FILE NUMBER: _____

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

HUGH ALEXANDER TRENCHARD

APPLICANT
(Respondent)

and

WESTSEA CONSTRUCTION LTD.

RESPONDENT
(Appellant)

APPLICATION FOR LEAVE TO APPEAL
(HUGH ALEXANDER TRENCHARD, APPLICANT)
(Pursuant to s. 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26)

VOLUME I

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. This is a test case involving a standard-form 99-year residential lease, directly affecting the interests of about 210 leaseholders in one building, and as many as 3000 long residential lessees in British Columbia. Several important and novel issues of law arise. What is the capacity of individual leaseholders to advance test cases under this kind of standard-form multi-party lease? Is new procedure required regarding the admission of fresh evidence involving standard-form contracts? What is the meaning of prudent and reasonable discretion in a lease of this kind? Does the duty of honest performance include relevant disclosure so as to equalize a substantial imbalance in the bargaining power between lessees and lessors under this kind of standard-form residential lease? This case impacts lessor-lessee relationships for a significant class of the British Columbia population, and arises within the wider context of Anglo-American residential tenancy law in which residential tenancies of all durations are widely regulated; yet the type of long residential lease in question has escaped legislative scrutiny in British Columbia for nearly 50 years. In turn, there is a corresponding social policy interest in the resolution of these issues.

2. The Applicant, Hugh Alexander Trenchard ("Mr. Trenchard") holds a leasehold interest in a suite in a 99-year high-rise residential apartment-style building in Victoria, British Columbia, called Orchard House, containing about 210 suites. The head lease was entered between Westsea Construction Supplies Ltd. ("Westsea"), as landlord, and Capital Construction Supplies Ltd., as tenant, dated May 1, 1974[1]. Units were subsequently assigned and re-assigned to third parties. Mr. Trenchard acquired his lease re-assignment in 2011. The lease assignments and re-assignments contain language that assume the terms of the original head-lease.

3. The head lease was entered by two corporate entities with a single common directing mind[2]; it was not negotiated by any of the assignees to the lease, and was presented to the Applicant and other assignees on a take-it-or-leave it basis. Consequently, Mr. Trenchard alleges the lease is a standard-form contract.

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[1] Affidavit #1 Hugh Trenchard (May 13, 2017), Exhibit "A" (Vol II, Tab 1)

[2] *Ibid.* note 1, Exhibit "A", George Mulek is the signatory as both the lessor and lessee

4. There are at least 1182 individual 99-year residential leaseholds in British Columbia, and as many as 3000. These are distributed over at least 13 high-rise apartment-style buildings in Victoria, and Greater Vancouver[3]. For at least nine of these head-leases, the lease term commenced in 1974; for at least one, the term commenced in 1986. Some eight or nine of these building head-leases contain identical terms; some three others contain nearly identical terms to the other first eight or nine; at least two additional 99-year leases contain significantly different terms from those of the other buildings. In all cases, the set of assigned leases for each individual building contain identical terms[4]. Like the Orchard House head lease, several of the head leases were entered by corporate entities with a single common directing mind[5].

5. There is no governing or remedial legislation for any of these private (non-government) long residential leases. The leases were drafted pursuant to the *Short Form Leases Act*[6] (for those of 1974), and pursuant to the *Land Transfer Form Act*[7] (for that of 1986), but these Acts provide only for the expanded definition of terms contained in the leases, and do not regulate, add to or derogate from the rights or duties contained in the leases. Further, leases that were entered into before May 3, 1974, including the Orchard House lease, are not remediated by the provisions of the *Frustrated Contracts Act*[8].

6. In British Columbia and Saskatchewan, residential tenancy legislation governs residential leases with terms of 20 years or less[9]. In all other Provinces, residential tenancy legislation either does not contain a term-length restriction, and by implication therefore governs 99-year leases, or expressly applies to 99-year leases; in Manitoba, the *Life Leases Act* governs leases with terms of 50 years or more, and life leases with indeterminate terms; the Quebec Civil Code applies to leases up to 100 years, and any lease longer than 100 years is deemed to be 100 years[10]. In

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[3] Affidavit of Hugh A. Trenchard (October 19, 2017), para 16-17 (Vol II, Tab 2)
[4] *Ibid.* note 3; Affidavit #1 Hugh Trenchard (May 13, 2017) (Vol II, Tab 1)
[5] *Ibid.* note 4 Exhibits "N", "O", "P", "Q", "R" (Vol II, Tab 1)
[6] RSBC 1960, c. 357
[7] RSBC 1996, c. 252
[8] RSBC 1996, c. 166
[9] SBC 2002, c. 78, s. 4(i) (British Columbia); SS 2006, C. R-22.0001, s. 5(g)(ii) (Saskatchewan)
[10] SA 2004, c. R-17.1, s. 2(1) (Alberta); CCSM, c. R-119; *Life Leases Act*, CCSM, c. L130, definitions (Manitoba); SO 2006, c. 17, ss. 3-7 (Ontario); Civil Code of Quebec, c. CCQ-1991, c. IV Lease, Art. 1880; .RS, c. 401; unrestricted def. "fixed term" (Nova Scotia); SNB 1975, c. R-10.2, "Long Term Tenancies", ss. 24.2-24.7, 29.1 (New Brunswick); RSPEI Cap. R-13.1 (Prince Edward Island); SNL 2000, c. R-14.1 s. 3 (Newfoundland)

England and Wales, where long residential leases are widespread[11], specific legislation applies to leases greater than 21 years.[12]

7. In British Columbia, the *Strata Property Act*[13]governs common-interest ownership. Indeed, provisions of the *Strata Property Act* allow lessor governments or First Nations with leases for which remaining terms are at least 50 years, to convert leases to strata titles and thereby be subject to the provisions of the *Strata Property Act*[14] while 99-year private residential leases are omitted from these provisions. Similarly, in British Columbia, specific legislation governs tenancies involving manufactured homes.[15] Under the *Commercial Tenancy Act*[16], which has been held not to apply to 99-year residential leases[17], a bundle of rights and responsibilities are created for parties to commercial leases. Further, consumer protection legislation protects leases of goods, but this does not extend to residential tenancy leases[18].

