



Court File No. **VLC-S-S-215858**

No. _____
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

***Re: THE OWNERS, STRATA PLAN VR456
IN THE MATTER OF DIVISION 2 OF PART 16 OF THE STRATA PROPERTY
ACT, SBC 1998, c. 43***

PETITION TO THE COURT

ON NOTICE TO: The registered owners of the strata lots comprising Strata Plan VR456 as listed in Schedule A [List of Registered Owners] to this Petition (the "VR456 Owners")

The holders of the registered charges in respect of the common property and the strata lots comprising Strata Plan VR456 as listed in Schedule B [List of Registered Chargeholders] to this Petition

This proceeding is brought for the relief set out in Part 1 below, by

- the person(s) named as Petitioner(s) in the style of proceedings above
- The Owners, Strata Plan VR456 (the Petitioner)

If you intend to respond to this Petition, you or your lawyer must

- (a) file a Response to Petition in Form 67 in the above-named registry of this court within the time for response to Petition described below, and
- (b) serve on the Petitioner
 - (i) 2 copies of the filed Response to Petition, and
 - (ii) 2 copies of each filed Affidavit on which you intend to rely at the hearing

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the Response to Petition within the time for response.

Time for Response to Petition

A Response to Petition must be filed and served on the Petitioner,

- (a) if you were served with the Petition anywhere in Canada, within 21 days after that service,
- (b) if you were served with the Petition anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the Petition anywhere else, within 49 days after that service, or
- (d) if the time for Response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe Street, Vancouver, British Columbia, V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the Petitioner(s) is: The Owners, Strata Plan VR456 Lesperance Mendes Attention: Paul G. Mendes 550-900 Howe Street, Vancouver BC V6Z 2M4
(3)	The name and office address of the Petitioner's lawyer is, as above: Paul G. Mendes

CLAIM OF THE PETITIONER

PART 1: ORDER SOUGHT

1. An order confirming the 80% vote resolution passed at the special general meeting of the strata corporation, The Owners, Strata Plan VR456 (the "**Strata Corporation**"), held on March 24, 2021 at which it was resolved to:
 - (a) approve the voluntary winding-up of the Strata Corporation;
 - (b) approve the appointment of Crowe MacKay & Company Ltd., as represented by Mr. Derek Lai, with an address for business at 1100 – 1177 West Hastings Street, Vancouver, B.C., as the liquidator (the "**Liquidator**");

- (c) cancel Strata Plan VR456 (the "**Strata Plan**");
- (d) dissolve the Strata Corporation;
- (e) surrender to the Liquidator of each owner's interest in:
 - (i) land shown on Strata Plan VR456; and
 - (ii) land held in the name of or on behalf of the Strata Corporation, but not shown on Strata Plan VR456,

(the lands referred to in subparagraphs (i) and (ii) being collectively the "**VR456 Lands**"); and
 - (iii) personal property held by or on behalf of the Strata Corporation (the "**VR456 Personal Property**");
- (f) approve the estimated costs of the winding up as follows:
 - (i) Liquidator fees of \$5,000 per strata lot, plus taxes and disbursements;
 - (ii) legal fees of approximately \$5,000 per strata lot, plus taxes and disbursements;
 - (iii) real estate agent's commission (2% of purchase price plus taxes);
 - (iv) court fees payable to the Province (approximately \$3,000);

provided that the actual costs of the winding up may vary from these estimates, and any variation will not require a further meeting or vote approval of the Strata Corporation; and

2. An order appointing Crowe MacKay & Company Ltd., as represented by Mr. Derek Lai, with an address for business at 1100 – 1177 West Hastings Street, Vancouver, B.C., as the liquidator of the Strata Corporation;
3. An order that the Liquidator shall incur no liability or obligation as a result of its appointment or the carrying out of the terms of this Order, save and except for:
 - (a) gross negligence or wilful misconduct on its part; or
 - (b) amounts in respect of obligations imposed on liquidators by applicable legislation.

