

CANADA / JUDGMENT

Kapoor v. Makkar

2020 BCCA 223

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 223 Kapoor v. Makkar

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Kapoor v. Makkar,

2020 BCCA 223

Date: 20200730

Docket: CA46702

Between:

Sapna Kapoor also known as Sapna Makkar

Appellant

(Claimant)

And

Sonam Makkar and Saroj Makkar

Respondents

(Respondents)

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Dickson

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated

January 20, 2020 (Kapoor v. Makkar, New Westminster Docket E054162).

On an application to vary: An order of the Court of Appeal for British Columbia

dated April 30, 2020 (Kapoor v. Makkar, 2020 BCCA 132,

Vancouver Docket CA46702)

Oral Reasons for Judgment

Counsel for the Appellant

(via teleconference on July 30, 2020):

J.E. Shragge

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Counsel for the Respondent

(via teleconference on July 30, 2020):

B.J. Cabott

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Place and Date of Hearing:

Vancouver, British Columbia

July 23, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 30, 2020

Summary:

Ms. Kapoor appeals from an interlocutory order directing her and Mr. Makkar's former matrimonial home to be listed for sale on March 1, 2020, giving Mr. Makkar exclusive conduct of the sale, and ordering Ms. Kapoor to give vacant possession of the property to Mr. Makkar on March 1, 2020. Ms. Kapoor contends the judge erred in granting the order for sale in weighing the evidence to determine Mr. Makkar was the preferred occupant and in failing to give sufficient weight to relevant factors. She contends the judge erred in respect of the occupancy order in failing to apply statutory criteria to vary an order under the Family Law Act and in failing to disclose the basis upon which he made the order. Held: Appeal allowed. The sale order must be set aside as the judge erred in failing to balance the relevant factors and in giving weight to the respondent's approach to compromise and settlement of her claim. The occupancy order was inextricably connected to the sale order and must also be set aside.

In respect to staying execution of the orders appealed, s. 234 of the Family Law Act assigns the jurisdiction to the court that made the order, in this case the Supreme Court of British Columbia.

- [1] SAUNDERS J.A.: This appeal arises in a family law case that is currently mid-trial. The parties were married on May 9, 2016, and separated on September 6, 2017. They have one child now three years' of age. The litigation concerns spousal and child support, parenting arrangements, property division, and an issue of relocation of Ms. Kapoor.
- [2] The appeal is brought by Ms. Kapoor from an interlocutory order made by Mr. Justice Groves on December 9, 2019, on Mr. Makkar's application, directing the former matrimonial home be listed for sale on March 1, 2020, giving Mr. Makkar exclusive conduct of the sale, and ordering Ms. Kapoor to give vacant possession of the property to Mr. Makkar on March 1, 2020. The order of December 9, 2019, changes the occupancy from that established by an order obtained by Ms. Kapoor on November 3, 2017 "without notice" under R. 10-9, the Urgent Applications rule of the Supreme Court Family Rules, whereby Mr. Justice Riley ordered that Ms. Kapoor have exclusive occupancy of the residence. The order of December 9, 2019 was expressed as varying the order of Mr. Justice Riley made November 3, 2017.
- [3] Ms. Kapoor was not in attendance at the December 9, 2019 hearing.
- [4] On January 20, 2020, Justice Groves heard further applications, including an application by Ms. Kapoor for an order postponing the sale of the home. That application was dismissed.
- [5] Ms. Kapoor next applied to a single justice of this court on February 19, 2020, for leave to appeal from the orders concerning occupancy and sale of the property, and for a stay of the December 9, 2019 order. The trail of proceedings in respect to the order of December 9, 2019 are set out in reasons for judgment of Mr. Justice Abrioux given April 30, 2020, indexed as 2020 BCCA 132. Those reasons are helpfully digested in the reasons of Madam Justice Griffin of May 28, 2020, wherein she extended the time to allow Mr. Makkar to apply under s. 9(6) of the Court of Appeal Act to discharge the order of Justice Abrioux, on the condition that the review would be set for hearing on the same day as this appeal. The proceedings that followed the two hearings before Justice Groves include:
- on February 28, 2020, the day before the day for change in exclusive occupancy of the property, Ms. Kapoor obtained from a single justice of this court, without notice, a one-week stay of the order of December 9, 2019;
 - on March 5, 2020, in reasons indexed as 2020 BCCA 81, Ms. Kapoor's application to extend the interim stay ordered on February 28, 2020 was refused on the basis that s. 234 of the Family Law Act, S.B.C. 2011, c. 25 directed such applications to the Supreme Court of British Columbia;
 - on the next day, March 6, 2020, the Supreme Court of British Columbia stayed the order of December 9, 2019, until March 27, 2020;
 - by order made on March 27, 2020, the Supreme Court of British Columbia extended the date for vacant possession to May 1, 2020;