8. Moreover, despite a finding that the *Commercial Tenancy Act* does not apply to 99-year residential leases in B.C.[19], there is a body of judicial authority that relies upon the premise that 99-year residential leases are commercial leases. The theory sustained is that 99-year residential leases are commercial leases negotiated at arms-length between sophisticated parties of equal bargaining power.[20] [21]

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[11] Bracke, P., Pinchbeck, E.W. and Wyatt, J. 2017. The time value of housing: Historical evidence on discount rates. *The Economic Journal*. "In England and Wales as many as 1 million houses and 2 million flats are owned under long leases, 40% of recent new build properties are leased, and leaseholds account for around a quarter of residential sales" (p.3)

[12] Including, but not limited to: *Commonhold and Leasehold Reform Act*, 2002, c. 15; *Landlord and Tenant Act 1985*, c. 70, s.26(2)(a), *Landlord and Tenant Act 1987*, c. 31, s. 59(3)

[13] SBC 1998, c. 43

[14] *Ibid.* Part 12 – Leasehold Strata Plans, Definitions, ss. 200-207

[15] *Manufactured Home Park Tenancy Act*, SBC 2002, c. 77, s.2 "What this Act applies to"

[16] RSBC 1996, c. 57

[17] *Westsea Construction Ltd. v. Mathers*, 2014 BCSC 143

[18] *Business Practices and Consumer Protection Act*, SBC 2004, c. 2; Application of Act; Part 5 – definition "lease"

[19] *Ibid.* note 17, and *Westsea Construction v. 0759553* Ltd. 2012 BCSC 1799 involve Sussex Square Apartments, another 99-year residential lease (term starting 1984), not identified in the affidavits of Hugh Trenchard herein.

[20] *Sector v. Priatel* 2004 BCSC 45 (CanLII); followed: *Harbuz v. Capital Construction Supplies Ltd.*, 2011 BCSC 778 (CanLII); considered: *Archibald v. 1219 Harwood Street (Chelsea) Ltd.*, 2009 BCPC 364 (CanLII), all involved residential 99-year leases; similar finding in *Evergreen*

9. The specific facts of this case are traced to November 20, 2013[22], when Westsea notified all leaseholders of a 2015-2018 windows and doors replacement project with a budget cost of $3 million (which estimate subsequently nearly doubled). This letter referred to a project prioritization report, authored by an engineering firm[23].

10. After receipt of the November 20, 2013 letter, Mr. Trenchard and Westsea engaged in a series of communications in which Mr. Trenchard sought engineering reports and "any other reports or information that Westsea is relying on in arriving at the dollar values that were quoted in Westsea's letter of November 20, 2013." Westsea stated that the reports Mr. Trenchard sought did not exist. Westsea later indicated in a letter that it would provide the information requested once it was prepared. Mr. Trenchard argued in the courts below that the reports he requested were reasonably inferred to have existed when Mr. Trenchard requested them and that, based on the pattern of dealings between him and Westsea, Westsea's assertion was unreliable[24].

11. Later, in June 2014, Mr. Trenchard sought information to explain a threefold increase in repair and maintenance costs charged back to leaseholders from 2012 to 2013, as set out in an auditor's report. Westsea's response was that Mr. Trenchard was not entitled to the information he sought[25].

12. As a result of Westsea's resistance to providing requested information, on August 1, 2014, Mr. Trenchard filed his original petition in the Supreme Court of British Columbia (Victoria). He filed an amended petition on November 12, 2014 (the "Petition"). The Petition was ultimately narrowed to two primary interpretation questions:

a) Does the phrase "the lessor agrees to exercise prudent and reasonable discretion in incurring operating expenses, consistent with its duties hereunder", imply a term of "transparency"?

Building Ltd. v. IBI Leaseholds Ltd., 2008 BCSC 235 (CanLII) (office lease), but the court does not distinguish between residential and commercial leases (appeal allowed on costs 271 BCAC 298).

[21] Westsea also made this argument at the Petition hearing: Appendix 4E, p. 332 (lines 14-42); p. 333 (lines 42-47)

[22] Appendix Tab 4A, page 287

[23] Appendix Tab 4A, pages 307-309

[24] Appendix Tab 4A, correspondence generally, relevant parts highlighted in blue

[25] Appendix Tab 4A, pages 304-306

b) Does the phrase "legal and accounting charges and all other expenses paid or payable by the Lessor in connection with the Building, common property therein or the Lands" (the "Legal Costs Provision") entitle Westsea to recover its litigation costs associated with the Petition as an operating expense under the lease?[26]

13. On January 22, 2015, upon Mr. Trenchard's application for substituted service, Madam Justice Power found that the leaseholders' interests were likely to be affected by the Petition[27]. She found that it was not practical for Mr. Trenchard to serve other leaseholders personally with notice of his Petition, and ordered that Mr. Trenchard make substituted service on the approximately 194 leasehold suites required to be served. Mr. Trenchard subsequently completed service in accordance with this order[28].

14. The Petition was heard by Mr. Justice Mackenzie January 4 - 7, 2016. At the end of four days, the parties came to an agreement under which the first question under the Petition was dismissed by consent on the condition that Westsea commit, by letter, to provide the leaseholders an engineering report[29]. Mr. Justice MacKenzie then heard submissions from the parties on the interpretation of the Legal Costs Provision. On September 23, 2016, Mr. Justice MacKenzie, in his decision on the Legal Costs Provision, held that the proper interpretation of the lease did not entitle Westsea to recover its litigation costs associated with the Petition as an operating expense under the lease.

