Case Name:

Strata Plan VR 2213 v. Duncan

Between
The Owners Strata Plan VR 2213, Claimant, and
Terry Ronald Duncan & John Robert Owen, Defendants

[2010] B.C.J. No. 1245

2010 BCPC 123

File No. 0928638

Registry: Vancouver

British Columbia Provincial Court
Vancouver, British Columbia

D.W. Yule J.P.

Heard: June 9, 2010.
Judgment: June 21, 2010.

(50 paras.)

Counsel:

Counsel for the Claimant: James Jamieson.

Appearing on their own behalf: Terry Ronald Duncan & John Robert Owen.

REASONS FOR JUDGMENT

D.W. YULE J.P.:--

NATURE OF DISPUTE

1 The Claimant, The Owners Strata Plan VR 2213 (the "**Strata Corporation**"), claim against the Defendants, Terry Ronald Duncan and John Robert Owen (the "Unit Owners"), for the sums of $375.00 for unpaid levied move in fees and $800.00 for strata fines imposed. Underlying the monetary claims however is an issue of principle, namely whether the Unit Owners are required to give

notice to the **Strata Corporation** whenever there is a change in the persons using the Unit Owner's unit. Pursuant to one of the **Strata Corporation's** bylaws, the giving of notice triggered the application of a move-in fee.

BACKGROUND CIRCUMSTANCES

2 The Unit Owners own unit 604 in the building known as The Carlyle, at 1060 Alberni Street, Vancouver, B.C. Since 2000, the Unit Owners have rented their fully furnished suite to Dunowen Properties Ltd. ("Dunowen") by a residential lease pursuant to the *Residential Tenancy Act* of B.C. The current lease for the term from June 1, 2008 to June 30, 2010 is Defendants' document B to the Defendants' Statement of Facts. Dunowen was at one time owned by the Unit Owners, but they sold the company in February 2006 to a third party. Pursuant to the provisions of the *Strata Property Act*, the Unit Owners provided to the **Strata Corporation** the requisite notice (then Form D) when they initially leased the unit to Dunowen, and subsequently have provided a renewed form (Form K) after the events giving rise to this claim occurred. It is common ground that Dunowen is in the business of providing accommodation to others for a fee and uses unit 604 for this purpose. The Unit Owners assert, and there is no evidence to the contrary, that Dunowen employs a Licensing Agreement to govern the use of unit 604 by its clients. The form of licensing agreement used is not in evidence.

3 At the annual general meeting of all unit owners on April 25, 2001, the bylaws were amended to add a fee of $75.00 for each move-in. Section 42 of the bylaws dealt with the subject matter of moving. The bylaw prior to its amendment provided, *inter alia*, that a resident must give prior notice of all moving arrangements to site office staff, must ensure that the elevator service key is used to control the elevator so the doors are not jammed open, and must ensure that the lobby doors are not left open, ajar or unattended. To these provisions the amendment passed in April 2001 added the following:

> "42.5 All move-ins shall be assessed a $75.00 fee for each move-in."

4 The Minutes of the April 2001 AGM record some of the discussion that ensued. There was an objection that the motion was not fair to owners who rent their units out as furnished, as the tenants of these units do not move in large amounts of furniture. Despite this objection, the amendment was passed. During the discussion, it was stated that the bylaw was an attempt to defray the costs of ongoing wear and tear created by moving. In response to a question as to how the fee would be applied, it was stated that the charge would be applied when there was a transfer of ownership of a strata lot, or upon receipt of a Form K showing a change of tenant, or whenever it was ascertained that a tenant change had taken place as reported by the site staff.

5 The Unit Owners have obtained statements (documents R and S to the Defendants' Trial Statement) from two former Strata Council members who were on the Strata Council at the time of the April 2001 AGM. Ms. Sharon Mack was Council Chairperson at the time and Mr. Richard Roy was a Council Member. Both individuals in their signed statements provide similar evidence, namely that the move-in fee was intended to compensate the **Strata Corporation** for wear and tear on common areas of the building and for additional administration costs of the participation of site staff to facilitate move-ins. The charge was never intended to be applied to a change of occupant of a furnished suite, where the occupant was only arriving with suitcases. Mr. Roy notes that while he was on Council, a number of unit owners were companies who maintained furnished suites for use by their employees when in Vancouver and that type of rotation was not assessed a move-in fee. It

appears to be common ground that between 2001 and 2007, the **Strata Corporation** did not attempt to assess the Unit Owners a move-in fee when there was a change in occupant at unit 604.

