

CANADA / JUDGMENT

Costa vs. Charest

2025 BCSC 2421

COURT

Supreme Court of British Columbia

DECIDED

11 March 2025

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2025 BCSC 2421 Costa vs. Charest

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Costa vs. Charest,

2025 BCSC 2421

Date: 20250311

Docket: S23408

Registry: Nelson

Between:

Jarred Paul Costa

Claimant

And

Kara Lyn Charest

Respondent

Before: The Honourable Madam Justice Lyster

Oral Reasons for Judgment

Counsel for Claimant:

Y. Gershony

No other appearances

Place and Date of Trial/Hearing:

Nelson, B.C.

March 11, 2025

Place and Date of Judgment:

Nelson, B.C.

March 11, 2025

- [1] THE COURT: These are my oral Reasons for Decision with respect to the petitioner's application to remove a certificate of pending litigation ("CPL") which was registered against property owned by the petitioner, Mr. Costa, located at 849 Balsam Road, Kelowna. The petition respondent, Ms. Charest, was served pursuant to an order for alternative service on December 31, 2024. Ms. Charest has not responded to the petition, nor has she appeared for the hearing before me.
- [2] The CPL in question was registered in separate family law proceedings by Ms. Charest. Those proceedings were between Ms. Charest and her former common-law partner, Mr. McClusky. The CPL was registered in that family law proceeding which is Nelson Registry, Action No. 21104, on January 10, 2020. Counsel advised, and there is an affidavit from his legal assistant, which indicates that they have not been permitted to access the family law file in the Nelson Registry.
- [3] I have reviewed the court's policy on access to the court record, which refers to Rule 22-8(1) (a) of the Supreme Court Family Rules, B.C. Reg. 169/2009, and it provides that unless the court otherwise orders, no person other than the following may search a registry file in respect of a family law case. The first sub-listing under that at (1) is a lawyer, whether or not a lawyer of a party.
- [4] Counsel candidly indicated that he has found that his experience with searching family law files has varied from registry to registry. It is my view that as a lawyer, counsel ought to have been able to search the family law file in this proceeding, and I have done so. I have determined the history of the family law proceeding in this matter.
- [5] I can advise as follows:
- a) The notice of family law claim was initially filed on October 1, 2019.;
 - b) An amended notice of family claim was then filed on January 7, 2020, and it was pursuant to the amended notice of family law claim that the CPL was registered in this matter;
 - c) Ms. Charest filed her financial statement form F8 on May 15, 2020.;

- d) A judicial case conference ("JCC") was conducted on December 10, 2020, and an order was made at that time that dealt with matters that have no relevance to the present proceeding. Of some note, perhaps, an order was made for Mr. McClusky to produce certain documents relating to the purchase of the property in issue here.
- [6] No further steps have been taken in the family law proceeding since the December 10, 2020 order of Justice Church. Since that time, there was a Family Maintenance Enforcement Program ("FMEP") notice of enrollment put in the file of March 16, 2023. Subsequently, there has been a request by FMEP for copies of any Supreme Court orders. That was put in the file on September 20, 2024. I am satisfied that neither of those FMEP documents constituted a step in the family law proceeding. I am satisfied that the December 10, 2020 JCC order was, in fact, the last step in the family law proceeding.
- [7] The petitioner's evidence demonstrates, on a balance of probabilities on the evidence before me, that Mr. McClusky was only ever a bare trustee holding legal title, but with no beneficial interest in the Balsam Road property. That property was purchased on February 12, 2013. It was put in Mr. McClusky's name.
- [8] The evidence is that Mr. Costa, perhaps at times rather belatedly, paid all costs associated with the property, and I am referring to mortgage payments, insurance payments, taxes and utilities. It appears that Mr. McClusky's and Mr. Costa's practice was that Mr. McClusky would send Mr. Costa copies of the invoices and statements and that Mr. Costa would send Mr. McClusky cash by way of e-transfers to cover those costs. It would seem that Mr. McClusky may not also have paid all bills as they were due and owing. In any event, the evidence shows that it was Mr. Costa who was ultimately responsible for all costs related to the property.
- [9] It is Mr. Costa's evidence that he learned of the CPL in this matter only after the bare trust agreement which was originally verbal was reduced to writing in November 2020, and that he learned of the CPL having been registered only when he then wanted to take the steps necessary to transfer the property into his name.
- [10] He tried to persuade Ms. Charest to remove the CPL allowing him to deal with the property, (there are text messages in evidence between them), and Ms. Charest did not agree to do so. Mr. Costa learned through his current counsel that, despite the CPL, he actually could transfer title of the property into his name, and that occurred. The registration was on May 30, 2023.
- [11] However, it is Mr. Costa's evidence that the mortgage remains in Mr. McClusky's name and that the CPL is prohibiting him from essentially getting the mortgage into his own name, him selling the property, and even from insuring the property. Given the property's location on the west side of Okanagan Lake, the inability to insure the property would certainly be a significant concern for Mr. Costa.