15. Westsea appealed the decision of Mr. Justice MacKenzie. On October 6, 2017, the British Columbia Court of Appeal allowed the appeal in part, on grounds not raised by either party, and found that Mr. Justice MacKenzie's findings as to the interpretation of the lease on the second question, and his alternative finding that Westsea did not use prudent and reasonable discretion in incurring its litigation costs, were premature; that Westsea was required first to notify leaseholders of its election to seek recovery of its litigation costs from the leaseholders, demand payment from them and, if leaseholders were to refuse, only then could the interpretation issue be litigated.

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[26] excerpt Amended Petition (Appendix Tab 4B); excerpt Transcript of Appeal Proceedings, p.354 lines 8-12 as read in by Westsea's counsel (Appendix Tab 4G)

[27] Reasons for Judgment, Madam Justice Power, January 22, 2015 (Appendix Tab 4C)

[28] Affidavit of Hugh A. Trenchard (October 19, 2017), Exhibit "K" (Vol II, Tab 2)

[29] Affidavit #2 of Hugh A. Trenchard (November 6, 2017), Exhibit "A" (Vol II, Tab 3)

16. In brief oral submissions, Mr. Trenchard suggested that the Court of Appeal's proposed decision, as it was then, could result in some leaseholders simply agreeing to pay the noted litigation costs, while those who disputed the costs could expect to be back before the courts for more years of litigation, including ending up before the court of appeal in the same position Mr. Trenchard was in before the Court of Appeal at that moment[30]. Matters have unfolded rather as Mr. Trenchard predicted: Westsea has since made its demand for "legal fees" but appears to have inextricably mixed them among other operating expenses under the lease; some leaseholders have already agreed to pay them, and Westsea did not provide a breakdown of the costs so that leaseholders might know what costs they dispute and what costs they agree to pay. Mr. Trenchard has asked Westsea to isolate the litigation costs from the "legal" fees and other expenses.[31]

17. As part of his response to Westsea's appeal, Mr. Trenchard applied by way of Notice of Motion to adduce fresh evidence that the lease in question is a standard-form lease. The Court of Appeal said it had considered Mr. Trenchard's motion in the context of its decision of the appeal on its merits, but gave no analysis, nor further discussed the application during submissions[32].

PART II – QUESTIONS IN ISSUE

Issue 1: What is the capacity of a common-interest leaseholder to represent other leaseholders on an application for a declaratory judgment?

Issue 2: Related to Issue 1, is this capacity magnified, or altered in any way, if the lease is standard-form?

Issue 3: Does the Supreme Court of Canada decision in *Ledcor v. Northbridge* require the addition of a new criterion to the *R. v. Palmer* four-point test for the admission of fresh evidence when a standard-form lease is involved?

Issue 4: Is the lease in question in fact a standard-form lease?

Issue 5. Is there a substantive difference between long residential leases and commercial leases that impacts how lease terms are interpreted?

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[30] Transcript of Appeal proceedings CA44007, p. 360, lines 18-45 (Appendix Tab 4G)
[31] Affidavit #2 of Hugh A. Trenchard (November 6, 2017) Exhibit "D" (Vol II, Tab 3)
[32] *Ibid.* note 30, p.350, lines 23-39

Issue 6: Did the Court of Appeal err in finding that the lower court did not have jurisdiction to interpret the lease, and did the Court of Appeal err in not considering the lower court's alternative finding that Westsea did not exercise prudent and reasonable discretion in incurring its litigation costs in the circumstances?

Issue 7: What is the appropriate legal test for the contractual duty of prudent and reasonable discretion in long residential leases?

Issue 8: Does the duty of honest performance under *Bhasin v. Hrynew* include a duty to accommodate residential leaseholders' reasonable requests for disclosure of material information that affects their interests?

Issue 9. Did the Court of Appeal err in not allowing the parties adequate opportunity to make submissions on a matter not raised by either party in their submissions?

PART III – STATEMENT OF ARGUMENT

19. *"It is frequently forgotten that society has vested interests to protect in respect of landlord and tenant laws."*[33] The issues here originate from the standard-form nature of the lease[34], a conclusion drawn from the fact that the head lease was not negotiated between the original parties, who were one and the same individual[35], nor were the assignments negotiated between

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[33]Adrian J. Bradbrook, *Residential Tenancies Law – The Second Stage of Reforms*, 20 Sydney L. Rev. 402, 434 (1998)

[34] Ontario Law Reform Commission, *Interim Report on Landlord and Tenant Law Applicable to Residential Tenancies* (1968): "Tenants do not often insist that changes be made in lease provisions just as mortgagors do not request changes in the terms of the "standard" form of the mortgagee's mortgage. From this fact one might infer that "standard" terms are agreed to more or less freely. This conclusion overlooks the fact that these contracts have now become virtually contracts of "adhesion". The belief that one ought to be bound by one's bargain, freely arrived at, is not questioned but too often apparent freedom of contract does not stand up to close examination. The legislature has recognized this fact in relation to mortgage contracts and also with respect to various contracts relating to the personal property security and consumer contracts of purchase and sale. In each of these latter cases, statutory protection recognizes inequality of bargaining positions and the absence of freedom of contract in any real sense. Remedial legislation in such cases is admittedly based on value judgments concerning the basic interests of the parties which must be protected. The principle of freedom of contract must be flexible enough to yield where experience has shown it to be a pious hope and an unrealistic assumption." (p. 11-12)

[35] Contrary to the *dictum* of the Lord Denning in *Rye v. Rye* [1962] AC 496 (HL) "A person cannot be, at the same time, both landlord and tenant of the same premises", p. 513

assignees and the lessor, and assigned identical leases were presented to assignees on a take-it-or-leave it basis.