4. An order that, upon the filing of a certified copy of this order in the Land Title Office, the interest of each of the owners set out on Schedule “A” to the Petition (collectively, the “**Strata Owners**”) in:
 - a. the VR456 Lands; and
 - b. the VR456 Personal Property.

be surrendered to and vests in the Liquidator, subject to the mortgages, assignments of rent and liens registered on title to Strata Lots 1 to 6 of the VR456 Lands and as set out in Schedule “B” to the Petition.

5. A declaration that, upon the surrender to and vesting in the Liquidator of title to the VR456 Lands, it has been proven to the satisfaction of the court on investigation that the Liquidator has good, safeholding and marketable title to the VR456 Lands.
6. An Order confirming that the authority and powers of the Liquidator includes:
 - (i) To expend the balance of the funds in the contingency reserve fund as may be required to pay for the legal, liquidation and other transaction costs of the winding up;
 - (ii) To the extent that the costs of the legal, liquidation and other transaction costs exceed the total of the contingency reserve fund then to be paid reasonable remuneration out of the proceeds of the sale of the VR456 Lands, subject to the right of any VR456 Owner to assess that remuneration;
 - (iii) To employ or retain such other professional services or advisors that are reasonably necessary for the winding up of the Strata Corporation and the cancellation of the Strata Plan;
 - (iv) To deal with any creditors of the Strata Corporation, including the payment, compromise or settlement of any claims by those creditors;
 - (v) To pay costs, charges and expenses, including Administrator’s fees, properly incurred and to be incurred with respect to the winding up of the Strata Corporation and the cancellation of the Strata Plan;
 - (vi) To market and negotiate the sale of VR456 Personal Property;
 - (vii) To sell the VR456 Lands subject to the requirements of section 282 of the *Strata Property Act* or further order of the Court, and specifically to enter into all necessary documents and agreements whether on behalf of the Strata Corporation or in its own capacity to facilitate the sale of the VR456 Lands;
 - (viii) To distribute the proceeds from the sale of the VR456 Lands and the VR456 Personal Property in accordance with the Interest Schedule; and

- (ix) In the discretion of the Liquidator, to seek further orders or directions as may be necessary from the Court.
7. An order approving the sale of the VR456 Lands pursuant to a purchase and sale agreement dated November 6, 2020 (the “PSA”) between Butterscotch Holdings Inc., as purchaser, and The Owners, Strata Plan VR456, as vendor.
 8. An Order confirming the Interest Schedule and that the Interest Schedule shall be the interest schedule for the purposes of sections 278 and 280 of the *Strata Property Act* and shall be used to determine each individual Strata Owners’ share of the proceeds of distribution on the winding-up of the VR456 Lands and the VR456 Personal Property.
 9. Pursuant to section 100(4)(a) of the *Land Title Act*, RSBC 1996, c. 250, an order that the consents of the owners in fee simple of each of the strata lots comprising the Strata Plan and each holder of a registered charge on title to any of the strata lot comprising the Strata Plan are deemed to have been obtained and such consent is otherwise dispensed with for the purposes of filing any reference plan or an explanatory plan with the Land Title Office in relation to the VR456 Lands.
 10. An order that the Petitioner and the Liquidator are entitled to recover their respective fees and costs of this proceeding, on a solicitor and client basis, and such costs shall be paid from, and form a charge upon, the proceeds of the sale of the VR456 Lands and the VR456 Personal Property.
 11. An order that, if necessary, all or a part of the proceeds from the sale of the VR456 Lands and the VR456 Personal Property shall be paid into an interest bearing trust account which accrues to the benefit of the strata lot owners, held by counsel for the Liquidator, Lawson Lundell LLP, and shall be paid out as directed by the Liquidator in accordance with the Interest Schedule.
 12. An order that, upon closing in accordance with the terms of the PSA, the sale proceeds, including deposits and after adjustments, shall be paid by or on behalf of the Purchaser to Lawson Lundell LLP in trust and may be paid out or dealt with by Lawson Lundell LLP in the following manner in accordance with the terms of this Order and at the direction of the Liquidator:
 - a. Firstly, in payment of all matters of adjustment with respect to the sale of the VR456 Lands, including without limitation outstanding water and sewer rates, and interest and penalties thereon owing in connection with the VR456 Lands (the “**Adjustments**”) and, in the event any strata lot owner(s) is responsible for all or a part of the Adjustments paid pursuant to this subparagraph, then the amount of the Adjustments attributable to that strata unit owner(s) and paid from the sale proceeds (the “**Individual Adjustment**”) shall be deducted from that portion of the sale proceeds otherwise to be paid to that strata lot owner(s);

