Court of Appeal File No.: C70436

COURT OF APPEAL FOR ONTARIO

B E T W E E N

BRYTON CAPITAL CORP. GP LTD. and BAYVIEW CREEK RESIDENCES INC. (formerly known as BRYTON CREEK RESIDENCES INC.)

Applicants (Appellants)

and

CIM BAYVIEW CREEK INC., GRANT THORNTON LIMITED IN ITS CAPACITY AS THE BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC., BAYVIEW CREEK (CIM) LP, 10502715 CANADA INC., MNP LTD. IN ITS CAPACITY AS THE BANKRUPTCY TRUSTEE OF BAYVIEW CREEK (CIM) LP AND 10502715 CANADA INC., GR (CAN) INVESTMENT CO. LTD., MONEST FINANCIAL INC., TRACY HUI, JOJO HUI, CARDINAL ADVISORY LTD., and THE CORPORATION OF THE CITY OF RICHMOND HILL

Respondents (Respondents)

FACTUM OF THE APPELLANTS

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TO: SERVICE LIST

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PART I – STATEMENT OF IDENTIFICATION

1. The Appellants, Bryton Capital Corp. GP Ltd. ("**Bryton Capital**") and Bryton Creek Residences Inc. (the "**Optionee**") (collectively the "**Bryton Group**"), are the Applicants in the underlying application. The Bryton Group appeals the order ("**Order**") issued on March 2, 2022 dismissing, *inter alia*, the Bryton Group's application for declaratory relief.

PART II – OVERVIEW

2. This Appeal highlights the importance of economic certainty and the function of the Canadian judiciary.

3. Courts operate to resolve disputes, as reiterated by the Government of Canada.[1] In particular, the Commercial List was established to expedite the hearing and determination of issues arising in commercial law.[2] The court's purpose is to promote commercial efficacy.

4. In the underlying application, the Bryton Group sought declaratory relief from the Commercial List to confirm that a freely negotiated, arms-length option to purchase the subject property was valid and enforceable.

5. The purpose of seeking declaratory relief is for the court to determine the existence of one's legal rights and provide clarity to the litigants. Declaratory relief operates to bring all relevant parties to the table so the court can provide finality to a live issue, and the parties can thereafter act with certainty under their respective rights.

6. The right of the Optionee to exercise its already-adjudicated option ("**Option**") to purchase a multimillion development property was facing ***unsubstantiated*** resistance from the Respondents, and the Option was losing its value each day due to more than $40 million of mortgages registered on the subject property.

7. The application judge erred by considering an irrelevant factor in denying the declaratory relief sought. The application judge stated that granting declaratory relief would not be fair to those opposed to the Option, who may raise a challenge at an undetermined later point in time. This consideration was incorrect, and directly contrary to the purpose of declaratory relief.

8. The time to raise any challenge to the Option was at the time of the application hearing. The paucity of any evidence challenging the validity of the Option should have been fatal to the Respondents.

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[1] Government of Canada, https://www.justice.gc.ca/eng/csj-sjc/.
[2] Practice Direction, https://www.ontariocourts.ca/scj/practice/practice-directions/toronto/commercial/.

9. The application judge also erred by failing to determine that there is no basis to challenge the Option, as there were prior judicial determinations made by the court that validated the Option.

10. In this regard, the application judge erred by failing to give due consideration to his earlier finding that the Option was valid and enforceable. The specific factual determinations made at this earlier proceeding precludes any challenges under the APA, FCA, statutory oppression remedy, or ss. 95 and 96 of the BIA on the basis of *res judicata*. The doctrine of estoppel functions to prevent such endless challenges and to ensure finality.

11. As a result of the court's failure to grant the requested relief, to hold parties to their bargains under the Option Agreement, and to issue a timely decision, the Option risks losing its value and being nullified altogether. Legal challenges under the APA, FCA, statutory oppression remedy or s. 95 and 96 of the BIA are not meant to interfere with *bona fide*, arm's-length commercial transactions.

12. For all of the foregoing reasons, the appeal should be allowed, and the Order set aside.

PART III – SUMMARY OF FACTS

13. The complex factual history of this matter can be distilled. A freely negotiated and fairly straightforward transaction was the subject of a bargain between arm's-length parties represented by solicitors. Transactions like the one herein occur everyday. The Respondents have tried to challenge the Option with no evidence, in an attempt to meddle with the Optionee's contractual rights.

THE PROPERTY

14. The subject property at issue is a 9.21-acre residential development site in Richmond Hill, Ontario ("**Property**").[3] It consists of a western parcel and an eastern parcel, which can be

[3] Affidavit of B. McWatt dated May 24, 2021, Appellants' Exhibit Book, Tab 3, para 2.

conveyed separately only after the registration of a plan of subdivision.[4]

15. The Property is highly encumbered. DUCA Financial Services Credit Union Limited holds a first-ranking construction mortgage[5] in the amount of $20,720,000.00, with interest accruing at approximately 8% per annum.

16. Bryton Capital holds a second-ranking mortgage[6] ("**Second Mortgage**") in the amount of $22,300,000.00, with interest accruing at approximately 8% per annum.

17. Presently, the total interest under these charges amounts to around $10,000.00 per day, or $300,000.00 per month. The economic value of the Option continues to decrease each day.

THE FIRST AGREEMENT OF PURCHASE AND SALE

18. On June 3, 2019, Bryton Capital and the debtors, CIM Bayview Creek Inc., Bayview Creek (CIM) LP, and 10502715 Canada Inc., (collectively "**Debtors**") entered into an agreement of purchase and sale ("**First APS**") for the western parcel of the Property.[7] The parties, through their solicitors, negotiated a purchase price[8] of $27,650,000.00 based on the proposed development of the western parcel into 151 residential units at a rate of $183,112.58.