20. These factors reflect a fundamental imbalance in the bargaining power between lessor and lessees that has prevailed since the inception of the lease. This kind of imbalance has largely been addressed by legislation in other jurisdictions[36], which appear to have recognized that residential tenancy legislation ought to apply to all residential tenancies[37] regardless of term length. This legislation generally corrects legal biases that tended to favor landlords[38] [39], a trend that also occurred in the United States in the period between 1968-1974[40].

21. The existing common law regarding long residential leases in British Columbia, absent applicable remedial legislation, is a relic of landlord-tenant circumstances that existed in the

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[36] *Ibid.* notes 9-10, 12

[37] In *Reference re Amendments to the Residential Tenancies Act (N.S.),* [1996] 1 SCR 186, this Court well recognized that "Residential leases may be properly contrasted with commercial leases, but not with rural leases, which often were and are concerned with residential premises", per McLaughlin J., at para 100

[38] Law Reform Commission of British Columbia, *Report on Landlord and Tenant Relationships: Residential Tenancies* (Project No. 12) (1973): "At common law, and under Part I of the Act, no distinction was drawn between the law applicable to residential tenancies and that applicable to industrial and commercial tenancies. In the 1960's it became clear that the common law was not functioning efficiently in resolving problems between landlords of residential tenancies and their tenants. The fact that the legal relationship was much allied with the concept of the leasehold estate, and the fact that freedom of contract had, in practical terms, come to operate entirely to the benefit of landlords, meant that the law was producing unreasonable and unfair results. The call for reform was virtually unanimous." (p. 9).

[39] Lamont, D., Q.C. *Residential Tenancies* (3rd ed.), The Carswell Company, Toronto (1978): "The underlying consideration of the Commission was that landlord and tenant law is based on the ancient feudal concept of the tenant having an estate in the land…The other persuasive consideration for the study of the respective rights and obligations of landlords and tenants was that residential tenants had little bargaining power to achieve changes in lease terms. To put it another way, freedom of contract does not stand up to close examination…The aim of the Commission in making its recommendations was to redress the imbalance between landlords and tenants." (p. 1).

[40] Edward H. Rabin, *Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 Cornell L. Rev. 517 (1984), at p. 540

1960's and 1970's, prior to the widespread introduction of residential tenancy legislation that has overhauled Anglo-American law regarding residential tenancies[41].

22. In the context of public regulation that remediates imbalances between landlords and tenants under residential leases, the reasoning of the House of Lords in *Johnson v. Unisys Limited*[42] is appropriate. Lord Hoffman observed that the common law adapts itself to new attitudes "proceeding sometimes by analogy with statutory rights" whereby "the Courts may proceed in harmony with Parliament, but there should be no discord"[43] [44]. Before this Court is a class of standard-form residential leases that is in discord with legislation, accompanied by a persistent misconception that commercial and long residential leases are legally equivalent[45]. This misconception perpetuates a fundamental imbalance in bargaining power between lessors and lessees, thus trailing in decades behind Lord Hoffman's *dicta*, pronounced in our modern era in which legislation covers virtually every parallel circumstance to the long residential lease in issue. Thus entombed, this class of residential lease has fallen into a statutory crevice and languished there, petrified, for nearly fifty years[46]. In the absence of legislation to redress imbalances in bargaining power between lessees and lessors of this class of lease, the applicable common law needs to be reviewed and updated.

23. Obviously, comprehensive reform cannot be achieved in the narrow circumstances of this case, but Mr. Trenchard respectfully submits that certain basic reforms ought to be considered

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[41] *Ibid.* note 9-10, 12; Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 BCL Rev. 503 (1982), p. 505: "Together, legislative and judicial treatment of leases of dwellings now make it plain that the movement in residential lease law has been not from one area of private law to another, but from private ordering to public regulation".

[42] [2001] 2 All ER 801 (HL)

[43] *Ibid.* note 42, paras 35-37

[44] *Cf. Arnold v. Britton and others*, [2015] UKSC 36 (HL), per Lord Carnwath, in dissent, para 83: "As I shall explain, these leases are a rare example of a category of residential lease which has slipped through the statutory net. That is of no direct relevance to the legal issues before us, save that it may help to explain why no ready solutions are to be found in the authorities. Furthermore, in so far as policy has a part to play in the development of the common law, it may be legitimate to seek guidance in the approaches adopted by the legislature in analogous contexts (see *Johnson v Unisys Ltd* [2003] 1 AC 518 para 37, per Lord Hoffmann)."

[45] *Ibid.* notes 20-21

[46] A notable exception allows leaseholders to claim a tax rebate under s. 7 of the *Home Owner Grant Act*, RSBC 1996 c. 194; also, the Province of BC began a consultation process in 2003 which was, for whatever reason, evidently discontinued: Affidavit of Hugh A. Trenchard (October 19, 2017), Exhibit "J", (Vol II, Tab 2)

and implemented by this Court. Such reforms begin with a basic recognition that these leases are residential and not commercial leases; that these are standard-form leases; and some basic criteria to elucidate the meaning of "prudent and reasonable discretion" and to recognize the right of tenants to request information from lessors that directly affects tenants' interests.

24. It is not disputed that landlord-tenant common law applies legitimately to negotiated commercial leases entered at arms-length, but the law relating to commercial leases ought to be clearly distinguished from long residential tenancies[47].

Issue 1: What is the capacity of a common-interest leaseholder to represent other leaseholders on an application for a declaratory judgment?

25. Mr. Trenchard's Petition was commenced in accordance with British Columbia Supreme Court Rule 2-1(2)[48] that requires claimants to select the appropriate initiating document.