- b. Secondly, in payment of any legal fees, including disbursements and taxes, real estate commission, Administrator (defined below) fees, including disbursements and taxes, appraiser's fees, Liquidator fees and disbursements (including legal fees) and other similar expenses incurred by the Petitioner in relation to this proceeding and the sale of the VR456 Lands;
 - c. Thirdly, the remainder of the sale proceeds shall be divided rateably among the strata lot owners of the VR456 Lands in accordance with the Interest Schedule and, in advance of any payment to the strata unit owners;
 - i. any Individual Adjustments paid on behalf of the particular strata lot owner(s) shall be deducted from the individual entitlement of the particular strata lot owner(s);
 - ii. in the case of any strata lot owner(s) with mortgages and/or other financial charges or encumbrances registered on title to their interest in the VR456 Lands, payment of the outstanding balance on such obligations shall be made to each of the mortgagees and/or creditors (as the case may be) from the individual entitlement of the particular strata lot owner(s); and
 - iii. the remainder of the sale proceeds attributed to a particular strata lot owner(s) shall be paid to that owner(s) or as directed in writing by that strata lot owner(s).
13. The parties to this proceeding be at liberty to apply to Court for such further and other directions and orders as may be necessary to carry out the full purpose and intent of these Orders, including the approval of any sale of the land shown on Strata Plan VR456.

PART 2: FACTUAL BASIS

14. The Petitioner, The Owners, Strata Plan VR456 (the "**Strata Corporation**") is a strata corporation established under Section 2 of the *Strata Property Act*, SBC 1998, c. 43, as amended (the "**SPA**"). Strata Plan VR456, which is also commonly referred to as "Spruce West", is located at 1089 West 13th Avenue, Vancouver, B.C.
15. The strata plan establishing the Strata Corporation was filed on August 2, 1977. The Spruce West complex consists of six residential strata lots in one six-storey building and associated common property. The Strata Corporation and its owners face increasing capital expenditures to maintain and repair the Spruce West complex, including the building and its physical infrastructure.
16. On or about April 2018, the City of Vancouver ("**City**") issued a work order for the Strata Corporation to take immediate steps to repair the exit stairway structural concerns and fire stopping of the Spruce West complex (the "**City Work Order**").

On July 11, 2019, the City extended the deadline of the City Work Order until August 19, 2019.

17. Under a Court Order dated April 17, 2020 in the matter of *MacLennan v. The Owners, Strata Plan VR 456*, B.C. Supreme Court New Westminster Registry No. NEW-S-S-222743, Garth Cambrey was appointed as the administrator (the “**Administrator**”) of the Strata Corporation pursuant to section 174 of the SPA, and was ordered to exercise all of the powers and perform all duties of the Strata Council and the Strata Corporation and complete a voluntary winding-up of the Strata Corporation pursuant to Division 2 of Part 16 of the SPA (the “**Consent Order**”).
18. Although the Consent Order granted the Administrator all the powers and duties of the Strata Corporation subject to the SPA, it specifically ordered the administrator to do two things:
 - a. take steps on behalf of the Strata Corporation to voluntarily wind up and sell the Strata Corporation lands under Part 16, Division 2 of the SPA; and
 - b. take steps to carry out the City Work Order, unless the City agreed to extend its required repairs.
19. Following a bidding process conducted through a commercial real estate broker, Goodman Commercial Inc., the Strata Corporation signed a purchase and sale agreement with Butterscotch Holdings Inc. ("**Butterscotch**"), dated November 6, 2020, (the "**PSA**") for the sale of the lands and premises comprising the Spruce West complex, which purchase and sale is subject to the requirements of Division 2 of Part 16 of the SPA. The offered price for the VR456 Lands as set out in the PSA is within the range of proposed marketplace values as determined by Goodman Commercial Inc.
20. The Strata Corporation does not own any land or have any land held on its behalf by another entity, whether within Strata Plan VR456 or outside the plan. Further, the Strata Corporation does not have any creditors out of the ordinary course of the Strata Corporation's business.
21. The Strata Corporation held a special general meeting on March 24, 2021 (the "**SGM**") to consider resolutions to wind-up and cancel the strata plan and to approve the PSA. All of the 6 strata lots within Strata Plan VR456 were represented in person or by proxy at the SGM. At the SGM, the 80% vote resolution to approve the wind-up and cancellation of the strata plan received 5 votes in favour and 1 vote against or 83.33% in favour.