19. The First APS provided that the western parcel would be conveyed only *after* the Debtors completed the required registration of the plan of subdivision.[9]

20. At the time of this transaction, DUCA's mortgage was registered on title, and there was a second mortgage in the amount of $15,000,000.00 from Romspen Investment Corporation,[10] with interest accruing at approximately 13% per annum.[11]

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[4] Affidavit of B. McWatt dated Dec. 7, 2020, Appellants' Exhibit Book, Tab 60, para 9.
[5] DUCA Charge, Appellants' Appeal Book and Compendium, Tab 21.
[6] Affidavit of B. McWatt dated May 24, 2021, Appellants' Exhibit Book, Tab 3, para 3.
[7] First APS, Appellants' Appeal Book and Compendium, Tab 12.
[8] First APS, Appellants' Appeal Book and Compendium, Tab 12, section 2.1.
[9] Affidavit of B. McWatt dated Dec. 7, 2020, Appellants' Exhibit Book, Tab 60, para 10.
[10] Romspen Charge, Appellants' Appeal Book and Compendium, Tab 22.
[11] Affidavit of B. McWatt dated Dec. 7, 2020, Appellants' Exhibit Book, Tab 60, paras 6, 11; *see also* Transcript of J. Feng, Appellants' Appel Book and Compendium, Tab 23, questions 254-257.

21. Bryton Capital provided the Second Mortgage to replace the Romspen mortgage.[12] The Debtors obtained a benefit by the reduction of the interest from 13% to 8%.

THE OPTION AGREEMENT

22. The common principal of the Debtors, Jiubin Feng, had many failed past ventures.[13] As such, the Bryton Group and the Debtors agreed upon additional security with respect to the First APS, giving the Optionee the option to purchase ("**Option Agreement**")[14] the entire Property in the event that the Debtors failed to fulfil its obligations under the First APS.

23. The parties' solicitors negotiated a purchase price for the Property of $40,720,000.00,[15] and the court subsequently validated this transaction. The Option Agreement was registered on title to the Property on June 17, 2019.[16]

24. After the agreements were executed, the Bryton Group immediately expended significant time and resources on the site plan application process in anticipation of the Debtors completing the registration plan of subdivision as required under the First APS.[17]

THE DEBTORS BREACH THE FIRST APS

25. The Debtors failed to make any meaningful progress on the registration of the plan of subdivision as required under the First APS.[18]

26. After more than a year of delays, it was evident that the Debtors would be unable to fulfil their obligations. The Debtors thus requested the termination of the First APS so they could attempt to sell the entire Property.

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[12] First APS, Appellants' Appeal Book and Compendium, Tab 12, section 2.2(b).
[13] Affidavit of B. McWatt dated Dec. 7, 2020, Appellants' Exhibit Book, Tab 60, paras 3, 4.
[14] Option Agreement, Appellants' Appeal Book and Compendium, Tab 14.
[15] Email correspondence between B. McCutcheon and R. Lebow dated May 29, 2019, Appellants' Appeal Book and Compendium, Tab 11.
[16] Parcel Register, Appellants' Appeal Book and Compendium, Tab 9.
[17] Affidavit of B. McWatt dated Dec. 7, 2020, Appellants' Exhibit Book, Tab 60, paras 12, 13.
[18] Affidavit of B. McWatt dated Dec. 7, 2020, Appellants' Exhibit Book, Tab 60, paras 14, 16; *see also* Transcript of J. Feng, Appellants' Appel Book and Compendium, Tab 24, questions 201-207.

THE PARTIES AMEND THE SECOND MORTGAGE AND THE OPTION AGREEMENT

27. The Debtors offered to pay a break fee ("**Break Fee**") of $1,000,000.00 to terminate the First APS, in exchange for an increase in the Option price by the same quantum. The Bryton Group accepted the Debtors' offer.

28. The parties agreed to extend the term of the Second Mortgage. The purpose of extending the payment obligation under the Second Mortgage, and the timeline to exercise the Option, was to give the Debtors a reasonable opportunity to fulfil their obligations.

29. As such, on July 1, 2020, the Debtors and Bryton Capital entered into an Amended Second Mortgage, extending the term until the end of October 2020. As part of the Amended Second Mortgage, Bryton Capital advanced an additional $2,300,000.00 to the Debtors.

30. The Debtors and the Bryton Group also entered into an Amended Option Agreement[19] for a purchase price of $41,720,000.00.

31. This package of amending agreements was a result of negotiations between the parties' solicitors.[20] They were subsequently ratified and validated by the court.

32. In connection with the amending agreements, the Debtors provided, *inter alia*, the following representations:

a. The Debtors are not insolvent and [have] not committed an act of bankruptcy; and

b. The Debtors shall not further encumber the Property.[21]

33. The Debtors and Mr. Feng also executed a full and final release which expressly acknowledged that the Break Fee constituted fair and reasonable consideration for:

a. Bryton Capital's agreement to terminate the First APS;

[19] Affidavit of B. McWatt dated May 24, 2021, Appellants' Exhibit Book, Tab 3, para 4.
[20] Email correspondence between P. Proszanski, B. McCutcheon, and R. Lebow dated July 2 and 3, 2020, Appellants' Appeal Book and Compendium, Tab 17.
[21] Affidavit of B. McWatt dated Dec. 11, 2020, Appellants' Exhibit Book, Tab 76, paras 5, 6.

b. reimbursement for Bryton Capital's various costs and expenses in relation to the development and other costs; and

c. for the increase to the purchase price of the Option.[22]

DEBTOR FILES NOTICE OF INTENTION TO MAKE A PROPOSAL

34. On October 29, 2020, CIM Bayview filed a Notice of Intention to make a Proposal ("**NOI**") under the *Bankruptcy and Insolvency Act* ("**BIA**").[23]

35. Around this time, the Bryton Group learned that the Debenture Holders, Jojo Hui and Tracy Hui, had registered a certificate of pending litigation against the Property and obtained a *Mareva* injunction against the Debtors in a separate action.[24]

THE PROCEDURAL HISTORY LEADING TO THE OPTION MOTION

36. As a result of the improper charges to the Property and the NOI filed by the Debtors, the Bryton Group brought motions to the Commercial List to determine the validity and enforceability of the Option ("**Option Motion**"). The Debtor now sought to disclaim the Option pursuant to its NOI.

