

**IN THE SUPREME COURT OF CANADA**  
**(On Appeal from the Court of Appeal of Alberta and Court of Queen's Bench of Alberta)**

BETWEEN:

**HERITAGE CAPITAL CORPORATION**

Appellant  
(Respondent)

- and -

**604 – 1<sup>st</sup> STREET S.W. INC.**

Respondent  
(Appellant)

- and -

**THE EQUITABLE TRUST COMPANY now continued as EQUITABLE BANK, THE  
LOUGHEED BLOCK INC., NEIL RICHARDSON, HUGH DARYL RICHARDSON,  
HERITAGE PROPERTY CORPORATION and KRAZYEL CORP.**

Respondents  
(Respondents)

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**FACTUM OF THE RESPONDENT**  
**THE LOUGHEED BLOCK INC.**

*Pursuant to Rule 42 of the Rules of the Supreme Court of Canada (SOR/2002-156)*

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## I. Overview & Facts

1. The City of Calgary (“**the City**”) designated a downtown office building known as the Lougheed Block (“**the Property**”) a municipal historic resource. The owner of the Property, Lougheed Block Inc. (“**LBI**”), waived its right to statutory compensation and entered into an agreement with the City to rehabilitate the Property in exchange for \$3.4 million over 15 years (“**the Payments**”). This agreement (“**the Rehabilitation Incentive Agreement**”) detailed the work that would be done to the Property (“**the Rehabilitation Work**”) and that no Payments would be made until all of the Rehabilitation Work was completed.<sup>1</sup> The Rehabilitation Incentive Agreement also stated that the Payments would be compensation for any decrease in value due to its designation as a municipal historic resource.<sup>2</sup> There is no significant evidence however that any decrease in value of the Property has actually occurred due to this designation.
2. LBI completed the necessary Rehabilitation Work, satisfying the terms of the Rehabilitation Incentive Agreement, and began receiving the Payments. However, LBI went into default in payment to its creditors before all Payments were transferred to LBI, forcing a Judicial Sale of the Property (“**the Judicial Sale**”).
3. 604 1<sup>st</sup> Street SW Inc. (“**604**”) purchased the Property through the Judicial Sale. There was no mention of the Payments in 604’s offer to purchase the Property or in the documentation of the Judicial Sale. Yet, 604 claims to be owed the Payments. 604 is not entitled to the Payments through the Judicial Sale because the Payments were not part of the sale of the property nor are they attached to the Property through a positive covenant able to be enforced against the City by the building owners.<sup>3</sup>

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<sup>1</sup> See Sections 3.1, 4.1, 5.1 and 5.2 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B [AR Part III vol 1 Tab 7, pg 143].

<sup>2</sup> See Section 2.1 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B [AR Part III vol 1 Tab 7, pg 143].

<sup>3</sup> Appellant’s Factum (for Heritage Capital Corporation), Part I, Tab A, pgs 19-29.

4. 604 is also not entitled to the Payments from the Rehabilitation Incentive Agreement because it was not a party to the contract and did not complete any of the Rehabilitation Work. The primary purpose of the Rehabilitation Incentive Agreement is to establish a framework for completion of the Rehabilitation Work in exchange for compensation. If 604 receives the Payments for Rehabilitation Work completed by LBI, 604 will be unjustly enriched.
5. Compensation for a decrease in the value of the Property due to its designation as a municipal historic resource is not part of the Payments. This is because there is no significant evidence that there has been an actual decrease in value of the Property and no such evidence has been put before any level of court. However, it is evident that LBI completed all of the Rehabilitation Work, a precursor to receiving the Payments.<sup>4</sup> Even if it is found that some of the Payments is for a decrease in value of the Property, there is no way to divide the Payments between the amounts for devaluation and for compensation for the Rehabilitation Work. Thus, if 604 receives the Payments, they will be unjustly enriched from compensation for the Rehabilitation Work that they did not complete from a contract that they were not a party to.
6. The fact that the City can offset taxes from the Payments does not tie the Payments to the Property. The purpose of offsetting taxes from the Payments is to ensure revenue collection, not tie the Payments to the land.<sup>5</sup> If the City wanted to tie the Payments to the land, they would have included the ability to withhold Payments if the negative covenants on the Property regarding commercial leases and the Grand Theatre were not followed.<sup>6</sup> This was not done, indicating a focus on revenue collection, not attaching the Payments to the Property.