> (2) To start a proceeding in the following circumstances, a person must file a **petition** or, if Rule 17-1 applies, a requisition:
>
> > (c) the sole or principal question at issue is alleged to be one of construction of an enactment, will, deed, oral or **written contract** or other document [*emphasis added*]

26. The issues here principally involve contractual interpretation; there were no issues of damages or compensation. In fact, during the Petition hearing, Mr. Trenchard withdrew applications for specific performance and a declaration of breach of contract. This ensured that he was in strict compliance with Rule 2-1(2).

27. When an action is commenced by petition, Rule 16-1 (3) of the *Supreme Court Rules* provides:

> (3) Unless these Supreme Court Civil Rules otherwise provide or the court otherwise orders, a copy of the filed petition and of each filed affidavit in support must be served by personal service on all persons whose interests may be affected by the order sought.[*emphasis added*]

28. As stated, Mr. Trenchard applied to the court for an order of substituted service, upon which the court recognized the Petition was likely to affect the interests of the leaseholders[49].

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[47] *Ibid.* note 37, McLaughlin J.
[48] *Supreme Court Civil Rules,* BC Reg. 168/2009
[49] *Ibid.* note 27

29. Mr. Trenchard served the Petition in accordance with the court's order[50]. No leaseholders applied to join the Petition. Substituted service cannot provide certainty that all the leaseholders did in fact receive the Petition, but certainty is not the standard when dealing with multiple parties of a class. Nor did Mr. Trenchard commence the action as a class action, but there is no requirement for him to have done so. By analogy, however, the various options under s. 19(4) of the British Columbia *Class Proceedings Act*[51] for providing notice of certification where multiple parties are involved, are not dissimilar from the court's order (not appealed) for substituted service.

30. Here the Court of Appeal found that Westsea ought to have given notice to all the leaseholders of Westsea's election to attempt recovery of litigation costs from leaseholders; that having failed to do so[52], Mr. Justice MacKenzie's interpretation of the lease was premature. Mr. Trenchard respectfully submits this is an error because Mr. Justice MacKenzie had jurisdiction to interpret the lease and issue a declaratory judgment in the context of Rule 2-1(2), and given that notice of Mr. Trenchard's application was properly given to the leaseholders.

31. As a proviso, Mr. Justice MacKenzie had jurisdiction to make a declaratory judgment, if there was a "real issue" between the parties. As this Court stated in *Solosky v. The Queen* [1980] 1 SCR 821, p.830:

> Declaratory relief is a remedy neither constrained by form nor bounded by substantive content, which avails persons sharing a legal relationship, in respect of which a 'real issue' concerning the relative interests of each has been raised and falls to be determined.

32. The interpretation issue was clearly real because Westsea had in fact incurred litigation costs regarding the Petition. It is immaterial that Westsea elected to seek recovery of its litigation costs under the lease from the leaseholders, not prior to the Petition hearing but prior to its

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[50] Affidavit of Hugh A. Trenchard (October 19, 2017), Exhibit "K", Trenchard's Affidavit of Service, pp. 453-464 (Vol II, Tab 2)

[51] RSBC 1996 c. 50

[52] The Court of Appeal did not have before it evidence that after the Petition hearing, but prior to Mr. Justice MacKenzie's decision and well before the appeal, Westsea in fact notified leaseholders of its election; a full opportunity to make submissions on this point may have revealed this: Affidavit #2 Hugh A. Trenchard (November 6, 2017) Exhibit "A" (Vol II, Tab 3); further, Westsea's election notification arguably constituted notice to the leaseholders of the substantive grounds for Westsea's appeal, which notice the Court of Appeal expressed concerns about (Transcript of Appeal Proceedings, p.352, lines 41-46; p. 6 lines 43-45; p.356, lines 24-29 (Appendix Tab 4G))

submissions on costs[53]. Some costs had obviously been incurred and were not merely projected or fanciful, the interpretation question and application for a declaratory judgment had already been properly pleaded, and proper notice was provided to leaseholders.

33. The mischief which the Court of Appeal has, apparently, sought to ameliorate is Westsea's failure to observe the leaseholders' natural justice right to receive notice of Westsea's election to include its litigation costs as an operating expense under the lease[54]. However, as stated, the leaseholders had already been given notice of Mr. Trenchard's application for a declaratory judgment. Consequently, to whatever extent the noted mischief may be reduced by the Court of Appeal's decision, the decision has achieved the opposite result by markedly increasing prejudice to the leaseholders.

34. Presently, having been notified of Westsea's demand for payment of its Petition litigation costs, apparently inextricably mixed among a global set of other operating costs[55], leaseholders are left in the difficult, if not impossible position, of having to discern the specific legal cost to dispute their legitimacy[56]. In this circumstance, some leaseholders have already paid[57], or likely will pay, on demand because they may not understand that they can refuse to pay the specific litigation cost. Many will pay even if they understand that they can refuse, because it will be less onerous simply to pay than to extricate the disputed cost from the global amount, and then refuse and expect to be sued. And those who do refuse (such as Mr. Trenchard) can expect to be sued and then to engage in highly onerous litigation in attempt to seek the very same answer that Mr. Justice MacKenzie has already given; i.e. that the lease is not properly interpreted to permit Westsea to recover its Petition-related litigation costs[58].

35. Further, and more serious from a systemic legal perspective, in stating that the issue was not properly before the court below, the Court of Appeal has potentially foreclosed test cases by individual leaseholders on applications for declaratory judgments, and puts leaseholders in the

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[53] *Cf. ibid.* note 52

[54] But see *ibid.* note 52

[55] Affidavit # 2 Hugh A. Trenchard (November 6, 2017), Exhibit "C" (Vol II, Tab 3)

[56] *Ibid.* Exhibit "D": "...it is important that you isolate precisely the amount you are seeking in this respect so that I know what costs as set out in your October 24, 2017 letter I am prepared to pay, and what costs I am not prepared to pay".