37. On November 27, 2020, Cavanagh, J. ordered that the Option Motion would be scheduled for a full day hearing on **December 21, 2020**.[25] The November 27th Order, as well as the Bryton Group's motion materials, were circulated to all of the Respondents, including the Third Mortgagees and the Debenture Holders. Any and all challenges to the Option were to be heard on December 21, 2020.

38. On December 3, 2020, the Bryton Group, Debtors, Third Mortgagees, Debenture Holders, and remaining Respondents appeared before Cavanagh J. pertaining to the *Mareva* injunction. As part of the December 3rd Order, Cavanagh, J. directed, *inter alia*, the following:

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[22] Affidavit of Bryan McWatt dated Dec. 7, 2020, Appellants' Exhibit Book, Tab 60, para. 17.
[23] Affidavit of Bryan McWatt dated Nov. 24, 2020, Appellants' Exhibit Book, Tab 45, para 12.
[24] Affidavit of Bryan McWatt dated May 24, 2021, Appellants' Exhibit Book, Tab 3, para 4.
[25] November 27, 2020 Endorsement, Appellants' Appeal Book and Compendium, Tab 6, para 2.

> THIS COURT FURTHER ORDERS **that any motions or cross-motions relating to whether the Bryton Option is valid** and whether the stay of proceedings in respect of CIM Bayview… should be lifted to allow for the Bryton Option to be enforced at this time **shall be heard at the time of hearing the Bryton Option Motion**.[26]

39. The Third Mortgagees, Debenture Holders, and remaining Respondents received a copy of the December 3rd Order. All parties were on full notice that any purported challenges to the validity of the Option had to be raised at the Option Motion. Notably, the Debenture Holders filed a Statement of Position in opposition to the Option.

40. The Bryton Group, the Debtors, Third Mortgagees, Debenture Holders, and remaining Respondents all attended the Option Motion on December 21, 2020 and were all given the opportunity to make submissions.

THE JANUARY 12, 2021 ORDER

41. On January 12, 2021, Cavanagh, J. determined that the Option was **valid and enforceable**, based on, *inter alia*, the following:[27]

a. The purchase price under the Option Agreement and Amended Option Agreement was negotiated by the parties who were represented by lawyers at all times;

b. The Option Agreement was ancillary to the First APS, as the primary objective of the Bryton Group was to purchase for development the Western Parcel;

c. The Break Fee constitutes fair and reasonable compensation;

d. The Amended Option Agreement was a separate contract which provided rights to the Optionee, a separate entity from Bryton Capital who holds the Second Mortgage;

[26] December 3, 2020 Endorsement, Appellants' Appeal Book and Compendium, Tab 5, para 2 (*emphasis added*).
[27] January 12, 2021 Order, Appellants' Appeal Book and Compendium, Tab 4.

e. The amending agreements are not stand-alone agreements, but part of the then existing agreements and arrangements.

f. The Amended Option Agreement does not impose a fine or penalty and is a valid and enforceable negotiated agreement; and

g. The Bryton Group did not act unfairly, oppressively, or unconscionably in negotiating the Option Agreement or the Amended Option Agreement.[28]

42. Cavanagh, J. further directed that the Optionee may exercise the Option.

THE EVENTS LEADING TO THE APPLICATION HEARING

43. The Optionee thus exercised the Option.

44. However, the Debtors refused to close the transaction citing a possible appeal of the January 12th Order.[29] The appeal was later dismissed for delay.[30] The other Respondents did not appeal.

45. Despite the finality of the January 12th Order validating the Option, the Bryton Group was nevertheless met with the further resistance by the Respondents who, among other things, issued a fresh court application to challenge the validity the Option.[31]

46. The urgency for the Optionee to exercise the Option and close in a timely manner was amplified by the approximate $10,000.00 of interest charge per day owing under the DUCA and the Second Mortgage on the Property. The Option is effectively losing value each and every day as a result of the Respondents' unsubstantiated resistance.

47. As a result of the delays, the effective purchase price under the Amended Option Agreement has already increased from $41,720,000.00 to at least $47,150,000,00.

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[28] January 12, 2021 Order, Appellants' Appeal Book and Compendium, Tab 4, paras 21, 29, 68, 76, 77, 79-82.
[29] Affidavit of B. McWatt dated May 24, 2021, Appellants' Exhibit Book, Tab 3, para 13.
[30] Order from Court of Appeal, Appellants' Appeal Book and Compendium, Tab 20.
[31] Emails between Solicitors for Bryton Capital and CIM Bayview et al, Appellants' Appeal Book and Compendium, Tab 19.

48. The Bryton Group sought the Commercial List's assistance to give effect to the January 12th Order, and provide certainty to the validity and enforceability of the Option. To do this, the Bryton Group issued a Notice of Application in the Commercial List seeking, *inter alia*, an order declaring that any proceedings commenced after the Option Motion relating to the validity of the Option should be barred and of no force and effect.[32]

49. The Bryton Group's application materials, together with all supporting materials, were served upon all of the Respondents.