PART 3: LEGAL BASIS

22. The Petitioner relies upon:

- (a) Rules 1-3, 2-1, 4-4, 13-5, 14-1 and 16-1 of the *Supreme Court Civil Rules*;

- (b) Sections 1(1), 53, and Division 2 of Part 16 of the *Strata Property Act*, SBC 1998, c. 43, as amended (the "SPA");
- (c) Part 10 of the *Business Corporations Act*, RSBC 2002, c. 57, as amended;
- (d) Sections 34 and 100 of the *Land Title Act*, RSBC 1996, c. 250, as amended;
- (e) sections 15 and 37 of the *Law & Equity Act*, R.S.B.C. 1996, c.253; and
- (f) and the inherent jurisdiction of the court.

Voluntary Winding Up with a Liquidator

23. The appointment of a liquidator, the winding of a strata corporation and the cancellation of a strata plan all require an 80% vote of the eligible voters, with each strata lot entitled to one vote (an "**80% Vote Resolution**").

SPA, sections 1(1), 53 and 277.

24. In the event that a strata corporation passes an 80% Vote Resolution, section 278.1 of the SPA provides as follows:

Confirmation by court of winding-up resolution

278. 1 (1) A strata corporation that passes a winding-up resolution in accordance with section 277, if the strata plan has 5 or more strata lots,

(a) may apply to the Supreme Court for an order confirming the resolution, and

(b) must do so within 60 days after the resolution is passed.

(2) For certainty, the failure of a strata corporation to comply with subsection (1)(b) does not prevent the strata corporation from applying under subsection (1)(a) or affect the validity of a winding-up resolution.

(3) A record required by the Supreme Court Civil Rules to be served on a person who may be affected by the order sought under subsection (1) must, without limiting that requirement, be served on the owners and registered charge holders identified in the interest schedule.

(4) On application by a strata corporation under subsection (1), the court may make an order confirming the winding-up resolution.

(5) In determining whether to make an order under subsection (4), the court must consider

(a) the best interests of the owners, and

(b) the probability and extent, if the winding-up resolution is confirmed or not confirmed, of

(i) significant unfairness to one or more

(A) owners,

(B) holders of registered charges against land shown on the strata plan or land held in the name of or on behalf of the strata corporation, but not shown on the strata plan, or

(C) other creditors, and

(ii) significant confusion and uncertainty in the affairs of the strata corporation or of the owners.

25. Section 278.1(5) of the SPA establishes a balancing test of the rights and interests and interests of owners and others in determining whether an 80% Vote Resolution should be confirmed:

[79] The SPA clearly contemplates that a wind-up and sale could occur despite opposition from up to 20% of the owners. For those owners who oppose a wind-up and sale, an order confirming the winding-up resolution is clearly not in the "best interests of the owners". However, that fact alone is not sufficient to overcome the view of the 80% plus majority who consider that a wind-up and sale is in their "best interests". Therefore the "best interests of the owners" factor requires a balancing of the competing individual views of whether a sale is appropriate or not.

...

[131] The winding-up provisions of the SPA balances the various legal rights, so that property rights are not to be given priority over other legal rights.

The Owners, Strata Plan VR 2122 v. Wake
2017 BCSC 2386, para. 79 and 131;
varied on other grounds, 2018 BCCA 280;

The Owners, Strata Plan NWS 243 (Re), 2020 BCSC 670, para. 16.

26. The "best interests of the owners" in the context of s. 278.1 of the SPA is an objective test: what would reasonable owners do in comparable circumstances?

Wake, supra, para. 98.