[57] *Ibid.* Exhibit "E"

[58] *Trenchard v. Westsea Construction Ltd.* 2016 BCSC 1752, per Mr. Justice MacKenzie, paras 19-22

impractical and fundamentally unfair position of always having to proceed by class action or multi-party joinder. Such foreclosure of a viable mechanism to resolve disputes substantially exacerbates, by judicial imposition, the existing imbalance between lessors and multi-party residential lessees. This is an injustice that is further exacerbated by the lack of any meaningful opportunity for the parties to make submissions on the effects of the Court of Appeal's decision.

Issue 2. **Related to Issue 1, is a test case appropriate if the lease is standard-form?**

36. A test case may be advanced in circumstances in which the cause of action is the same among multiple parties[59] [60] [61]. Here, because the lease is standard-form in nature and identical among lease assignees,[62] the Petition was appropriately litigated as a test case. It would be unreasonable to expect or require other leaseholders to the identical lease to commence their own individual actions and join with the test case, or to commence a separate class action. There is no requirement in B.C. law that a petitioner must apply to the court to proceed as a test case.[63]

Issue 3: **Does the Supreme Court of Canada decision in *Ledcor v. Northbridge*[64] require the addition of a new criterion to the *R. v. Palmer*[65] four-point test for the admission of fresh evidence when a standard-form lease is involved?**

37. By motion, properly initiated[66], Mr. Trenchard sought to adduce fresh evidence to establish that the lease was standard-form, an issue on which the Court of Appeal declined to make findings. Mr. Trenchard respectfully submits that the decision in *Ledcor* obligated the Court of Appeal to resolve the threshold question of whether the lease is a standard-form contract in order to establish the applicable standard of review. Where a standard-form contract exists, the standard of review is correctness.[67]

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[59] *McLeod et al. v. The Crow's Nest Pass Coal Company, Limited* [1908] BCR 103 (CA)
[60] *Amos v. Chadwick* (1878), 9 Ch.D. 459 CA
[61] See: Nathanson, A., Fasken and Martineau, "Strategic Aggregation & Disaggregation of Claims: Joinder, Consolidation, Severance, Representative Actions, and Test Cases Or, The Problem of Complex Litigation in: CLE BC, June 8, 2007, "A Litigator's Arsenal".
[62] Affidavit #1 of Hugh Trenchard; Affidavit of Hugh A. Trenchard
[63] *Ibid.* note 61
[64] [2016] 2 SCR 23
[65] [1980] 1 SCR 759
[66] Notice of Motion, filed May 31, 2017, CA44007 (Appendix Tab 4F)
[67] *Ibid.* note 64, para 46

38. In this case, aside from the requirement that the evidence must be credible, the usual four-part criteria under *Palmer*[68] do not apply. In these circumstances, the fresh evidence was, as a matter of law, necessary to assist the Court of Appeal in resolving the singular threshold question on the appropriate standard of appellate review.

39. Although the Court of Appeal found that the interpretation issue was not properly before the lower court, the Court of Appeal did not expressly state that it applied a standard of correctness in its decision. If the standard of review derived from an implicit finding that the lease is standard-form, then it ought first to have expressly made such a finding.

40. Consequently, in view of his application for fresh evidence, Mr. Trenchard proposes a fifth criterion for the admission of fresh evidence: fresh evidence is admissible if it is credible and may potentially affect the standard of appellate review.

41. On the other hand, if the Court of Appeal applied a correctness standard on the basis that Mr. Justice MacKenzie did not have jurisdiction to interpret the lease, then Mr. Trenchard respectfully submits that the Court of Appeal itself was incorrect to have done so because:

a) Mr. Justice MacKenzie was correct to assume jurisdiction to interpret the lease;
b) Mr. Justice MacKenzie's actual interpretation was reasonable and/or correct;
c) The Court of Appeal ought to have considered Mr. Justice MacKenzie's alternative conclusion that Westsea had breached its duty to exercise prudent and reasonable discretion in incurring its litigation costs. Thus, *even if* his interpretation was incorrect, and *even if* he did not have jurisdiction to make the interpretation, the Court of Appeal ought to have reviewed Mr. Justice MacKenzie's finding that Westsea was not entitled to recover its Petition-related litigation costs in the first place, which finding effectively preceded the jurisdictional and interpretation questions in its analytical application.

Issue 4: Is the lease in question in fact a standard-form lease?

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[68] *Ibid.* note 65, headnote: "(1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases. (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial, (3) The evidence must be credible in the sense that it is reasonably capable of belief. (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result."

42. Mr. Trenchard maintains that the evidence establishes that the lease in question is standard-form, and respectfully asks this Court to make such a finding.

Issue 5. Is there a substantive difference between long residential leases and commercial leases that impacts how lease terms are interpreted?

43. Judicial authority in British Columbia has perpetuated an imbalance in lessee/lessor bargaining power relating to long residential leases in British Columbia[69]. Courts have affirmed and perpetuated this imbalance by positively equating commercial leases, as arms-length transactions, to long residential leases.[70] This authority aims the law and any potential public policy that might rely upon that law, on a mistaken trajectory because such authorities fail to recognize that long residential leases are non-negotiated standard-form contracts, and are not the result of arms-length negotiations between parties of equal sophistication and bargaining power.

44. Moreover, submissions from leaseholders to elected representatives in British Columbia to address widespread issues related to long residential leases, have generated responses which appear to rely on the fiction that long residential leases are akin to arms-length commercial leases that are negotiated leases between two private parties[71]. This underscores the problem and the importance of a decision from this Court that resolves the question of whether long residential leases are standard-form leases in which the freedom to contract does not stand up to close examination[72].