50. As previously referenced, the Third Mortgagees had issued a fresh Notice of Application seeking to invalidate the Option under the *Fraudulent Conveyances Act*, R.S.O. 1990, c. A.33 ("**FCA**") the *Assignment and Preferences Act*, R.S.O. 1990, c. A.33 ("**APA**"), and the statutory oppression remedy.[33]

51. The Third Mortgagees advised it intended to seek orders under s. 38 of the BIA to pursue claims under sections 95 and 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("**BIA**"). To date, no proceedings seeking such relief have been commenced.[34]

52. **The Third Mortgagees failed to serve a responding application record, and failed to provide any evidence to support their purported challenges to the validity of the Option**.

53. It quickly became clear to the Bryton Group that the purpose of the Third Mortgagees' notice of application was nothing more than an attempt to further delay until the Option no longer held any value. This tactical move by the Third Mortgagees further necessitated the court's involvement for finality.

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[32] Amended Notice of Application dated June 22, 2021, Appellants' Appeal Book and Compendium, Tab 8.
[33] Second Affidavit of B. McWatt dated June 22, 2021, Appellants' Exhibit Book, Tab 12, para 12; Notice of Application, Appellants' Exhibit Book, Tab 18.
[34] Third Affidavit of B. McWatt dated July 5, 2021, Appellants' Exhibit Book, Tab 19, para 3.

THE APPLICATION HEARING AND DELAYED DECISION

54. The Bryton Group's Application was heard on August 11, 2021 ("**Application Hearing**"). The Respondents were all given an opportunity to make submissions and present evidence.

55. The Third Mortgagees opposed the relief sought by the Bryton Group, and again, **presented no evidence** to support their purported claims under the APA, FCA, statutory oppression remedy, or under ss. 95 and 96 of the BIA.

56. Over six (6) months after the Application Hearing, the application judge released his decision dismissing the Bryton Group's application for declaratory relief.

PART IV – STATEMENT OF ISSUES, LAW & AUTHORITIES

57. The following issues are to be determined in this appeal:

a. Did the court err by refusing to declare that the Option is valid and enforceable, and as a result no relief may be granted to set aside the Option pursuant to the FCA, APA, statutory oppression remedy, and ss. 95 and 96 of the BIA, and any claims brought under same shall have no force and effect?

b. Did the court err by failing to declare that any proceedings commenced after December 21, 2020 relating to the validity of the Option are barred by the principles of *res judicata* and abuse of process?

THE HISTORY AND PURPOSE OF DECLARATORY RELIEF

58. Declaratory relief is a declaration, formal statement, confirmation, pronouncement, and recognition by the courts as to the legal relationship between the parties.[35]

59. It dates back as early as 1531 in Scotland,[36] and has been recognized in both Canada and England since the mid-1800s.

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[35] Lazar Sarna, *The Law of Declaratory Judgments*, 3d ed. (Toronto: Thomson Carswell, 2007), p. 6.
[36] A.J. Vinje, *Declaratory Relief*, (1920) 4:3 Marq. L. Rev., p. 106.

60. The first statutory authorization for declaratory relief appeared in England in the *Chancery Act* of 1850. The long title of the Act discussed the purpose of such relief: to diminish the delay and expense of proceeding in the High Court of Chancery in England. Put another way, declaratory relief permitted the courts to declare the legal rights of the parties without the need for consequential relief, so the parties could have certainty and act upon their rights.[37] Though there was some hesitation at first, the courts have acknowledged the remedy and granted such relief for more than 100 years.

61. Canada's history of declaratory relief mirrored the English experience, and is both well-known and frequently utilized today. In fact, section 97 of the Courts of Justice Act expressly provides the Superior Court of Justice and the Court of Appeal with jurisdiction to make "binding declarations of right whether or not any consequential relief is or could be claimed."[38]

62. The elements of declaratory relief are also well-established. The Supreme Court of Canada in *Solosky*, neatly explains the English jurisprudence of Lord Dunedin relied upon today:[39]

> [12] "[t]he question must be a real and not a theoretical question; the person raising it must have a real interest in raising it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."[40]

63. A dispute is real where the facts disclose an actual or threatened infringement of a legal right. As long as the dispute is real, the Supreme Court has confirmed that a declaration should

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[37] Lazar Sarna, *The Law of Declaratory Judgments*, 3d ed. (Toronto: Thomson Carswell, 2007), p. 9.
[38] Courts of Justice Act, R.S.O. 1990, c. C.43, s. 97.
[39] *Solosky v. R.*, 1979 CarswellNat 4, at paras 12-16 [*Solosky*].
[40] *Solosky*, 1979 CarswellNat 4, at para 12 (citing *Russian Commercial & Industry. Bank v. Br. Bank for Foreign Trade Ltd.*, [1921] 2 AC 438 (HL)); *see also* *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4, at para 61; *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12, at para 11; *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, at para 46.

be granted, even if such declaration affects potential future rights of the parties not before the court.[41] This is because a granting of a declaration does not require that an injury or wrong has been committed, or even threatened.[42]

64. Courts also consider whether the declaration has "practical utility" or solves a "live controversy" between the parties if granted.[43]

65. It is gleaned from the established principles of declaratory relief that the remedy operates as a function to ensure commercial efficacy. For example, in *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, the court held:

> Judicial intervention through declaratory relief in real property cases is especially useful where, like here, the absence of a declaration regarding a proprietary right could result in continued, protracted litigation with resultant inefficiencies and escalated costs.[44]

66. This is also in accord with the Rules of Civil Procedure, which provides:

> **1.04** (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.[45]

67. As such, courts often grant declarations to enable parties to know and act upon their rights, and to avoid future disputes.[46] Such relief is frequently sought in commercial matters to determine whether a contract was formed, whether it has been breached or terminated, and