6 In 2007/2008 there was a change in the composition of the Strata Council Members, as well as a change in the property manager at The Carlyle. The new Council instituted a review of the overall operations of the **Strata Corporation.** According to Mr. Jamieson, one of the issues of concern was that a large number of fobs, used to access the building, were unaccounted for. The dispute between the **Strata Corporation** and the Unit Owners appears to have begun in April 2008 when all of the fobs for unit 604 were unilaterally deprogrammed without prior warning. The Unit Owners immediately complained of this action and some of the fobs for unit 604 were promptly reactivated. However, it appears the **Strata Corporation** then took the position that the Unit Owners must comply with the requirement of giving notice to the **Strata Corporation** whenever there was a change of the person occupying unit 604. At around the same time, May 2008, the **Strata Corporation** charged the Unit Owners a $75.00 move-in fee with respect to the then current occupant of unit 604, and took the position that in future a move-in fee and delivery of a Form K would be required with every change in the occupancy of unit 604. The Unit Owners objected to paying any move-in fee, which they asserted was not authorized by the bylaw amendment, which was intended only to apply to persons moving in furniture and full personal possessions. The Unit Owners objected to delivering a Form K because it was one of the circumstances that triggered the move-in charge. The parties corresponded and communicated largely through the property manager, Ascent Real Estate Management Corporation throughout 2009, mostly to no avail. The **Strata Corporation** imposed move in levies when they discerned that there was a change of occupant and imposed fines. The Unit Owners objected to both assessments and fines and demanded full particulars of the alleged changes in occupancy.

7 At the March 2010 AGM, the move in bylaw was amended. An amendment was proposed to charge an owner a fee of $150.00 each time a new owner or tenant moved into a suite. The fee was to be payable regardless of whether or not the tenant moved any furniture into the suite. That proposed amendment was defeated and a motion carried by an overwhelming majority recast bylaw 42.5 to read as follows:

> "An owner must pay a move in fee of $150.00 each time a new owner or tenant moves into a suite where movement of furniture is involved. An owner must pay a move in fee of $50.00 each time a tenant moves into a suite where only luggage is moved. There are no move out fees."

8 The Unit Owners in their discussions with the property manager had previously proposed a differential move in fee depending on whether the movement of furniture was involved. Their proposal was accepted in essence by the majority of the unit owners at the most recent AGM.

LEGISLATION AND BYLAWS

9 Bylaw 6 - Duty to Inform **Strata Corporation** provides as follows:

"6.1 An owner must notify the **Strata Corporation:**

(a) within two weeks of becoming an owner, of the owner's name, strata lot number and mailing address outside the strata plan, if any; and

(b) within 2 weeks of renting out the suite by completing and submitting a 'Notice of Tenant's Responsibilities Form K' to the Building Manager or Property Agent.

This bylaw applies only to strata lots 2-147.

6.2 On request by a **Strata Corporation,** a tenant must inform the **Strata Corporation** of the tenant's name and the strata lot which the tenant occupies."

10 The *Strata Property Act* S.B.C. 1998, c. 43 s. 146 provides a similar provision. It says:

"14 6 (1) Before a landlord rents all or part of a residential strata lot, the landlord must give the prospective tenant

(c) the current bylaws and rules, and

(d) a Notice of Tenant's Responsibilities in the prescribed form.

(2) With 2 weeks of renting all or part of a residential strata lot, the landlord must give the **strata corporation** a copy of the notice signed by the tenant."

The prescribed form is Form K.

11 Part 1 of the *Act* contains various definitions.

12 "Tenant" means a person who rents all or part of a strata lot, and includes a subtenant, but does not include a leasehold tenant in a leasehold strata plan as defined in section 199.