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<sup>4</sup> Court of Appeal Reasons at para 70 per O'Brien in dissent. [AR Part 1 Tab 5].

<sup>5</sup> The wording of Section 5.3 of the Rehabilitation Incentive Agreement indicates a focus on revenue collection, specifically regarding the last sentence. Richardson Affidavit, Exhibit B [AR Part III vol 1 Tab 7, pg 144].

<sup>6</sup> Section 8.4 of the Rehabilitation Incentive Agreement states that the Property will be used solely for commercial purposes until all Payments have been paid. Section 8.5 of the Rehabilitation Incentive Agreement states that the owner of the Property will use its best efforts to maintain the Grand Theatre performance space. Richardson Affidavit, Exhibit B [AR Part III vol 1 Tab 7, pg 146].

7. If 604 is allowed to receive the Payments, it will make it more expensive and risky for municipalities to designate buildings as municipal historic resources and create contracts for historic rehabilitation. If payments for construction work can change hands with building ownership, private sector companies will move away from installment payments and back-loaded contracts. Instead, municipalities may be forced to pay money upfront for rehabilitation work and be unable to spread payments over multiple tax years. This will make the protection of historic buildings more expensive, more risky and less appealing to municipalities and private sector companies. If 604 is allowed to receive the Payments, it may create unintended consequences that ultimately discourage the protection of historic buildings.
8. The Rehabilitation Incentive Agreement entitles LBI to receipt of the Payments upon completion of the Rehabilitation Work.<sup>7</sup> The Rehabilitation Incentive Agreement should be read as a completed contract between two parties, LBI and the City. 604 is a stranger to the Rehabilitation Incentive Agreement and did not complete any of the Rehabilitation Work. The Payments are not tied to the Property through the Judicial Sale nor a positive covenant capable of being enforced against the City. LBI is the rightful recipient of the Payments.
9. The Respondents for LBI (“**the Respondents**”) agree with the Facts as described by the Factum of the Appellant (for Heritage Capital Corporation) between paragraphs 1-35.<sup>8</sup>
10. The Respondents only add that no significant evidence has been put forward at any level of court showing any actual decrease in value of the Property due to its designation as a municipal historic resource by the City.

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<sup>7</sup> See Sections 5.1 and 5.2 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B [**AR Part III vol 1 Tab 7, pg 143**].

<sup>8</sup> Appellant’s Factum (for Heritage Capital Corporation), Part I, Tab A, pgs 1-8.

## II. Issues

11. The Respondents agree with the Appellants (for Heritage Capital Corporation) that the following questions are in issue in this Appeal:

- a. What is the Standard of Review?*
- b. Does the Historical Resources Act Allow Covenants to be Enforced against the City?*
- c. Did 604 Receive the Payments in the Judicial Sale of the Property?*

12. The Respondents add that the following questions are also in issue in this Appeal:

- a. Is the Rehabilitation Incentive Agreement a Private Contract between LBI and the City for Rehabilitation Work to the Property?*
- b. Does Section 5.3 of the Rehabilitation Incentive Agreement Tie the Payments to the Property?*
- c. What Are the Unintended Consequences of the Assignment of the Payments to 604 in Regards to Municipal Preservation of Historical Buildings?*

### III. Arguments

#### **The Master's and Chambers Judge's Interpretation of the Rehabilitation Incentive Agreement is Entitled to Deference**

13. The Respondents adopt the argument of the Appellants for Heritage Capital Corporation under the section of their Factum titled "Standard of Review."<sup>9</sup> The Master's and Chambers Judge's interpretation of the Rehabilitation Incentive Agreement and Judicial Sale Agreement are questions of mixed fact and law entitled to deference and reviewable on a standard of palpable and overriding error.<sup>10</sup>

#### **The *Historical Resources Act* does not Allow Covenants to be Enforced Against the City**

14. The Respondents agree with paragraphs 95-105 in the Factum of the Appellants (for Heritage Capital Corporation).<sup>11</sup> The Payments established in The Rehabilitation Incentive Agreement do not create a positive covenant in the Property because covenants cannot be enforced against the City as per s. 29(3) of the *Historical Resources Act*.<sup>12</sup> Master Laycock, Justice Jeffrey and Justice O'Brien in dissent all agree that the Payments cannot be construed as positive covenants that run with the land and cannot be enforced by the building owner against the City.<sup>13</sup>

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<sup>9</sup> Appellant's Factum (for Heritage Capital Corporation), Part III, Tab A, pg 10.