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[41] *Solosky*, 1979 CarswellNat 4, at para 17.
[42] *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, 2020 ONSC 3993, at para 337.
[43] *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12, at para 11. *Solosky*, 1979 CarswellNat 4, at para 16 (citing Hudson, *Declaratory Judgments in Theoretical Cases: The Reality of the Dispute* (1977), 3 Dalhousie LJ 706, p. 708; *see also G. (R.) v. G. (K.)*, 2017 ONCA 108, at para 58.
[44] *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, 2020 ONSC 3993, at para 350.
[45] Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 1.04 (1).
[46] *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, 2020 ONSC 3993, at para 336; *see also Harrison v. Antonopoulos*, 2002 CarswellOnt 4331, at para 28.

indeed whether it is enforceable in the circumstances of the case.[47]

THE APPLICATION JUDGE ERRED BY CONSIDERING AN IRRELEVANT FACTOR

68. The application judge erred by refusing to grant declaratory relief.

69. The application judge acknowledged that he had jurisdiction under s. 97 of the CJA to grant the requested relief sought by the Bryton Group.

70. However, the application's judge's inquiry halted there without assessing the additional factors. Instead, the judge stated:

> [61] Bryton seeks an order barring claims that have not been made from being adjudicated on their merits. It is not open for them to do so simply because they seek declaratory relief in this application.[48]

71. Respectfully, the application judge is incorrect. Declaratory relief operates to prevent such future challenges if the elements of the test have been met. Here, the Bryton Group presented uncontroverted evidence to meet all of the elements necessary for declaratory relief.

72. The dispute is real, as the Bryton Group exercised the Option in accordance with the Second Mortgage and Option Agreement, and as authorized by the court. However, such exercise of the Option was resisted by the Respondents, and the Third Mortgagees have issued a fresh application challenging the validity of the Option yet again.

73. The Bryton Group had, and continues to have a genuine interest in its resolution. The Bryton Group is unable to develop the Property without the certainty that its Option is valid. Such future, potential threats of challenges to the validity of the Option looming in the backdrop is causing commercial uncertainty. Even more, the value of the Option is decreasing

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[47] *Bacanora Minerals Ltd v. Orr-Ewing (Estate)*, 2021 ABQB 670, at para 42 (citing *Brennenstuhl v Trynchy*, 2002 CarswellAlta 1857, at para 70); *see also* *Russ-Cad Management Ltd. v. Bayview 400 Industrial Developments Inc.*, 1992 CarswellOnt 576, at para 40 (granting a declaration that the condominium agreement of purchase and sale was validly terminated by the vendor's fundamental breach).

[48] March 2, 2022 Order of Cavanagh, J., Appellants' Appeal Book and Compendium, Tab 3, para 61.

in value each day, and may soon become worthless.[49]

74. The resistance from the Respondents has left the Bryton Group at a standstill, with the only available remedy of seeking declaratory relief at the Commercial List for an expedited determination of its rights.

75. The Bryton Group's application is consistent with the purpose of declaratory relief, which is to confirm and determine the legal rights of the applicant. In fact, the Supreme Court of Canada has said "a person whose freedom of action is challenged can always come to the court to have his rights and position clarified."[50]

76. The declaration that the Option is valid and enforceable, and that any subsequent challenges will be barred has practical utility to the Bryton Group (and the Respondents). The effect of such a declaration will provide the parties with finality and permit the Optionee to exercise its Option to purchase the Property, and finally build residential homes on the Property.

77. It is common for the courts to grant a negative declaration of rights. To declare that a right does not exist is another way of finding in positive language that an alleged right has ceased to exist, is terminated, has limited opposability, is fictitious or illegal, or is vested or belongs to another party.[51]

78. For example, in *T1T2 Ltd. Partnership v. Canada*[52], the Ontario Superior Court granted a declaration that the defendant breached the contract and repudiated same. In doing so, the court found the such relief would be of "material assistance" to the plaintiffs because it would

[49] Third Affidavit of B. McWatt dated July 5, 2021, Appellants' Exhibit Book, Tab 19, paras 5-10.
[50] *Solosky*, 1979 CarswellNat 4, at para 14 (citing Lord Upjohn in *Pharmaceutical Society of Great Britain v. Dickson*, [1970] AC 403).
[51] Lazar Sarna, *The Law of Declaratory Judgments*, 3d ed. (Toronto: Thomson Carswell, 2007), p. 8.
[52] *T1T2 Ltd. Partnership v. Canada*, 1995 CarswellOnt 356 [*T1T2*].

"decide the issue of the defendant's liability to the plaintiffs under the contracts."[53] The court expressly rejected the defendant's argument that declaratory relief should not be granted because there is an "alternative, more appropriate, process or remedy is available."[54]

79. Similarly, here, the application judge made a critical error by refusing to grant such relief on the basis that the Third Mortgagees *may* raise challenges to the validity of the Option in the future. This reasoning is directly contrary to the Supreme Court of Canada's ruling, which stated the effect of future rights cannot deprive the remedy of its potential utility in resolving a real dispute.[55]

80. The Bryton Group should not have to wait to see if the Third Mortgagees will prosecute their claims, or if they will simply wait for time to run out. This tactic runs afoul to the fundamental purpose of declaratory relief, and is directly contrary to case law, which stands for the proposition that "the plaintiffs have no obligation to slow their action to a pace to which the defendant may feel more comfortable."[56]

81. Even more, the Third Mortgagees, along with the other Respondents had the opportunity to raise challenges to the Option at the Application Hearing (in addition to the Option Motion). Both times, the Third Mortgagees presented no evidence to support their purported challenges under the FCA, APA, statutory oppression remedy, or ss. 95 and 96 of the BIA. This is because no such evidence exists. The absence of such evidence is fatal to their claims.