27. In VR 2122, Loo J. noted in interpreting the s. 278.1 "balancing test" provisions that a person opposing the winding up and sale must establish more than their own view of why moving from the strata complex is not in their perceived best interest to do so. Further, the onus is on the opposing person to establish the factors necessary to defeat an order confirming the winding up resolution.

Wake, supra, para. 81 -82.

28. In assessing the factors set out in ss. 278. 1 (5)(b)(i) and (ii) of the SPA, the court must make a qualitative assessment of likelihood and probability of "significant unfairness" or "significant confusion and uncertainty" and "extent". In that regard, any significant unfairness of significant confusion and uncertainty must be to such an extent that it warrants the court to override the clear legislative ability for the strata corporation and be sold by 80% or more of the votes of the strata corporation.

Wake, supra, para. 83.

29. The phrase "significant unfairness" has been interpreted in the context of the SPA, including s. 278.1(5)(b)(i) to encompass "oppressive conduct and unfairly prejudicial conduct or resolutions.":

It is conduct or consequences that are "burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith." The modifying term "significant" indicates that the "unfairness" must be oppressive or transcend beyond mere prejudice or trifling unfairness. It must be "unfairness" that is "of great importance or consequence.": Dollan v. The Owners, Strata Plan BCS 1589, 2012 BCCA 44, paras. 25-28. The word "significant" imposes a more stringent threshold than simply "unfairness": Jaszczewska v. Kostanski, 2016 BCCA 286 at para. 41.

Wake, supra, para. 140.

30. The final aspect of the section 278.1(5) confirmation provisions is an assessment of the probability and extent of significant confusion and uncertainty in the affairs of the strata corporation or the owners if the winding up order is confirmed or not. In *Whitehorse Condominium No. 95*, the court, in the context of a similar provision of the Yukon condominium legislation dealing with amendment to the declaration (our strata plan), stated:

[42] It is not necessary to expand on this principle. The court must assess whether a refusal to terminate or amend the Declaration will result in confusion and uncertainty. It implies that there must be some uncertainty or confusion that can only be resolved by making the termination order or amending the Declaration.

Whitehorse Condominium Corporation No. 95 v. 37794 Yukon Inc.

31. Repairing and maintaining the common property of a condominium complex is an "essential and fundamental" statutory obligation of the Strata Corporation under the SPA.

SPA, section 72(1);
Royal Bank of Canada v. Holden, 1996 CanLII 3440 (BCSC).

32. Factors supporting the confirmation of the 80% vote winding up resolution approved by the VR456 owners at the March 24, 2021 Special General Meeting by this Court include:

- (g) At the Special General Meeting, 83.33% of the votes of the Strata Corporation were cast in favour of the 80% vote resolution. Prior to the formal 80% vote, all of the informal votes of the VR456 owners indicated strong support, with 83.33%% voting in favour for the proposed winding up and sale.
- (h) Following an extensive marketing campaign by its real estate broker and a competitive bidding process that resulted two initial offers and then further submissions, the owners received an offer to purchase their strata lots that exceeds the most recent assessed values of the strata lots in the Spruce West complex multiplied by 6 as determined by the 2021 BC Assessment. There has been no sale of an individual strata lot in the Spruce West complex since 2005.
- (i) The PSA also allows the owners to remain in their strata lots for a period of up to 4 months following the closing of the proposed sale of the property to Butterscotch (on a "rent free" basis), giving owners time to consider their accommodation options following the closing of the transaction. The offer further provides owners with an incentive to purchase into a new development to be constructed on the VR456 Lands.
- (j) At the same time, the winding up of the Strata Corporation and proposed sale to Butterscotch would avoid the significant liabilities that the Strata Corporation faces to repair and maintain the 43+ year old Spruce West complex.
- (k) A decision not to confirm the 80% vote resolution to wind up the Strata Corporation and cancel the strata plan would leave the owners obligated to incur significant costs to repair and maintain the Spruce West complex and a special levy would be required to raise the funds to pay for these significant costs will come from, given the limited funds currently held in the Strata Corporation's Contingency reserve fund. The imposition of

significant special levies by the Strata Corporation (each of which requires a $\frac{3}{4}$ vote resolution of the owners) comes with the risk that not all owners will be able to fund the special levies and may lose their homes as a result through foreclosure or forced sale.