13 "Occupant" means a person, other than an owner or tenant, who occupies a strata lot.

14 There is no definition of "subtenant" or "visitor".

15 The *Act* requires a **Strata Corporation** to keep certain records. These records include a list of owners and tenants (s. 35(1)(c)(i) and (iii)). The **Strata Corporation** must make available to owners or tenants (or persons authorized in writing by owners or tenants) the records and documents that **Strata Corporation** is required to maintain.

16 The *Act* provides that the **Strata Corporation** may fine an owner or a tenant in certain circumstances. S. 130 provides as follows:

"13 0 (1) The **strata corporation** may fine an owner if a bylaw or rule is contravened by

(a) the owner,
(b) a person who is visiting the owner or was admitted to the premises by the owner for social, business or family reasons or any other reason, or
(c) an occupant, if the strata lot is not rented by the owner to a tenant.

(2) The **strata corporation** may fine a tenant if a bylaw or rule is contravened by

(a) the tenant,
(b) a person who is visiting the tenant or was admitted to the premises by the tenant for social, business or family reasons or any other reason, or
(c) an occupant, if the strata lot is not sublet by the tenant to a subtenant."

17 The *Act* makes an owner or landlord responsible in some circumstances for fines and costs incurred by a tenant. S. 131 provides as follows:

"13 1 (1) If the **strata corporation** fines a tenant or requires a tenant to pay the costs of remedying a contravention of the bylaws or rules, the **strata corporation** may collect the fine or costs from the tenant, that tenant's landlord and the owner, but may not collect an amount that, in total, is greater than the fine or costs.

(2) If the landlord or owner pays some or all of the fine or costs levied against the tenant, the tenant owes the landlord or owner the amount paid."

18 The *Act* prohibits the imposition of user fees in some circumstances. S. 110 provides as follows:

"A **strata corporation** must not impose user fees for the use of common property or common assets by owners, tenants or occupants, or their visitors, other than as set out in the regulations."

19 The *Act* provides that notice must be given to an owner or tenant where recovery of money is sought. S. 112 provides as follows:

"11 (1) Before suing or beginning arbitration to collect money from an owner

2 or tenant, the **strata corporation** must give the owner or tenant at least 2 weeks' written notice demanding payment and indicating that action may be taken if payment is not made within that 2 week period."

20 Finally, the Schedule of Standard of Bylaws annexed to the *Act* provides in s. 3 that an "owner, tenant, occupant or visitor" must not use the strata lot or common property in specified ways. In addition, s. 7 provides that an "owner, tenant, occupant or visitor" must allow a person authorized by the **strata corporation** to enter the strata lot in an emergency without notice and at a reasonable time on 48 hours' written notice in order to carry out the **strata corporation's** maintenance and repair responsibilities.

SUBMISSIONS OF THE PARTIES

21 The **Strata Corporation** says that any person who occupies unit 604 pursuant to any arrangement with Dunowen is a tenant for the purposes of the *Strata Property Act* and accordingly, the Unit Owners' obligation (or Dunowen's obligation as tenant) to provide a Form K is triggered. In this regard, they rely upon a legal opinion provided by their counsel. A portion of that legal opinion is excerpted in the letter from Ascent Real Estate Management Corporation to the Unit Owners dated July 29, 2009 (document O to the Defendants' Trial Statement). The referenced opinion is as follows:

> "A 'tenant' is defined in s. 1(1) of the *Strata Property Act* (the "SPA") as a person who rents all or part of a strata lot and includes a subtenant. Based on this definition, anyone who rents a unit from the owners, or from Dunowen, is a tenant for the purposes of the SPA, even if they are short term tenants. The SPA does not distinguish between short term and long term tenants, or subtenants."