· on April 30, 2020, Justice Abrioux stayed execution of the order of December 9, 2019, until further order of this court or a decision of the Supreme Court of British Columbia in the trial of the action, whichever first occurs; and

· on May 28, 2020, Justice Griffin allowed the application of Mr. Makkar for an extension of time to apply under s. 9(6) of the Court of Appeal Act to discharge the stay order made April 30, 2020.

[6] Before us now are Ms. Kapoor's appeal of the orders of Justice Groves made December 9, 2019 and January 20, 2020, as well as Mr. Makkar's application to discharge the order of Justice Abrioux made April 30, 2020. The reasons for judgment of Justice Griffin refer to a stated intention of Ms. Kapoor to appeal from the order of the Supreme Court of British Columbia dated March 27, 2020, but as no notice of appeal has been filed in respect to that order it is not before us.

[7] In preparing these reasons for judgment, I have reviewed Affidavit #31 of Ms. Kapoor. In that affidavit, Ms. Kapoor refers to an order of Mr. Justice Crawford dismissing a previous application to vary the November 3, 2017 order of exclusive occupancy. While the record before us does not include the order of Justice Crawford, its existence would be relevant to the appeal from the order respecting exclusive occupancy, as I now explain.

[8] At the hearing of the appeal, having found no order concerning occupancy of the property made between November 3, 2017 and the one of December 9, 2019, I expressed my view to counsel (who are new to this protracted case) that in December 2019 it was open to Mr. Makkar, under the Urgent Applications rule, to apply to change or set aside Justice Riley's exclusive occupancy order without engaging criteria for varying an interlocutory order, for example, whether a material change in circumstances was established. This opportunity would flow naturally from the general law of ex parte orders, now known as "without notice" orders, and would obviate the need to hear submissions on the application of sections 90 and 215 of the Family Law Act, contested in the factums. Neither party apprised us of the intervening order of Justice Crawford and we proceeded without hearing from counsel on the application of the disputed statutory provisions. Notwithstanding the new information of Justice Crawford's order, I consider that the appeal of the exclusive occupancy order should be resolved without further submissions on ss. 90 and 215 of the Family Law Act.

[9] Although the character of Justice Riley's order as "without notice" will not determine the outcome of the appeal, I will say something about the special, privileged, nature of a "without notice" remedy. While the moniker given such orders has changed from "ex parte" to "without notice", the applicable principles have not altered. Both the Supreme Court Family Rules and the Supreme Court Civil Rules contain a rule titled "Urgent Applications", with the same provision for obtaining an order "without notice" (R. 10-9(6) and R. 8-5(6) respectively), and they have the same subrule (8):

On the application of a person affected by an order made without notice under subrule (6), the court may change or set aside the order.

[10] It appears to me, from the scant information available in the record, that the application before Justice Crawford proceeded as a variation application, that is, an application that treats the original order as bearing the imprimatur of a complete hearing. Yet, if it was the first challenge to Justice Riley's order, from a procedural perspective it was then an application Mr. Makkar was entitled to bring under R. 10-9(8) and warranted a hearing of the issue *de novo* in accordance with the standards of sub-rule (8), without the presumption that the first order was correct. In *Gulf Islands Navigation Limited v. Seafarers' International Union of North America (Canadian District)* (1959), 18 D.L.R. (2d) 325 at 631, 28 W.W.R. 517 at 522-523 (B.C.C.A.), Mr. Justice S. Smith explored the nature of a hearing to set aside an *ex parte* injunction and explained that the parameters of the hearing subsequent to the *ex parte* order are influenced by the general rule of adjudication, *audi alteram partem*:

Ex parte orders are *sui generis*; the general rule of adjudication is *audi alteram partem*, and that rule is only relaxed in *ex parte* proceedings because of their inconclusiveness. In such proceedings a Judge usually relies on counsel to a large extent, both as to the facts and the law; and to hold that when the inconclusive order is looked at again more carefully, the party at first absent is restricted so that he cannot raise all the points that he could have raised if heard in the first instance, is clearly an injustice. It would mean that if the original Judge is not available for a rehearing, the party not at first heard is seriously prejudiced. In the absence of intractable authority the other way, we should hold that he is entitled to be heard, not to be half heard, which is all that he would be if any part of the subject of the *ex parte* order were closed to him when he at last got before a Judge.

[11] A "without notice" order is an extraordinary, powerful, interlocutory remedy which is recognized as having the potential to inflame a dispute between parties in fraught situations or to produce potential injustice when made on incomplete submissions that generate a wrong understanding of the circumstances. To protect against avoidable damage to the litigants or the litigation process, while retaining this valuable judicial response for emergency situations, procedural safeguards (which I do not see in this case) are usually employed. These may include a true interim term establishing the duration of the order, or a term providing a return date by which an opportunity is given to the other party to be heard without their filing a fresh application, and a term requiring service, by a time certain, of all materials that were before the judge on the application, along with a copy of the entered order. On occasion even short notice, or even informal notice, will serve to alleviate some of the offence that may be taken from the presentation to a party of an order obtained against them without notice. There is, of course, a time and place for without notice orders, but I respectfully suggest that to the extent possible when a without notice order must be made, these time honoured safeguards should be employed vigorously.

[12] With those comments, I turn now to the appeal.

- [13] The reasons for judgment of December 9, 2019 are brief. The judge commented on his view of the veracity of Ms. Kapoor and her attitude to the litigation, and on his conclusion that the order for sale of the home giving Mr. Makkar conduct was the appropriate order. He did not specifically address the issue of exclusive occupancy of the home, but rather simply ordered Ms. Kapoor to give vacant possession on the date he set for Mr. Makkar to have conduct of sale.
- [14] On the question of Ms. Kapoor's veracity and attitude to the litigation the judge said:
- [2] I am also satisfied on the basis of what was pointed out to me about the [bank accounts] , that Ms. Kapoor has been less than frank with the court about her ability to earn income.
- [3] Those documents referred to show that on at least seven occasions she received some income from her former employer who she has said and sworn she was not working for and did not receive income from.
- [5] She has been less than frank with the court about her income. She has been receiving substantial support. This is an incredibly short-term marriage, a marriage which began on May 9, 2014, ended in September 2016,
- [6] It appears, because cooperation, compromise, settlement are not words which appear to be part of [Ms. Kapoor's] vocabulary, the only way to move this litigation along is to provide Mr. Makkar with the remedies that he is legally entitled to.
- [7] I should add that this matter was before me for trial in New Westminster a few weeks ago. I adjourned the trial after hearing from Ms. Kapoor. I do not think I had the full story of what has happened in this litigation
- [8] This matter has got to come to an end. I am satisfied on the basis of the information before me, having not heard from Ms. Kapoor on this point, that she is playing games.
- [9] In terms of her attendance today Ms. Kapoor telephoned this morning and said she is ill. She may very well be, but there are too many games being played here. I suspect she has been less than frank with the court about her inability to attend today.
- [15] With respect to the sale of the house the judge said:
- [1] I am satisfied that this is the only real asset of any consequence between the parties. This is litigation that has dragged on for way too long.
- [10] The bottom line is this - the law, as I understand it, is that when there is really one asset that is subject to division between the parties, an interim sale of that asset, wherever practical, is not necessary but helpful in resolving the dispute between the parties. There may be a claim for spousal support. There is currently a claim for child support. There are some issues around the child's care perhaps.