<sup>10</sup> *Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53, [2014] 2 S.C.R. 633 [**Sattva**] [**Appellant's Authorities Tab 11**].

<sup>11</sup> Appellant's Factum (for Heritage Capital Corporation), Part I, Tab A, pgs 25-29.

<sup>12</sup> *Historical Resources Act*, R.S.A. 2000, c. H-9, s. 29(3) [**Appellant's Factum, Part VII, Tab B**].

<sup>13</sup> Reasons for Judgment of Master Laycock, 2011 ABQB 269 at paras 20-39 [**Master's Reasons**] [**AR Part 1 Tab 1**]; Reasons for Decision of Justice PR Jeffrey, 2013 ABQB 209 at paras 36-50 [**Chambers Judge's Reasons**][**AR Part 1 Tab 3**]; Court of Appeal Reasons at paras 66-77 per O'Brien J.A. in dissent [**AR Part 1 Tab 5**].



### **The Payments were not Sold to 604 in the Judicial Sale**

15. The Respondents agree with the Factum of the Appellants (for Heritage Capital Corporation) at paragraphs 77-94.<sup>14</sup> Master Laycock, Justice Jeffrey and Justice O'Brien in dissent all agree that the Judicial Sale of the Property did not include the Payments.<sup>15</sup>
16. The Payments were part of a private contract for the Rehabilitation Work between the City and LBI. Master Laycock was not able to include the benefits of the Rehabilitation Incentive Agreement in the Judicial Sale as the purchaser, 604, was a stranger to contract.
17. The Payments in the Rehabilitation Incentive Agreement are not a Positive Covenant tied to the Property. The Payments stem from the Rehabilitation Incentive Agreement, a private contract between the City and LBI to complete the Rehabilitation Work. Without full performance of the Rehabilitation Work by LBI, no Payments would be made to LBI from the City. 604 is a stranger to the Rehabilitation Incentive Agreement and did not complete the Rehabilitation Work for which the Payments are compensation.

### **The Rehabilitation Incentive Agreement is a Private Contract between LBI and the City for the Rehabilitation Work to the Property**

18. The sole purpose of the Rehabilitation Incentive Agreement is to establish a framework for the Rehabilitation Work to be completed in a way that insulated the City of Calgary from the risks associated with upgrading a historical building. In essence, the Rehabilitation Incentive Agreement is a contract for LBI to perform the Rehabilitation Work in exchange for \$3,400,000. This is clear from reading the Rehabilitation Incentive Agreement, which goes into great detail on what the Rehabilitation Work would entail in Section 3.1 and how it would be verified by the Heritage Planner in Sections 4.1 and 4.2.<sup>16</sup>

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<sup>14</sup> Appellant's Factum (for Heritage Capital Corporation), Part I, Tab A, pgs 19-25.

<sup>15</sup> Master's Reasons at paras 6-10 [**AR Part 1 Tab 1**]; Chambers Judge's Reasons at paras 51-64 [**Chambers Judge's Reasons**][**AR Part 1 Tab 3**]; Court of Appeal Reasons at paras 60-64 per O'Brien J.A. in dissent [**AR Part 1 Tab 5**].

<sup>16</sup> Section 3.1 of the Rehabilitation Incentive Agreement details a description of the Rehabilitation Work that was completed on the Property by LBI. Richardson Affidavit, Exhibit B [**AR Part III vol 1 Tab 7, pg 140**]. Section 4.1