82. To permit the impugned Order to stand would effectively nullify the purpose of declaratory relief, and nullify the Option in its entirety.

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[53] *T1T2*, 1995 CarswellOnt 356, at para 7.
[54] *T1T2*, 1995 CarswellOnt 356, at para 11.
[55] *Solosky*, 1979 CarswellNat 4, at para 17.
[56] *T1T2*, 1995 CarswellOnt 356, at para 13.

THE COURT OF APPEAL SHOULD GRANT DECLARATORY RELIEF

83. It is important to note that even though declaratory relief is a discretionary remedy, such discretion is not unfettered. In fact, it is widely established that the discretion should not be continually used to deny declaratory relief.[57]

84. Here, the application judge committed an error in principle by considering an irrelevant factor, and failing to grant declaratory relief.

85. An error in principle occurs when a judge, in exercising his or her discretion, fails to consider a relevant factor, or alternatively considers an irrelevant factor.[58] This includes an error of law.[59] Once an error in principle has been shown to exist, the judge's decision is no longer entitled to deference,[60] and appellate courts are then entitled to take a fresh look at the matter by applying the correct legal principles.[61]

86. Interference is justified if the lower court's exercise of discretion was based upon consideration of irrelevant factors, or overlooked or misapprehended material evidence.[62]

87. A fresh look at the matter is necessary, and the evidence further confirms that there is no chance of success to any purported challenges to the validity of the Option.

ANY CHALLENGES TO THE VALIDITY OF THE OPTION FAIL

88. The great object of the law is to afford certainty and repose to titles honestly acquired.[63] Courts should not set aside a contract between a corporation and a *bona fide* arm's length

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[57] Lazar Sarna, *The Law of Declaratory Judgments*, 3d ed. (Toronto: Thomson Carswell, 2007), p. 21.
[58] *Ligate v. Richardson*, 1997 CarswellOnt 2185, at para 69. [*Ligate*]; *see also Anderson v. Cyr*, 2014 NSCA 51, at para 23. [*Anderson*]; *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 1999 CarswellOnt 454, at para 34.
[59] *Ligate*, 1997 CarswellOnt 2185, at para 69; *see also R. v. Rezaie*, 1996 CarswellOnt 4753, at para 20.
[60] *Anderson*, 2014 NSCA 51, at para 24.
[61] *Ligate*, 1997 CarswellOnt 2185, at para 70; *see also Anderson*, 2014 NSCA 51, at para 24; *Ellph.com Solutions Inc. v. Aliant Inc.*, 2012 NSCA 89.
[62] *Derks Estate (Trustee of) v. Derks*, 2013 ABCA 195, at para 9.
[63] *Bank of Montreal v. i Trade Finance Inc.*, 2009 ONCA 615, at para 21 (citing *Bump on Fraudulent Conveyances*, 4th ed. (1896) at pp. 489-490).

commercial party.[64]

89. The APA, FCA, statutory oppression remedy, and ss. 95 and 96 are the exception to the default rule above. These provisions exist only to set aside untoward transactions.

90. As such, embedded in the laws against fraudulent transactions is the protection of *bona fide* purchasers for valuable consideration, without notice of any fraudulent activity. It is well-established that such innocent purchasers must remain unharmed.[65] This is consistent with the *Land Titles Act*, which also protects a purchaser in good faith for valuable consideration.[66]

91. To succeed on a claim under the above causes of action, the party must show that the debtor was insolvent at the time of the transfer, and had the intent to defeat, hinder, delay, or prejudice other creditors.[67] An inference of intent may only arise from suspicious facts or circumstances.[68]

92. Where a transaction is attacked as a fraudulent conveyance, the court particularly examines the adequacy of consideration, and looks at whether the consideration is "nominal or grossly inadequate."[69] This is a high threshold.

93. Courts have held that even the presence of some of indicia of fraud does not always rise to the level of necessary intent to succeed on an APA or FCA claim.[70]

94. The Option Agreement, and Amendment, are genuine transactions, for good and valuable consideration, between two arm's-length parties. The evidence presented surrounding the Option Agreement includes, *inter alia*:

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[64] Markus Koehnen, *Oppression and Related Remedies*, (Toronto: Thomson Carswell, 2004), p. 375.
[65] *Bank of Montreal v. i Trade Finance Inc.*, 2009 ONCA 615, at para 21.
[66] Land Titles Act, R.S.O. 1990, c. L.5, s. 57 (3).
[67] *Assignment and Preferences Act*, R.S.O. 1990, c. A.33, s. 4 (1); *Fraudulent Conveyances Act*, R.S.O. 1990, c. F.29, s. 5.
[68] *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406, at paras 72, 73 [*Montor*]; *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052, at para 67.
[69] *Montor*, 2016 ONCA 406, at para 53.
[70] *Montor*, 2016 ONCA 406, at para 72.

a. The Bryton Group and the Debtors are separate and distinct entities;[71]

b. Both parties were represented by independent counsel at all times;

c. The Option was registered on title as early as June 2019. There was nothing secret about this transaction;

d. There was valid consideration for the Option, which was freely negotiated;

    i. The purchase price under the Option Agreement, and Amendment, are akin to the fair market value of the Property, and was agreed-upon based on a specifically methodology;

e. The purchase price under the Amended Option Agreement exceeds the average combined price of both parcels;

f. The Option Agreement was ancillary to the First APS;

g. The Amended Option Agreement was part of a package of agreements, including the Break Fee, and the extended term under the Second Mortgage; and

h. Mr. Feng testified that he was aware of the solicitors' negotiations and did ultimately agree to this purchase price.