22 The **Strata Corporation** gives several reasons, apart from collecting the move-in fee, as to why they should have the identity of each unit occupant disclosed to them. One reason is security, and the desirability of keeping strict control of the fobs issued with respect to each unit. Another reason is the "good neighbour" principle, that it is desirable for persons living at The Carlyle to know who else is residing there and who might be a stranger. Another reason is a concern that if each of the individual units were to have a series of 10 to 12 occupants per year coming and going, there would be both excessive wear and tear on the building facilities and it would transform The Carlyle into a wholly different kind of place in which to live. The Strata Council stresses that it is not a money making venture and in bringing this action it is acting after having obtained advice from both its solicitors and its property manager.

23 With respect to the application of the move in fee, the **Strata Corporation** says that the fee was explicitly stated to be applicable when a Form K was filed, and a Form K should have been filed by the Unit Owners with every change of occupant. In this case, the **Strata Corporation** relies upon the alternative explicit intent to have the fee payable where a tenant change that should have been reported is discovered by site staff. The **Strata Corporation** also submits that there is nothing in the bylaw amendment in April 2001 that restricts the move-in fee to a change of occupant of unfurnished units. The issue of the disparity between charging the fee to furnished units as well as to unfurnished units was discussed at the time the bylaw was passed, but that concern did not make its way into the bylaw amendment that was passed.

24 The Unit Owners say that there has only ever been one tenant of their fully furnished unit 604, namely Dunowen. The Strata Council was provided with a Form D (the predecessor to the current form K) in December 2000 (document C to the Defendants' Trial Statement). Subsequently, in April 2008 the Unit Owners provided a replacement form K (document F to the Defendants' Trial Statement). Thus, the Unit Owners say they have complied with their obligations under both the bylaw and the *Act*. The persons who occupy unit 604 through the licensing agreement with Dunowen are licensees and not subtenants. Dunowen is itself responsible for all of the utilities. There has never been a security issue or other complaint reported to the Unit Owners arising out of the conduct of one of Dunowen's clients. All of Dunowen's clients are said to occupy the premises for more than 30 days and in some cases for up to a year.

25 With respect to the imposition of the move-in fee, the Unit Owners assert that the bylaw was clearly intended to apply only to a change of occupancy of unfurnished units because of the reference to defraying the costs of ongoing wear and tear. The Unit Owners also rely upon the evidence of Ms. Mack and Mr. Roy regarding the intended application of the move-in fee, as well as the fact that no attempt was made to apply the fee to changes of occupancy of unit 604 between 2001 and 2007.

26 Finally, the Unit Owners object to the imposition of fees and fines on the basis that the **Strata Corporation** has not followed the mandated procedures under the *Act*, particularly s. 135. They complain particularly that they were not provided with full names and initial occupancy dates of the occupants with respect to whom the move-in fee was charged.

DISCUSSION AND ANALYSIS

27 The fundamental question is whether s. 146(2) of the *Act* and s. 6.1(b) of the bylaws apply to the circumstance in which a customer of Dunowen occupies unit 604 under a licensing agreement. Both the *Act* and bylaw speak in terms of "renting" and refer to a tenant. As noted, the definition of "tenant" in the *Act* includes a subtenant, but there is no definition of subtenant. Neither is there any definition of "rents" or "renting". It seems to me that the **Strata Corporation's** position amounts to asserting that anyone who occupies unit 604 pursuant to a commercial arrangement (thus eliminating visitors) must be considered to be a tenant for the purposes of the *Act*.

28 The parties did not provide any legal authorities during their submissions and I have conducted some research myself. The issue of units in a condominium being used on a commercial basis for the provision of short term accommodation to others has been considered in several Ontario cases, although the precise question raised in this case has not been answered.

29 In *Metropolitan Toronto Condominium Corp. No. 850 v. Oikle* (1994 CarswellOnt 763) a unit owner, Ms. Oikle leased her unit to Executive Suites Ltd., which was in the business of leasing condominium units to persons who would otherwise stay in hotels. The court found that Ms. Oikle and Executive Suites Ltd. were in breach of provisions that required units to be used only as private single family residential dwellings and for no other purpose and prohibiting any commercial use with respect to any unit.

30 In *Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp. No. 1280* (2001 CarswellOnt 3203), Skyline Executive Properties Inc. was the owner of multiple units in a luxury residential condominium building, which it leased to persons as an alternative to hotel accommodation. The **strata corporation** passed rules prohibiting the occupancy of the unit for more than one

period of less than six months in any particular period of 12 consecutive months. The court upheld the validity of the rules.