19. The Rehabilitation Work is the central tenet of the Rehabilitation Incentive Agreement. The payment conditions in the Rehabilitation Incentive Agreement require verified completion of the Rehabilitation Work before any payments begin. It does not matter if LBI followed all other conditions in the Rehabilitation Incentive Agreement, it would not be compensated if it failed to complete the Rehabilitation Work.<sup>17</sup>
20. Potential reduction in value of the Property by designating it a municipal historic resource is not a component of the payments in the Rehabilitation Incentive Agreement. Potential decrease in economic value of the Property is only contemplated in one sentence in the entire Rehabilitation Incentive Agreement. Section 2.1 states that the payments “shall be full compensation from the City for any decrease in economic value of the Building or Land (emphasis added).”<sup>18</sup> However, there is no significant evidence that any economic devaluation to the Property has occurred.
21. The mortgage for the Property was registered for a total of \$27,000,000 on November 8<sup>th</sup>, 2006. The Property was appraised at \$30,918,000 on February 3<sup>rd</sup>, 2010, after the completion of the Rehabilitation Work. It is impossible to conclude from this that there was any significant decrease in value as a result of the designation of the building as a municipal historic resource. No expert evidence was provided by any as to the effect of the designation.
22. LBI waived their right to statutory compensation under s. 28(1) of the *Historical Resources Act* and the City does not quantify any exact amount in the Payments as specifically for devaluation of the Property.<sup>19</sup> Without significant evidence of economic devaluation or a specific portion of the Payment specifically noted for devaluation, there is no indication that any amount of the Payments is actually for devaluation. Therefore, the purpose of Section 2.1

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and 4.2 of the Rehabilitation Incentive Agreement detail the inspection process for the Property that the City would undertake, including seeking approval from the City Heritage Planner. Richardson Affidavit, Exhibit B [**AR Part III vol 1 Tab 7, pg 143**].

<sup>17</sup> See Sections 5.1 and 5.2 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B [**AR Part III vol 1 Tab 7, pg 143**].

<sup>18</sup> Section 2.1 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B [**AR Part III vol 1 Tab 7, pg 139**].

<sup>19</sup> *Historical Resources Act*, s. 28(1) [**Applicant’s Factum, Part IV, Tab D**]; LBI waives their right to statutory compensation under the *Historical Resources Act* in Section 2.1 of the Rehabilitation Incentive Agreement. Richardson Affidavit, Exhibit B [**AR Part III vol 1 Tab 7, pg 139**].

is to protect the City from paying further compensation if any decrease of economic value occurs, not necessarily for any specific amount of compensation for devaluation.

23. The Payments are entirely dependent on the completion of the Rehabilitation Work and not whether any economic decrease in value occurs. If the Rehabilitation Work did not occur, then no Payments would have been made. However, if a decrease in the economic value of the Property was documented but the Rehabilitation Work was not completed, then no Payments would be made. This shows how devaluation of the Property is not a substantial part of the Rehabilitation Incentive Agreement. The Rehabilitation Incentive Agreement is entirely focused on compensation for the completion of Rehabilitation Work.
24. The central focus on Rehabilitation Work makes the Rehabilitation Incentive Agreement a private contract between LBI and the City for performance of the Rehabilitation Work in exchange for \$3,400,000.
25. In the alternative, if the Court views that the Payments in the Rehabilitation Incentive Agreement are both compensation for the Rehabilitation Work and decrease in economic value of the Property, there are still issues with 604 receiving the Payments. If 604 is allowed to receive the Payments, it would be receiving, at least in part, compensation for work it did not do.
26. If 604 receives the Payments, it will be unjustly enriched for receiving compensation for work it did not do. Justice O'Brien notes at paragraph 69 of his dissent that the Rehabilitation Incentive Agreement does not break down what amount of the Payments are for devaluation and what amount is for completion of the Rehabilitation Work.<sup>20</sup> There is no way to split the \$3,400,000 amount between these two matters. Justice O'Brien also says that "from the description of the required rehabilitation work, that a substantial portion of the promised payments related to this work which LBI completed prior to the judicial sale."<sup>21</sup>

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<sup>20</sup> Memorandum of Judgment of the Court of Appeal of Alberta, 2014 ABCA 427 at para 69 per O'Brien J.A. in dissent [**Court of Appeal Reasons**][**AR Part 1 Tab 5**].

<sup>21</sup> Court of Appeal Reasons at para 70 per O'Brien J.A. in dissent [**AR Part 1 Tab 5**].

27. If 604 begins receiving the Payments, it will in part be receiving compensation for completion of the Rehabilitation Work. This is problematic because 604 did nothing to complete the Rehabilitation Work as detailed in the Rehabilitation Incentive Agreement. LBI contracted to perform the Rehabilitation Work and took on financial risk in order to meet the conditions in the Rehabilitation Incentive Agreement. 604 is a stranger to the Rehabilitation Incentive Agreement, it did not complete the Rehabilitation Work and took on no financial risk to meet all the details of the Rehabilitation Incentive Agreement.