95. There truly is nothing particularly special about the transaction. It was an ordinary commercial dealing between the parties, acting in their separate interests.[72]

96. It further cannot be said that there was "grossly inadequate" consideration, or that the purchase price was "conspicuously less" than the fair market value.[73]

97. To the contrary, the Court of Appeal has held the value of consideration is to be accepted by the court in the absence of evidence to the contrary.[74] Valuable forms of

[71] *Montor*, 2016 ONCA 406, at paras 43, 69.
[72] *Doyle Salewski Inc. v. Scott*, 2019 ONSC 5108, at paras 203, 204.
[73] *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 2; *see also Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757, at para 42.
[74] *Montor*, 2016 ONCA 406, at para 52.

consideration are not even limited to the fair market value, but can also include forbearance from suit or an extension of time under mortgage terms.[75]

98. **It cannot be ignored that the Respondents have put forth no evidence to even give the slightest indication that there was anything suspect about the transaction.** It is simply because none exists, and the transaction does not fit into the realm of the APA, FCA, statutory oppression remedy, or ss. 95 and 96 of the BIA.

THE OPTION FALLS OUTSIDE OF THE STATUTORY LOOK-BACK PERIOD UNDER THE BIA

99. The purported, but not yet raised, claims under sections 95 and 96 of the BIA should also fail for the following reasons.

100. Section 95(1) of the BIA provides that transactions will be reviewed up to three months before the date of the initial bankruptcy event.[76] Section 96(1) of the BIA provides such transactions will be reviewed up to a year before the date of the initial bankruptcy event.[77]

101. This Court has determined that the onus is on the party raising such claims under sections 95 and 96 to show that the challenged transfer falls within the statutory review period.

102. It is undisputed that the Option was registered on title on June 17, 2019. It is also undisputed that the initial bankruptcy event was the filing of the NOI, which occurred on October 29, 2020.

103. This is exceptionally longer than three months as required under section 95. As such, the Option is not reviewable under section 95.

104. Even the longer look-back period under section 96 fails. October 29, 2020 is *after* the Option Agreement on July 17, 2019.

105. The application judge erred by failing to determine that the Option Agreement falls

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[75] *Project Forest Lakes Pte. Ltd. v. Terra Firma Development Corporation Limited*, 2021 NSSC 350, at paras 71, 72.
[76] Bankruptcy and Insolvency Act, s. 95.
[77] Bankruptcy and Insolvency Act, s. 96.

outside the look back period under sections 95 and 96 of the BIA.[78]

106. The analysis under the BIA should have started and ended there, and declaratory relief barring these purported future claims must be granted.

THE RESPONDENTS' PURPORTED CHALLENGES SHOULD BE BARRED BY *RES JUDICATA*

107. The validity and enforceability of the Option was confirmed in the January 12th Order.

108. The application judge erred by failing to determine any purported challenges to the validity of the Option is barred by *res judicata*.

109. The equitable doctrine of *res judicata* operates as an estoppel. It means that any action or issue that has been litigated and decided cannot be retried in a subsequent lawsuit between the same parties or their privies.[79] The purpose of *res judicata* is for judicial finality,[80] judicial efficiency, to promote consistency, and to avoid duplicative litigation where a party has already had his or her day in court.[81]

110. By preventing re-litigation of claims that have already been decided, it requires parties to "bring forward their whole case"[82] in the first instance. As Binnie, J. stated in *Danyluk v. Ainsworth*,

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry . . . an issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive

[78] *Montor*, 2016 ONCA 406, at para 44.
[79] *Bear Island Foundation v. Ontario*, 1999 CarswellOnt 3603, at para 29 [*Bear Island*]; *Martin v. Goldfarb*, 2006 CarswellOnt 4355, at para 59 [*Martin*].
[80] *Bear Island*, 1999 CarswellOnt 3603, at para 29.
[81] *Martin*, 2006 CarswellOnt 4355, at para 60.
[82] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354, at para 49 (citing *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.)). [*Catalyst Capital*].

proceedings are to be avoided.[83]

111. *Res judicata* consists of both cause of action estoppel and issue estoppel.

112. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding.[84] It is triggered when, *inter alia*, the cause of action and the subsequent action either were argued or *could have been argued* in the prior action if the party in question had exercised reasonable diligence.[85]

113. Issue estoppel is similar, and serves to prevent a litigant from raising an issue that has already been decided in a prior proceeding.[86] Issue estoppel is triggered when the same question has been decided in a final order, and the parties to the prior proceeding (or their privies) are the same in the current proceeding.[87]

114. Here, the findings in the January 12th Order squarely meet the requirements for both cause of action estoppel and issue estoppel.

115. The January 12th Order was a final order involving the same parties. The Respondents, including the Third Mortgagees and Debenture Holders, were on notice as early as November 2020 that the validity of the Option was set for a full day hearing for December 21, 2020. In fact, they were *directed* to bring any challenges to the Option at the Option Hearing.[88]

116. The Third Mortgagees attended the Option Motion, and were represented by counsel.

117. Such challenges under the APA, FCA, and statutory oppression remedy *could have been raised*, but were not.

118. In any event, the judge found that the Bryton Group did "**not act unfairly, oppressively, or unconscionably in negotiating the Option Agreement or the Amending**

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[83] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, at para 18.
[84] *Erschbamer v. Wallster*, 2013 BCCA 76, at para 12 [*Erschbamer*].
[85] *Catalyst Capital*, 2019 ONCA 354, at para 50; *see also Erschbamer*, 2013 BCCA 76, at para 15; *Hoque v. Montreal Trust Co. of Canada,* 1997 NSCA 153, at para 37.
[86] *Erschbamer*, 2013 BCCA 76, at para 12.
[87] *Erschbamer*, 2013 BCCA 76, at para 13.
[88] December 3, 2020 Endorsement, Appellants' Appeal Book and Compendium, Tab 5.