45. The noted absence of legislation in British Columbia, may, in part, be traced to the interconnection between two factors: the common law in British Columbia that reflects a misunderstanding of the nature of long residential leases in British Columbia, and policy makers in British Columbia who, in choosing not to regulate these types of leases[73], have apparently relied upon this mistaken common law trajectory. It is appropriate, therefore, for this Court, not to guide government policy makers, but instead to reset the trajectory of the common law in relation to long residential leases and to equalize the longstanding imbalance in bargaining power between lessor and lessee in long residential leases.

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[69] *Ibid.* notes 20-21
[70] *Ibid.* notes 20-21
[71] Affidavit of Hugh A. Trenchard, (October 19, 2017), Exhibit "L" (Vol II, Tab 2)
[72] *Ibid* note 34, 38-39
[73] *Ibid.* note 71

Issue 6: **Did the Court of Appeal err in finding that the lower court did not have jurisdiction to interpret the lease, and did the Court of Appeal err in not considering the lower court's alternative finding that Westsea did not exercise prudent and reasonable discretion in incurring its litigation costs in the circumstances?**

46. As indicated in foregoing paragraphs, Mr. Trenchard respectfully submits that the answer to this question is "yes". Mr. Trenchard submits that a review of Mr. Justice MacKenzie's interpretation of the lease will affirm that his was the correct interpretation; that his alternative finding was also reasonable and/or correct, for reasons submitted before the Court of Appeal, and which Mr. Trenchard may outline in his factum to this Court if he is granted to leave to Appeal.

47. It is noteworthy that it is well established in American landlord-tenant legislation that leases cannot contain one-sided, unconditional agreements for tenants to pay a landlord's attorney's fees in a litigation context.[74] This indicates that such an agreement is contrary to public policy.

48. The underlying rationale[75] for such a public policy rests on an absurdity that arises if the landlord's litigation costs are recoverable as operating costs from tenants, regardless of the landlord's success in the litigation: there would never be a risk or disincentive for a landlord to litigate with maximum resources, or to delay proceedings and appeal them indiscriminately, since the associated costs would always be paid by the leaseholders. Similarly, punitive costs awarded against a landlord could also be charged back to the lessees. There is no rational economic or legal system in which there is essentially zero risk to any competitive or adversarial course of action; yet that is what Westsea has proposed.

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[74] AK Stat § 34.03.040 (2016) (Alaska), CT Gen Stat § 47a-4a (2012) (Connecticut), KS Stat § 58-2547 (2015) Kansas, KY. Rev. Stat 383.570 (2016) (Kentucky), NE Code 76-1415 (1)(c) (2016), NV Rev Stat § 118A.220 (2015) (Nevada), Ohio Rev Code § 5321.13 (2016), 41 OK Stat § 41-113 (2016) (Oklahoma). Variations: permitting 25% of unpaid rent as attorney's fees HI Rev Stat § 521-35 (2016) (Hawaii); fees awarded to prevailing party: AZ Rev Stat § 33-1315 (2016) (Arizona) OR Rev Stat § 90.255 (2015); VA Code § 55-248.9 (2016) (Virginia), MA Gen L ch.186 § 20 (2016) (Massachusetts),WA Rev Code § 59.18.230 (2016) (Washington)

[75] *Cf.* Boyer, R., Amato, L. 1973. *Up From Feudalism – Florida's New Residential Leasing Act.* 28 U. Miami Rev. 115, at 118: "If only the landlord is entitled to such fees, as the lease often provides, the tenant will be discouraged from asserting his right because, even if successful, the cost of litigation may be in excess of recovery. Now, since the tenant knows that if he is successful he may recover attorney's fees, he may also be more willing to assert his rights in court. Conversely, both parties will be more reluctant to file frivolous or harassing suits."

49. Further, the prospect that all leaseholders might have to pay a landlord's litigation costs to defend a single test lessee's legal action, regardless of success, effectively punishes all the leaseholders for the one lessee's action. Potentially this poisons relations as lessees begrudge those who perhaps pursue litigation without unanimous consent. The risk to the collective is not just for having to pay the landlord's extensive costs if the landlord wins, but also the risk of extensive costs even if the lessee wins.

50. This prospect is also unfair to the individual test lessee who must also pay a portion of the landlord's costs, despite that the test lessee may have won the case, and who possibly even pays for a portion of costs that were awarded to him or her but were then charged back to all the leaseholders, including the test lessee. Any lease provision that causes lessees to pay landlord's litigation costs with these results is repugnant to law and public policy.

51. Again, class actions are an appropriate analogy. Under the *British Columbia Class Proceedings Act*, class members other than the person appointed as representative plaintiff for the class, are not liable for costs except with respect to the determination of their own individual claims.[76]

Issue 7: What is the appropriate legal test for the contractual duty of prudent and reasonable discretion in long residential leases?

52. As argued in his Court of Appeal factum, Mr. Trenchard respectfully submits that a principled approach is required to determine whether Westsea's litigation costs have been prudently and reasonably incurred. There appears to be no applicable Canadian authority in the context of leasing law for what constitutes prudent and reasonable discretion. Mr. Trenchard submits that the legal framework for whether costs have been prudently incurred is appropriately found in the decision of this Court in *Ontario (Energy Board) v. Ontario Power Generation Inc.*[77] ("*OEB*").

53. Mr. Trenchard submits that the appropriate framework gleaned from *OEB*, as it applies analogously to Westsea and the leaseholders, includes:

- There is no presumption of prudence.[78]

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[76] RSBC 1996 c. 50, s. 37(4)
[77] 2015 SCC 44
[78] *Ibid.* paras 79, 104

- There should be a just and reasonable balance between Westsea's interests and those of the leaseholders.[79]
- Is there a risk that by disallowing the costs, there will be a chilling effect on Westsea's willingness to incur operating costs in the future; in *OEB*, this Court held that this may have been an effect, but that was precisely the intended effect in the circumstances[80], as it should be here.
- Are the costs committed costs in the sense of Westsea having been unable to reduce them[81], or forecast costs[82]. Here, Westsea's litigation costs were not committed in the sense of an ongoing contract for services, as for payment of staff or hydro-electric power, for example. Westsea's litigation costs are more akin to forecast costs, where Westsea had not yet paid them and there was flexibility in reducing them[83].