- [11] In terms of property, this is a very straightforward matter. It is a very short marriage. There may have been some growth in the townhouse that Mr. Makkar owned when the parties began living together. When it was sold about a year later - and there has been some growth on an asset that Mr. Makkar essentially bought just prior to separation. Those may be subject to division, depending on the arguments back and forth, but the bottom line is the property has to be sold.
- [12] March 1 gives Ms. Kapoor plenty of time to find other alternate accommodations. It gives her two and a half months. Properties generally do not sell, from my experience, in the months of December and January, although they sometimes do, and delaying it to March 1 is sufficient to allow people to start thinking about moving and buying properties and gives Ms. Kapoor enough time to find alternate accommodations. That is my order today.
- [16] While his reasons given on December 9, 2019 must stand as reasons for the order appealed, the judge further explained his order on January 20, 2020 in dealing with other applications before him, including an application by Ms. Kapoor to postpone the sale of the family home:
- [48] There is an application to postpone the sale of the family home. That application is dismissed. The order for the sale of the family home was granted for very real reasons. The very real reasons are it is the only asset that the parties have. It is the only asset that is subject to division. Its value has to be determined. The person who can make the greater claim for it is Mr. Makkar, and he wants it sold. There is nothing in the materials to suggest that Ms. Kapoor is going to be in a position to buy out his much larger interest in the home than is her interest. In my view, it is not only expeditious but necessary to sell the family home. The sooner that can be done, the better.
- [17] The order appealed has two aspects, the order for sale of the property and the order for exclusive possession.
- [18] Ms. Kapoor says the judge erred in respect to the order for sale in:
- 1) weighing the evidence to determine that, on the balance of convenience, Mr. Makkar was the preferred occupant of the family home; and
 - 2) failing to give any or sufficient weight to the factors relevant on an application for an interim sale of a family asset under R. 15-8 of the Supreme Court Family Rules.
- [19] She says the judge erred in respect of the occupancy order in:
- 1) failing to apply the statutory criteria for varying an order made under the Family Law Act; and
 - 2) failing to disclose the basis upon which he made the occupancy order so as to preclude effective appellate review.
- [20] I turn to the order concerning sale of the property. Rule 15-8 of the Supreme Court Family Rules provides:

- (1) If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.
- (3) The court may give directions for the purpose of effecting a sale, including directions
- (a) appointing the person who is to have conduct of the sale,
- [21] In *Tomic v. Tough*, 2013 BCCA 355, this court considered an interlocutory order for sale of property under R. 15-8 in a family case and said:
- [26] The criteria for an interlocutory order for sale of property are whether it is expedient and necessary. Those words were described in *Bodo* [*Bodo v. Bodo* (1990), 66 D.L.R. (4th) 700, 25 R.F.L. (3d) 295 (B.C.S.C.)] as encompassing, in family law proceedings, a number of factors: the needs of the children; the availability of alternative accommodation; the emotional condition of the spouses; external economic factors; wasting of the asset; and the capacity of both parties to maintain the asset. In *Reilly v. Reilly* [(1992), 99 D.L.R. (4th) 47 (B.C.C.A.)], the court adopted the word 'advantageous' in place of 'expedient', at para. 35:

At the risk of over simplification my own view is that what the rule requires, where necessity is not in issue, is that the proposed sale be advantageous to both parties.

- [22] In *Bodo*, referred to in *Tomic*, Madam Justice Huddart described the approach that should be brought to such an application:

I consider that, on an interim application, the onus should be on the spouse seeking to change the status quo pending trial. Any doubts about the justice of an order for sale on an interim application should be resolved in favour of the status quo.

Given the wide variety of factual patterns in family law actions it would be singularly foolish of me to attempt a definitive listing of factors that might be relevant to the determination as to whether a sale is "necessary and expedient". However, those factors that have been considered in determining whether a sale should be ordered at trial will always be relevant. They include:

1. Children's need for stability and easy access to their school and friends, particularly in the period immediately following the separation of their parents;
2. The availability (including affordability) of alternative accommodation for each spouse and his or her dependents;
3. The emotional condition of the spouses, especially the parenting spouse;
4. External economic factors (e.g., a declining market);
5. Wasting of the asset, and
6. The capacity of the parties to maintain the asset.