33. In the event that this Honourable Court grants the orders set out in paragraphs 1 through 3 of Part 1 herein (the "**Winding Up Confirmation Orders**"), the PSA sets out certain conditions to be waived or satisfied by Butterscotch as the purchaser, which conditions include the making of an application by Butterscotch to the City of Vancouver with respect to its proposed redevelopment of the VR456 Lands (the "**Purchaser's Conditions**"). In the event that Butterscotch does not waive or satisfy the Purchaser's Conditions, and a sale of the VR456 Lands does not complete, the Strata Corporation and the Liquidator may seek a further order of this Court to set aside the Winding Up Confirmation Orders.

PART 4: MATERIAL TO BE RELIED ON

- 34. Affidavit #1 of Garth Cambrey, made 6/14/2021.
- 35. Affidavit #1 of Dan Sonnenschein made 6/14/2021.
- 36. Affidavit #1 of Mark Goodman, made 6/10/2021.
- 37. Affidavit #1 of Derek Lai, made 6/8/2021.
- 38. Such further and other materials as the lawyer for the Strata Corporation may advise.

Petitioners estimate that the application will take 1 hour.

June 15, 2021

Dated

Paul G. Mendes

Paul G. Mendes
Solicitor for the Petitioner

Schedule A

List of Registered Owners

	Name(s) of owner(s)	Postal Address of owner(s)
1	AGNES OY LINE MUI	#201 - 1089 West 13 th Avenue Vancouver, BC V6H 1N1
2	AGNES OY LINE MUI	#201 - 1089 West 13 th Avenue Vancouver, BC V6H 1N1
3	PETISLAV TOVBIS	#301 - 1089 West 13 th Avenue Vancouver, BC V6H 1N1
4	MICHELLE MARGARET ELIZABETH MOK and JAMES MOK, AS JOINT TENANTS	#401 - 1089 West 13 th Avenue Vancouver, BC V6H 1N1
5	TRACEY ANNE MACLENNAN and SUZANNE ELISE FOSTER, EXECUTORS OF THE WILL OF COLIN MACKENZIE MACLENNAN, DECEASED, SEE CA7213967	Tracey Anne MacLennan #209 - 250 East 11 th Street North Vancouver, BC V7L 2G7
		Suzanne Elise Foster 2822 East Ken Avenue South Vancouver, BC V5S 4T4
6	DAN JACOB SONNENSCHNEIN	#601 - 1089 West 13 th Avenue Vancouver, BC V6H 1N1

Schedule B

List of Chargeholders

Strata Lot Number	Name of Holder of Registered Charge	Postal Address of Holder of Registered Charge	Estimated value of the interest of each holder of a registered charge against the land
NOTE TO OWNERS: Section 278(1)(d) of the <i>Strata Property Act</i> requires that the interest schedule list the names of all registered charge holders (such as mortgage companies) who have an interest in the land - which includes every strata lot. As the Strata Corporation has no authority to contact the charge holders of each of the strata lots to ask for an updated statement of what is owing, the only available information regarding amounts set out in column D of this table is that set out in the documents that the charge holders filed in the Land Title Office. It is acknowledged that this information may not be accurate. In any event, mortgage and other financial charge information will need to be updated before a sale of the building completes.			
1	No charges against strata lot.		
2	No charges against strata lot.		
3	No charges against strata lot.		
4	Bank of Montreal (Mortgage filed under CA268746)	2601 Granville Street, Vancouver BC, V6H 1N1	\$150,000.00
	Bank of Montreal (Mortgage filed under CA1583834)	865 Harrington Court, Burlington ON, L7N 3P3	\$156,000.00
	Bank of Montreal (Priority Agreement filed under CA164998, granting CA1583834 priority over CA268746).	865 Harrington Court, Burlington ON, L7N 3P3	N/A
5	Jennifer MacLennan (Judgment filed under R41955)	Not Disclosed - Unknown	Family law judgment dated September 19, 1979. Registered as a charge on May 5, 1987.
	Canadian Imperial Bank of Commerce (Mortgage filed under CA4232875)	501-1089 West Broadway, Vancouver BC, V5Z 1G8	\$100,000.00
6	No charges against strata lot.		