Option Agreement."[89]

119. Even more, it is of no moment that the respondents *technically* could not bring BIA claims at the Option Motion. Issue estoppel applies to even new claims where those claims are subject to the factual determinations that have been decided on in a prior proceeding.[90] This is precisely applicable here.

120. The pertinent factual findings made by Cavanagh, J. validating the Option as a *bona fide* transaction, terminates any possibility of success to challenge same.[91]

121. These findings, together with the decision that the Option is valid and enforceable, are clear.

122. It was an error for the application judge to leave open the possibility of the Third Mortgagees raising future challenges to the validity of the Option. It was not open for him to do so.

PART V – ORDER REQUESTED

123. The Appellants respectfully request that the Court of Appeal set aside the Order in part and issue a new order as follows:

a. The Appellants' application for declaratory relief shall be granted;

b. The Respondents shall be precluded from challenging the validity of the Option, or setting it aside pursuant to, *inter alia*, the *Fraudulent Conveyances Act*, R.S.O. 1990, c. A.33, the *Assignment and Preferences Act*, R.S.O. 1990, c. A.33, the statutory oppression remedy, or sections 95 and 96 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

c. The Respondents shall be ordered to pay to the Appellants the costs of the Application and the within Appeal; and

d. Such other and further relief as this Court deems just and proper.

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[89] January 12, 2021 Order, Appellants' Appeal Book and Compendium, Tab 4, para 82.
[90] *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44, at para 54.
[91] January 12, 2021 Order, Appellants' Appeal Book and Compendium, Tab 4.

May 24, 2022

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TO: SERVICE LIST

Court of Appeal File No.: C70436

COURT OF APPEAL FOR ONTARIO

B E T W E E N

BRYTON CAPITAL CORP. GP LTD. and BAYVIEW CREEK RESIDENCES INC. (formerly known as BRYTON CREEK RESIDENCES INC.)

Applicants (Appellants)

and

CIM BAYVIEW CREEK INC., GRANT THORNTON LIMITED IN ITS CAPACITY AS THE BANKRUPTCY TRUSTEE OF CIM BAYVIEW CREEK INC., BAYVIEW CREEK (CIM) LP, 10502715 CANADA INC., MNP LTD. IN ITS CAPACITY AS THE BANKRUPTCY TRUSTEE OF BAYVIEW CREEK (CIM) LP AND 10502715 CANADA INC., GR (CAN) INVESTMENT CO. LTD., MONEST FINANCIAL INC., TRACY HUI, JOJO HUI, CARDINAL ADVISORY LTD., and THE CORPORATION OF THE CITY OF RICHMOND HILL

Respondents (Respondents)

CERTIFICATE

We estimate that **three (3) hours** will be needed for the oral argument of the appeal.

An order under subrule 61.09(2) is not required.

May 24, 2022

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SCHEDULE 'A'
LIST OF AUTHORITIES

1. *Solosky v. R.*, 1979 CarswellNat 4.
2. *S.A. v. Metro Vancouver Housing Corp.*, 2019 SCC 4.
3. *Daniels v. Canada (Minister of Indian Affairs and Northern Development)*, 2016 SCC 12.
4. *Khadr v. Canada (Prime Minister)*, 2010 SCC 3.
5. *York Region Condominium Corporation No. 890 v. Market Village Markham Inc.*, 2020 ONSC 3993.
6. *G. (R.) v. G. (K.)*, 2017 ONCA 108.
7. *Bacanora Minerals Ltd v. Orr-Ewing (Estate)*, 2021 ABQB 670.
8. *Russ-Cad Management Ltd. v. Bayview 400 Industrial Developments Inc.*, 1992 CarswellOnt 576.
9. *T1T2 Ltd. Partnership v. Canada*, 1995 CarswellOnt 356.
10. *Ligate v. Richardson*, 1997 CarswellOnt 2185.
11. *Anderson v. Cyr*, 2014 NSCA 51.
12. *Committee for Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 1999 CarswellOnt 454.
13. *R. v. Rezaie*, 1996 CarswellOnt 4753.
14. *Ellph.com Solutions Inc. v. Aliant Inc.*, 2012 NSCA 89.
15. *Derks Estate (Trustee of) v. Derks*, 2013 ABCA 195.
16. *Bank of Montreal v. i Trade Finance Inc.*, 2009 ONCA 615.
17. *Montor Business Corp. (Trustee of) v. Goldfinger*, 2016 ONCA 406.
18. *DBDC Spadina Ltd. v. Walton*, 2014 ONSC 3052.
19. *Doyle Salewski Inc. v. Scott*, 2019 ONSC 5108.
20. *Urbancorp Toronto Management Inc. (Re)*, 2019 ONCA 757.
21. *Project Forest Lakes Pte. Ltd. v. Terra Firma Development Corporation Limited*, 2021 NSSC 350.
22. *Bear Island Foundation v. Ontario*, 1999 CarswellOnt 3603.
23. *Martin v. Goldfarb*, 2006 CarswellOnt 4355.
24. *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2019 ONCA 354.
25. *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.
26. *Erschbamer v. Wallster*, 2013 BCCA 76.
27. *Hoque v. Montreal Trust Co. of Canada*, 1997 NSCA 153.

SCHEDULE 'B'
TEXT OF STATUTES, REGULATIONS & BY – LAWS

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 97

97. Declaratory orders
The Court of Appeal and the Superior Court of Justice, exclusive of the Small Claims Court, may make binding declarations of right whether or not any consequential relief is or could be claimed.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, s. 1.04

General Principle
1.04(1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits.

BRYTON CAPITAL CORP. GP LTD ET AL. - and- **CIM BAYVIEW CREEK INC. ET AL.**

Appellants	*Respondents*	Court of Appeal File No.: C70436

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SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT
TORONTO

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