54. Mr. Trenchard submits that Westsea could have provided the professional reports that Mr. Trenchard requested (as Mr. Justice MacKenzie concluded in his decision) and thereby have reduced its litigation costs. This implies an onus on Westsea to make reasonable attempts to clarify leaseholders' objectives and purpose in requesting documents, and to make reasonable efforts to fulfill those requests, which Westsea failed to do. Until Westsea had made such reasonable efforts, it cannot be said to have prudently incurred litigation costs to defend against an action for disclosure of documents.

55. Further considerations include that to be prudent, a decision must have been reasonable under circumstances known or ought to have been known by Westsea at the time of the decision; hindsight should not be used; prudence must be determined retrospectively, in that the evidence must be concerned with facts about the elements that could or did enter the decision at the time[84]. In this case, such facts include Westsea's knowledge of the existence of preliminary and post-project reports involving the earlier 2010-2011 windows replacement project[85], as these may all have indicated the rationale for an extended 2015-2018 windows and doors replacement project.

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[79] *Ibid.* paras 81, 110, 114
[80] *Ibid.* para 108
[81] *Ibid.* paras 82, 112
[82] *Ibid.* paras 82, 83, 110
[83] *Ibid.* para 82
[84] *Ibid.* para 99
[85] As Mr. Trenchard argued before the Court of Appeal

56. The key is whether Westsea could have, and ought to have, mitigated the possibility of litigation in the first place by reasonable attempts to accommodate Mr. Trenchard's requests. Westsea simply did not reach a standard of reasonable accommodation, but instead met Mr. Trenchard's requests with refusal, misconstruction or misinterpretation of his requests, and attached arbitrary conditions to information provided[86]. To the extent that it only misinterpreted Mr. Trenchard's requests, Westsea made no meaningful attempt to clarify or understand his requests, but rather insisted upon its own view of what he was requesting.

Issue 8: Does the duty of honest performance under *Bhasin v. Hrynew*[87] include a duty to accommodate residential leaseholders' reasonable requests for disclosure of material information that affects their interests?

57. As argued in both the Petition and Court of Appeal proceedings, Mr. Trenchard submits that in these circumstances, the duty of honest performance under *Bhasin* encompasses a duty to accommodate residential leaseholders' reasonable requests for information disclosure that directly affects the interests of those leaseholders, without responding capriciously or arbitrarily or being misleading about the existence or nature of that information.[88] Also *Bhasin* involved a commercial contract, suggesting a modified standard more favorable to residential leaseholders.

58. Mr. Trenchard submits that the duty of honest performance is not a duty to provide unsolicited disclosure, which is what this Court referred to when it said the duty does not extend to disclosure or to the disclosure of material facts; instead, the duty operates when the relevant information is specifically requested. This is apparent from the facts of *Bhasin* when the party Can-Am "also responded equivocally when Mr. Bhasin asked in August 2000 whether the merger was a "done deal""[89]. [*emphasis added*]

59. In this case, Mr. Trenchard alleges that after he asked for engineering reports, Westsea was misleading about the existence of such reports. The record shows that reports matching the substance of Mr. Trenchard's request did exist at the time, despite Westsea's assertions to the contrary. Mr. Trenchard submits that a duty to accommodate reasonable requests for disclosure

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[86] Appendix Tab 4A
[87] 2014 SCC 71
[88] *Ibid.* paras 60, 63, 73-75, 86
[89] *Ibid*, paras 12, 86

may be a function of either, or both, a duty to act with prudence and reasonable discretion, and a duty of honest performance.

Issue 9. Did the Court of Appeal err in not allowing the parties adequate opportunity to make submissions on a matter not raised by either party in their submissions?

60. The Court of Appeal, without reservation, made its decision on matters that neither party raised in their written submissions. In oral submissions, both parties asked the Court of Appeal to decide the interpretation question on its merits, which the Court of Appeal declined[90]. The parties were not given an opportunity to prepare complete submissions the issue relied on by the Court of Appeal. This is contrary to the procedure set out by this Court in *R. v. Mian*[91] that requires "even a brief adjournment" for an issue that is not new but rooted in existing issues[92].

61. Mr. Trenchard submits the issue was new, but even if the Court of Appeal relied on an issue not new, but rooted in existing issues, the Court of Appeal ought to have considered whether it risked an injustice if it did not rely on the issue, as stated by this Court in *R. v. Mian*[93]:

> Appellate courts should have the discretion to raise a new issue, but this discretion should be exercised only in rare circumstances. An appellate court should only raise a new issue when failing to do so would risk an injustice. The court should also consider whether there is a sufficient record on which to raise the issue and whether raising the issue would result in procedural prejudice to any party. [emphasis added]

62. As earlier argued, not only was there not an injustice in failing to analyze the issue relied upon by the Court of Appeal in its decision, but quite the opposite occurred: the decision of the Court of Appeal has increased the prejudice and injustice to the leaseholders.

PART IV – SUBMISSIONS ON COSTS

63. Mr. Trenchard submits each party bear their own costs, regardless of the outcome.

PART V – ORDER REQUESTED

64. The Applicant requests that leave to appeal be granted.

All of which is respectfully submitted,

November 7, 2017

Hugh A. Trenchard

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[90] Transcript of Court of Appeal Proceedings; p. 11 line 47 to p.12 line 1 (Trenchard), p.12 lines15-17 (Westsea) (Appendix Tab 4G)
[91] 2014 SCC 54
[92] *Ibid.* note 91, para 33
[93] *Ibid.* 91, para 41

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PART VII -- STATUTORY PROVISIONS