer irreparable harm

now that its injunction applications have been refused. In the circumstances, I am not inclined to impose an award of costs on LMS, on top of everything else. The parties will therefore bear their own costs.

"Milman J."