### **The Right of the City to Offset Unpaid Taxes Against the Payments Does Not Tie the Payments to the Property**

28. Section 5.3 of the Rehabilitation Incentive Agreement states:

The Owner, The Lougheed Block Inc., agrees that it shall have paid all taxes and levies owed by it to the City prior to receiving all or a portion of the Yearly Installments referenced in this Agreement. **If, at anytime, the Owner, The Lougheed Block Inc., and any future owner, has not paid such taxes and levies when they become due, the City may, but is not obligated to set off the amount owed by the Owner, the Lougheed Block Inc., or any future owner against any amounts owed, or that may be owing in the future, to the Owner by the City pursuant to this Agreement.** In the event that the City chooses not to setoff amounts owed or owing, under no circumstances shall the City be deemed to have waived its rights to such taxes and levies.<sup>22</sup>

29. The inclusion of the possible deduction of property tax from the Payments in Section 5.3 of the Rehabilitation Incentive Agreement is to ensure municipal tax is collected, not to tie the Payments to title as Justice Slatter suggests.<sup>23</sup> If the City wanted to tie the Payments to title, they would have also made their payment subject to abiding by the Negative Covenants in Section 8.4 and 8.5 of the Rehabilitation Incentive Agreement.<sup>24</sup> There is no wording in the

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<sup>22</sup> Section 5.3 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B (emphasis added) [AR Part III vol 1 Tab 7, pg 144].

<sup>23</sup> Slatter J.A. states that the provision in Section 5.3 regarding deduction of municipal taxes “would make no sense if the cash flow from the agreement did not follow title.” Court of Appeal Reasons at para 28 [AR Part 1 Tab 5].

<sup>24</sup> Section 8.4 of the Rehabilitation Incentive Agreement states that the Property will be used solely for commercial purposes until all Payments have been paid. Section 8.5 of the Rehabilitation Incentive Agreement states that the owner of the Property will use its best efforts to maintain the Grand Theatre performance space. Richardson Affidavit, Exhibit B [AR Part III vol 1 Tab 7, pg 146].

Rehabilitation Incentive Agreement that states the City can withhold the Payments if the owner does not maintain the Grand Theatre performance space or uses the Property for a non-commercial purpose. The absence of such wording shows that offsetting unpaid property taxes in Section 5.3 was to ensure the City could collect its taxes, not tie the Rehabilitation Incentive Agreement to title.

30. Section 5.3 of the Rehabilitation Incentive Agreement states that unpaid property taxes on the Property would be offset from the Payments. The Rehabilitation Incentive Agreement states in Section 8.4 that the Property shall only be used for a commercial purpose until all of the Payments have been paid. Section 8.5 states that the owner is to use their best efforts to maintain the performance space in the Grand Theatre. These are both negative covenants attached to the Property.
31. Justice Slatter ignores the City's primary goal of guaranteed revenue collection in the wording of Section 5.3 and instead incorrectly determines that Section 5.3 ties the Payments to the Property. Justice Slatter states that because unpaid property taxes can be deducted from the Payments, it would "make no sense" if the Payments did not follow title.<sup>25</sup> However, this assumes that the primary goal of the City in writing Section 5.3 was to tie the Payments to the land. This ignores the real goal of Section 5.3, which is to ensure that property taxes are collected, regardless of who owns the Property. This emphasis is made clear in the drafting by the inclusion of the last sentence of Section 5.3, which reinforces the City's right to collect taxes even if it does not offset unpaid taxes from the Payments.<sup>26</sup> This section was drafted to guarantee revenue to the City, not tie the Payments to the land.
32. Master Laycock points that if a future owner defaults on their property taxes and the City claims a right to offset this against LBI's Payments, this could create a future lawsuit.<sup>27</sup>

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<sup>25</sup> Court of Appeal Reasons at para 28 per Slatter J.A. [**AR Part 1 Tab 5**].

<sup>26</sup> Section 5.3 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B [**AR Part III vol 1 Tab 7, pg 144**].

<sup>27</sup> Master's Reasons at para 38 [**AR Part 1 Tab1**].