31 In *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan* (2001 CarswellOnt 2495), multiple unit owners in a luxury condominium building leased their units to Glen Grove Residences Inc., which was in the business of offering short term rentals to transient visitors. The court upheld a rule that required a lease or tenancy to be for a term of not less than three months and prohibited occupancy for transient or hotel purposes. The actual wording of rule 7.01 was as follows:

> "7.01 - A lease or tenancy of any unit shall be for a term of not less than three months. No unit shall be occupied under a lease, sub-lease, contract, or license arrangement for transient or hotel purposes. All tenancies of units shall be in writing and a copy must be filed with the management office. No roomers or boarders are permitted."

32 The significance of this rule for our purposes is that it specifically makes reference to occupancy under license arrangements as an addition to leases or subleases.

33 As noted previously, none of the above authorities address directly whether the occupancy is by a lease as opposed to licensing arrangement. This issue, however, has been addressed in other contexts. In *R. v. Boos* (1978) 7 B.C.L.R. 155 (B.C. County Court), the Crown appealed against the acquittal of the Defendants on three counts of breaching the *Landlord and Tenant Act* by unlawfully entering the tenant's premises, unlawfully terminating the tenancy, and unlawfully changing the locks. The "tenant" was a long time resident of the Columbia Hotel. The real issue arising on the appeal was whether or not the *Landlord and Tenant Act* applied. If Mr. Borgstad was a tenant, it did. If he was a licensee, the premises were exempted from the operation of the *Act*.

34 At paragraph 10, the court said:

> "The law relating to the distinction between the two shows that a tenancy must involve the grant of exclusive possession of the premises to the tenant, but that even with exclusive possession a tenancy need not necessarily exist. One must look to the intention of the parties."

35 The court concluded that in the circumstances, there was a license arrangement and the appeal was dismissed.

36 In *Maxwell v. Brown* (1982) 35 O.R. (2d) 770 (Ontario County Court), the occupant of a rooming house was evicted in a manner that contravened the requirements of the *Landlord and Tenant Act*. The initial question was whether the *Landlord and Tenant Act* applied, or whether the relationship was that of licensor-licensee.

37 At paragraph 7, the court cited the following passage from Halsbury, Laws of England, 4th Ed. Vol. 27:

> "General principles for determining whether agreement creates lease or licence. In determining whether an agreement creates between the parties the relationship of landlord and tenant or merely that of licensor and licensee the decisive consideration is the intention of the parties. The parties to an agreement cannot, however, turn a lease into a licence merely by stating that the document is

> deemed to be a licence or describing it as such. The parties' relationship is determined by law on a consideration of all relevant provisions of the agreement; and an agreement labelled by the parties to it as a "licence" will still be held to create a tenancy if the substance of the agreement conflicts with that label. Similarly, the use of operative words ("let", "lessor" etc.) which are appropriate to a lease will not prevent the agreement from conferring only a licence if from the whole document it appears that it was intended merely to confer a licence. Primarily the court is concerned to see whether the parties to the agreement intend to create an arrangement personal in its nature or not, so that the assignability of the grantee's interest, the nature of the land and the grantor's capacity to grant a lease will all be relevant considerations in assessing what is the nature of the interest created by the transaction. In the absence of any formal document the parties' intention must be inferred from the circumstances and the parties' conduct.
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> ...
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> Creation of licence. A licence is normally created where a person is granted the right to use premises without becoming entitled to exclusive possession of them, or the circumstances and conduct of the parties show that all that was intended was that the grantee should be granted a personal privilege with no interest in the land. If the agreement is merely for the use of the property in a certain way and on certain terms while the property remains in the owner's possession and control, the agreement will operate as a license, even though the agreement may employ words appropriate to a lease."

38 In *Marchant v. Charters* (1977) 3 All ER 918, the court said that "the true test was the nature and quality of the occupation: whether it was intended that the occupier should have a stake in the room or whether he only had permission for himself to occupy the room personally, whether under a contract or not".