It is appropriate for the court to turn its mind as well to questions of efficiency and expediency. A determination of the value of matrimonial property at or near the triggering event may facilitate the final resolution of the dispute.

This is particularly so in the vast majority of cases where the family home is the only asset with significant value. A judicial review of the evidence at an early stage may bring some reality to an emotionally laden conflict which can have only one outcome, the sale of the home and the equal division of the proceeds. Conversely, it may identify those situations in which there is a realistic expectation of a variation. Such a review can also focus the parties' attention on the needs of their children during the period of transition from a united to a divided family unit.

Potential prejudice to a party must always be a factor in determining an issue on an interim basis that irrevocably alters the status quo.

- [23] An order under R. 15-8 of the Supreme Court Family Rules engages the judge's discretion. This means that we may only interfere with the order if we are satisfied that the judge erred in principle or law, or failed to give weight or sufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3 at 76-77; *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2 at para. 43.
- [24] Rule 15-8 establishes necessity or expediency as the criteria for an order that property be sold before trial.
- [25] Considering the standard of review, and the words of R. 15-8, I consider, respectfully, that the order of December 9, 2019, must be set aside. The judge proceeded on the basis Ms. Kapoor was "playing games" and was unfamiliar with "cooperation, compromise and settlement", concluding "the only way to move this litigation along is to provide Mr. Makkar with the remedies that he is legally entitled to". It may be that there is much to complain of in Ms. Kapoor's litigation behaviour, but that litigation behaviour does not support the conclusion that the order is "the only way" to advance the litigation, especially as the same judge had recently ordered the trial adjourned. The imputation of fault in respect to an order the judge made appears to have influenced his consideration of the two pre-requisites to the order, necessity and expediency. For example, he moved from his comments on Ms. Kapoor's unfamiliarity with cooperation, compromise, and settlement, to his conclusion that the only way to advance the litigation was to provide Mr. Makkar with remedies he is entitled to. In doing so, he did not recognize the claims advanced by Ms. Kapoor in the court filings to other assets. It may be that those claims are weak and that Ms. Kapoor is unwisely holding firm in her positions. Those are matters that are beyond this appeal, but the judge's conclusory statement appears to decide a triable issue in part on the premise that Ms. Kapoor is obliged to compromise or settle, which may be desirable from the judge's perspective but is not required. This is an error in principle.
- [26] The judge also omitted any consideration of the status quo, and did not advert to the effect of the order made upon Ms. Kapoor except to say that delaying the operative date in the order to March 1, 2020 will allow her time to seek other housing. In this the judge failed to give

weight to a significant and relevant consideration. Nor is it apparent from the reasons for judgment why the order is both necessary and expedient - disapproval of Ms. Kapoor is not a basis upon which to find either of those criteria are met. Simply expressed, I consider the judge's reasons for judgment failed to give weight, or failed to give sufficient weight, to relevant considerations as demonstrated by the failure to balance the relevant factors, failure to explain beyond the conclusory statement that the property "has to be sold" why it is both necessary and expedient to take that step before trial, and failure to indicate how, if at all, the ordered sale is to the advantage of both parties, as suggested in Reilly.

- [27] The second aspect of the order challenged by Ms. Kapoor is the requirement that she provide vacant possession of the property to Mr. Makkar on the day he obtains conduct of sale. The order concerning occupancy is inextricably connected to the order the property be sold and, in my view, must also be set aside. Absent the order for sale, there is no reason provided to upset the status quo living arrangements. To the extent the order can be seen as responsive to Mr. Makkar's expressed concern that Ms. Kapoor would not cooperate with sale of the property, the order was not obviously justified by the evidence on the application and was, at best premature.
- [28] In conclusion on the appeal, I would allow the appeal and set aside the order of December 9, 2019 in its entirety.
- [29] I address now Mr. Makkar's application to discharge the order of April 30, 2020, staying execution of the order of December 9, 2019.
- [30] As I would allow the appeal, I consider that the order staying execution should necessarily expire and there is no live order to discharge. In other words, that order is spent. However, the order appealed attracted several applications for a stay, with mixed results, and Mr. Makkar bore the burden of responding to them. He now asks us to address his application to discharge the stay of execution ordered on April 30, 2020. Given the history, I consider we should address the issue.