However, Master Laycock correctly notes that this scenario is not an issue for him to consider in this dispute.<sup>28</sup>

33. The fact that there is no language relating the Payments to compliance with negative covenants on the Property show that the Payments are not tied to the land. To enforce the negative covenants in Section 8.4 and 8.5, the City could have reserved the right to withhold the Payments if either or both of the covenants were not followed. Instead, the City only chose to withhold payments only in lieu of unpaid property taxes. This shows an interest by the City in collecting taxes, not tying the Payments to the land. The appropriate remedy for the city in any event would be an injunction due to the unique nature of the Property and the intention behind the negative covenants.
  
34. In the alternative, the Respondents adopt the argument of the Appellants for Heritage Capital Corporation in paragraphs 53-55 of their Factum.<sup>29</sup> Section 5.3 notes that the City reserves the right to offset unpaid municipal taxes by LBI or future owners against the Payments. However, it states that the offset can be made against any amounts owed to the owner, which is LBI. No mention is made here of any payments being owed to future owners. This suggests the Payments are not meant to move with title and are to stay with LBI to ensure the collection of municipal taxes.
  
35. The expression of LBI as the sole receiver of the Payments in Section 5.3 is a purposeful exclusion of future owners from the receipt of the Payments. Section 5.3 specifically excludes the mention of a future owner when mentioning who might be owed Payments. Section 5.3 purposefully expresses that taxes might be owed by LBI or a future owner to the City, but that the Payments will only be owed to LBI by the City. Section 5.3 purposefully excludes future owners as being possibly owed the Payments from the City.

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<sup>28</sup> *Ibid.*

<sup>29</sup> Appellant's Factum (for Heritage Capital Corporation), Part III, Tab A, pg 14.

36. Section 5.3 also further demonstrates that the City and LBI emphasized that the Rehabilitation Incentive Agreement was a private contract between both parties. Section 5.3 puts LBI on the hook for unpaid taxes, whether or not LBI is still the owner of the Property. This puts the onus on LBI for getting an indemnity or including this risk in a future sale price when selling the Property. This demonstrates further planning by the City to reduce the risk of unpaid taxes and let LBI work out this issue if the Property was sold while allowing LBI to still be assured receipt of the Payments.
37. The Respondents agree with Justice Jeffrey when he states that his “conclusion that the City's covenant to pay does not run with the land is consistent also with the apparent intention of the parties to the [Rehabilitation] Incentive Agreement, evident from [Section] 5.3.”<sup>30</sup>

### **Allowing the Payments to Travel to 604 will Increase the Financial Risk to Municipalities and Private Developers in Preserving Historic Buildings**

38. In future incentive agreements for buildings with historical designations, Municipalities may lose their ability to withhold payment until full performance of a contract and make installment payments over long time horizons if the Payments travel to 604 instead of staying with LBI. Private companies will not be willing to take on large amounts of risk in rehabilitating and owning historical building if the payments they are expecting are not guaranteed. Instead, private companies may demand partial payments before full performance of the contract and be hesitant to agree to long-term installment payments.
39. The Rehabilitation Incentive Agreement is structured in a way to ensure private sector parties, namely LBI, take on the vast majority of risk in rehabilitating the Property. Sections 5.1 and 5.2 ensure that LBI would not receive any Payments until Rehabilitation Work was completed.<sup>31</sup> The Rehabilitation Incentive Agreement insulates the City from risk regarding the rehabilitation of a designated heritage property, such as cost overruns and delays.

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<sup>30</sup> Chambers Judge's Reasons at para 47 [AR Part 1 Tab 3].

<sup>31</sup> See Sections 5.1 and 5.2 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B [AR Part III vol 1 Tab 7, pg 143].

Regardless of what the rehabilitation of the Property cost LBI, the Rehabilitation Incentive Agreement ensured the City paid a defined amount to LBI for full completion of difficult construction work.