- [12] It is Mr. Costa's submission, and I accept, that Ms. Charest's claim to an interest in land in respect of the subject property is weak. If, as the evidence before me shows, Mr. McClusky only ever had legal title but no beneficial interest in the property, then it would follow that this is not family property as between Mr. McClusky and Ms. Charest. I refer in that regard to the decision of Justice Fleming, then of this court, in *J.D.G. v. J.J.V.*, 2016 BCSC 2389 at para. 178.
- [13] Mr. Costa's primary argument before me is made pursuant to s. 252 of the Land Titles Act, R.S.B.C. 1996, c. 250 [LTA], which provides that the court has the discretion to cancel a CPL where no steps have been taken in the proceeding for one year before service of the petition.
- [14] I have already gone through the history of the family law proceeding, and I have already expressed the view that the FMEP notices are not steps, and that the last step taken was the order issued pursuant to the JCC conducted December 10, 2020. That means that no steps have been taken in the family law proceeding for over four years. I think that that can fairly be stated to be a dormant family law file at this stage.
- [15] I will not read them now, but counsel took me to the decision in *Dhillon v. Dasta*, 2019 BCSC 729, at paras. 14-18, for the principles relevant to the application of s. 252 of the LTA. Here it is apparent on the facts as I have stated them that the statutory conditions for the cancellation of a CPL pursuant to section 252 have been met. That is, no step has been taken in the family law proceeding for one year prior to the service of this petition. Indeed, no steps had been taken for four years prior to service of the petition.
- [16] The court retains a discretion, despite the statutory conditions being met, to decline to cancel the CPL. I refer to para. 17 of *Dhillon* where Justice Dillon stated that the court retains a discretion not to cancel the CPL even if the statutory conditions have been met. However, once the statutory conditions are met, prejudice to the land owner is presumed. The respondent must show that the prejudice is either not serious or is outweighed by other factors that suggest that cancellation of the CPL would be unjust.
- [17] Factors relevant to the exercise of the court's discretion include whether an acceptable explanation has been given for the delay, whether no prejudice would, in fact, be incurred, and whether the plaintiff's claim for an interest in land has a reasonable prospect of succeeding. Here, of course, Ms. Charest has not filed a response. She has not put forward any evidence or submissions in support of discharging the burden that would be upon her to convince the court not to cancel the CPL.
- [18] On my review of the materials, however, I do not believe that an acceptable explanation could be provided by Ms. Charest for a delay of this length. I accept that Mr. Costa is, in fact, prejudiced by the continuing registration of the CPL. As I have already said, I find that Ms. Charest's claim to an interest in this property in the family law proceeding would likely not have a reasonable prospect of success.

- [19] For all of those reasons, I find that it would not be unjust for this court to order the cancellation of the CPL. I therefore order that the CPL is cancelled pursuant to s. 252 of the LTA. There is no need for me, therefore, to consider the petitioner's alternative argument under ss. 256 and 257 of the LTA, and I decline to do so.
- [20] I have not heard from you with respect to costs, Mr. Gershony.
- [21] CNSL Y. GERSHONY: I would seek costs payable on scale B. That was in the petition.
- [22] THE COURT: The petitioner is entitled to his costs of the petition at scale B. I just will note, as I am sure you would have noted, in any event, Mr. Gershony, but you will need to revise your draft order to only refer to s. 252.
- [23] CNSL Y. GERSHONY: Yeah. Yes. Thank you.
- [24] THE COURT: I think it is likely otherwise acceptable - but I would note that I am not an associate judge.
- [25] CNSL Y. GERSHONY: Right.
- [26] THE COURT: I think it is likely otherwise in order. Anything further, Mr. Gershony?
- [27] CNSL Y. GERSHONY: No. Nothing further, Madam Justice. Thank you.

"L.M. Lyster J."

LYSTER J.

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