- [31] Section 234 of the Family Law Act provides:

Despite any other enactment, if an order made under this Act is appealed, the order remains in effect until the determination of the appeal unless the court that made it orders otherwise.

- [32] By those words, the Family Law Act precludes this court from issuing a stay of execution of an order made by the Supreme Court of British Columbia under the Family Law Act (formerly the Family Relations Act). In *McPhail v. McPhail*, 1999 BCCA 705, Mr. Justice Donald explained the purpose of s. 234 in a passage I would adopt:

- [11] It is my opinion that for the purpose of deciding the question of jurisdiction, an application for a stay of proceedings takes its character not so much from the grounds of appeal but from the specific terms of the order sought. The primary and dominant purpose of this application is to maintain the status quo of the matrimonial property, a matter falling squarely and exclusively within the ambit of the Family Relations Act. In my view, it does not

matter that the appeal may later concentrate on Divorce Act issues such as the cruelty grounds and costs.

- [12] I approach the matter in this way because the Legislature obviously intended that the trial court control dispositions under the Family Relations Act, perhaps because that court has an intimate familiarity with the case under appeal and can put the request for a stay in a more informed context. The trial court will usually be in a much better position than a justice of this court to appreciate the motivation behind the application and to measure the effect it might have on the parties.
- [33] In *Bennett v. Bennett*, 2002 BCCA 580, Mr. Justice Donald, again sitting as a single judge, in denying a stay for reasons other than jurisdiction, appeared to open the door to a stay issuing in this court in extraordinary circumstances. He said:
- [12] I do not rest my decision on jurisdiction because there may arise a case in which this Court will have to act on an obviously wrong exercise of the Supreme Court's stay jurisdiction. This is not such a case. Here Mr. Justice Wilson gave careful consideration to the matter and concluded that he should not interfere with the liquidation of the assets. With the benefit of hearing eight days of trial he was well placed to decide that the parties could not afford to hold on to the assets pending the appeal because their creditors were closing in. Since the Act gives exclusive jurisdiction to the Supreme Court in this area, I do not think the legislature's intention should be finessed by means of an appeal of this kind. No extraordinary circumstances or egregious error have been shown to override the trial judge's decision to refuse a stay.
- [34] The reasons for judgment given for the order of April 30, 2020 describe the subject order for interim sale as made under R. 15-8(3) of the Supreme Court Family Rules, not the Family Law Act, and so not captured by s. 234.
- [35] Mr. Makkar submits that R. 15-8(3) is procedural only, and that the order respecting sale of the property was made under the substantive authority of s. 97 of the Family Law Act, invoked by him on his notice of application heard in December 2019. This means, he says, that the December 9, 2019 order may be stayed only by the court that made it, the Supreme Court of British Columbia.
- [36] Ms. Kapoor does not agree that the Family Law Act was the basis of the order for sale. She says the foundation for the order was R. 15-8 as stated on April 30, 2020, and on the premise that the justice had jurisdiction to stay the sale order because it was an order under R. 15-8, says the occupancy order and sale order were so inextricably linked that they really formed one indivisible order. This means, she says, that the stay of the order respecting sale of the property (allowed on her submission on the basis of R. 15-8) compels a stay of the occupancy order, perhaps within the language of Justice Donald in *Bennett*.

[37] In my view, the order for sale of the property took its statutory authority from the Family Law Act, as did the order for vacant possession that had the effect of negating the exclusive occupancy order made November 3, 2017. I conclude that s. 234 therefore precluded the stay of execution that issued from this court. However, given the result of the appeal, no order is required from us in respect of the April 30, 2020 order.

[38] In conclusion, I would allow the appeal and set aside the order of December 9, 2019.

[39] DICKSON J.A.: I agree.

[40] GRAUER J.A.: I agree.

[41] The appeal is allowed and the order of December 9, 2019 of the Supreme Court of British Columbia in this matter is set aside.

"The Honourable Madam Justice Saunders"

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