40. The City will face more financial risk if the Payments are found to belong to 604. Such a decision will signal to the private sector that installment payments on historical buildings are not guaranteed even if the contract for those payments is performed in full. Instead of being able to front-load risk onto a private company for rehabilitation of a historical site, as was the case with the Rehabilitation Incentive Agreement, the City may be forced to make guaranteed payments up front, before any construction begins.
41. The Rehabilitation Incentive Agreement allows the City to make the Payments over a number of tax years and avoid any large, lump-sum payments that would overly burden the City in any given year. This allows the City to engage in long-term financial planning and to spread the cost impact of designating a building a municipal historic resource over time.
42. The assignment of the Payments to 604 may have the unintended consequence of discouraging the preservation of historic buildings. The City may face shorter payment time frames and less overall ability to preserve historical buildings if the Payments are found to belong to 604. If payments for rehabilitation work are assigned as positive covenants, companies involved in historically designated properties may be hesitant to agree to any set of installment payments. Instead, they might ask for one lump sum payment upon performance of a contract. This would not allow municipal governments to spread the payments over multiple tax years and force them to amass money for these projects in shorter time frames. This could discourage municipalities from designating buildings heritage sites due to financial pressures and increased risk.

## **Conclusion**

43. LBI is the rightful recipient of the Payments. The Payments are not tied to the Property through the Judicial Sale nor a positive covenant that can be enforced against the City by the



building owner. The Rehabilitation Incentive Agreement should be read as a completed contract between two parties, LBI and the City. The Rehabilitation Incentive Agreement entitles LBI to receipt of the Payments upon completion of the Rehabilitation Work.<sup>32</sup> 604 is a stranger to the Rehabilitation Incentive Agreement and did not complete any of the Rehabilitation Work.

44. The Master's and Chambers Judges interpretation of the Rehabilitation Incentive Agreement and Judicial Sale Agreement are questions of mixed fact and law entitled to deference and reviewable on a standard of palpable and overriding error.<sup>33</sup> Master Laycock and Justice Jeffrey both found that LBI is entitled to the Payments.<sup>34</sup>

## IV. Costs

45. The Respondents request its costs of this Appeal and its costs in all courts below.

## V. Orders Sought

46. The Respondents seek an Order:

- a.* Allowing the appeal and setting aside the Judgment of the Court of Appeal of Alberta,
- b.* Declaring that LBI of the Respondents as entitled to any payments due under the Rehabilitation Incentive Agreement; and,

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<sup>32</sup> See Sections 5.1 and 5.2 of the Rehabilitation Incentive Agreement in the Richardson Affidavit, Exhibit B [**AR Part III vol 1 Tab 7, pg 143**].

<sup>33</sup> *Sattva* [**Appellant's Authorities Tab 11**].

<sup>34</sup> Master's Reasons at para 52 [**AR Part 1 Tab1**]; Chambers Judge's Reasons at para 70 [**Chambers Judge's Reasons**][**AR Part 1 Tab 3**].

- c. Awarding LBI, Neil John Richardson, Hugh Daryl Richardson and Heritage Property Corporation all costs before this Court and in the Courts below.

**Respectfully Submitted:** January 7<sup>th</sup>, 2015

**Willow Park Law Office**

Per:\_\_\_\_\_

**Toby D. Schultz, Barrister and Solicitor  
Tanner Oscapella, Student-at-Law**

**Counsel to the Respondent, The Lougheed Block Inc.**

## VI. Table of Authorities

Jurisprudence	Paragraph No.
<i>Creston Moly Corp v Sattva Capital Corp</i> , 2014 SCC 53, 373 DLR 393.	13, 44.

## VII. Legislation at Issue

### A. *Historical Resources Act*, R.S.A. 2000, c. H-9

#### **Compensation**

**28(1)** If a bylaw under section 26 or 27 decreases the economic value of a building, structure or land that is within the area designated by the bylaw, the council shall by bylaw provide the owner of that building, structure or land with compensation for the decrease in economic value.

#### **Condition or covenant on land**

**29(1)** A condition or covenant, relating to the preservation or restoration of any land or building, entered into by the owner of land and

(a) the Minister,

(b) the council of the municipality in which the land is located,

(b) the Foundation, or

(d) an historical organization that is approved by the Minister, may be registered with the Registrar of Land Titles.

(2) When a condition or covenant under subsection (1) is presented for registration, the Registrar of Land Titles shall endorse a memorandum of the condition or covenant on any certificate of title relating to that land.

(3) A condition or covenant registered under subsection (2) runs with the land and the person or organization under subsection (1) that entered into the condition or covenant with the owner may enforce it whether it is positive or negative in nature and notwithstanding that the person or organization does not have an interest in any land that would be accommodated or benefited by the condition or covenant.