39 In the result, in the *Maxwell* case, the court concluded that the *Landlord and Tenant Act* did not apply.

40 In *Canadian Pacific Hotels Ltd. v. Hodges* (1978) 23 O.R. (2d) 577 (Ontario County Court), the Plaintiff sought to recover approximately $13,000.00 in unpaid rent respecting the use of various rooms at the Royal York Hotel. The Defendant, Hodges, had resided in various hotel rooms for 15 years. The ability of the hotel to recover so much back rent depended upon the application of the *Landlord and Tenant Act*. At paragraph 24, the court stated:

> "It is relatively easy to state the principles. In determining whether an agreement between the parties constitutes a relationship of landlord and tenant or only that of licenser and licensee, the major consideration is the intention of the parties. If there is no formal agreement, in writing or otherwise, this intention must be gathered from all of the facts and circumstances and the conduct of the parties. The fact that the agreement grants a right of exclusive possession is, while important, by no manner or means conclusive."

41 The court concluded that the *Landlord and Tenant Act* did not apply. One of the factors relied upon by the court was that the occupant Hodges had absolutely nothing which he was entitled to assign or sublet to anyone else.

42 In this case it is unfortunate that the license agreement is not in evidence. The license agreement is of course between Dunowen and occupiers of unit 604, who are not parties to this litigation. The Unit Owners previously owned Dunowen. They created the licensing arrangements. I conclude that their intent was not to create a landlord tenant relationship. Their evidence, which I accept, is that the subsequent owner of Dunowen has continued to use the same form of licensing agreement. In any event, the **Strata Corporation** has not proven that unit 604 has been rented to an occupant pursuant to a lease agreement.

43 Another reason for concluding that s. 146 of the *Act* and bylaw 6.1 do not apply to the circumstances of the use of unit 604 is that the *Act* and the bylaws both contemplate occupiers who are not tenants. As noted, occupant is defined in the *Act* to be a person other than an owner or tenant who occupies a strata lot. S. 130 of the *Act* permits an owner to be fined for a bylaw or rule infraction where the person committing the infraction is an occupant if the strata lot is not rented by the owner to a tenant. A similar provision permits the **Strata Corporation** to fine a tenant for a bylaw or rule infraction committed by an occupant if the strata lot is not sublet by the tenant to a subtenant. The Schedule of Standard Bylaws in s. 3 prohibits uses of a strata lot or common property by an "owner, tenant, occupant or visitor". S. 7 of the Schedule of Standard Bylaws requires an "owner, tenant, occupant or visitor" to allow a person authorized by the **Strata Corporation** to enter the strata lot in an emergency without notice and on 48 hours' written notice to carry out its repair and maintenance obligations. The Form K notice itself refers to a "tenant or occupant". Under the heading "Important Notice to Tenants", paragraph 3 provides that "if a tenant or occupant of the strata lot" or a visitor contravenes a bylaw or rule, the tenant is responsible. The **Strata Corporation's** bylaws 42 and 43 (the only provisions annexed to the **Strata Corporation's** Trial Statement) refer to "resident" or "visitor".

44 Accordingly, it seems to me that the scheme of the *Act* and the bylaws contemplates persons lawfully occupying units who are neither owners or tenants or subtenants. The **Strata Corporation** is entitled and required to know the identity and contact information for each unit owner and tenant and subtenant. Each unit owner and tenant is jointly liable to the **Strata Corporation** for the conduct of occupiers or visitors to their unit. That in my view is the scheme of the *Act*. It does not require a Form K to be delivered to the **Strata Corporation** whenever there is a change in the occupant using a unit, unless that occupant is a tenant or sub-tenant.

45 Accordingly, I conclude that the Unit Owners ought not to have been assessed a move-in fee because they were not required to deliver a Form K and there was no "tenant" change. Similarly, the fines levied for non-compliance with the bylaw were invalid.

46 Having reached this conclusion, I do not need to address the separate defence of the Unit Owners based on alleged failure to comply with the requirements of the *Act* before a fine may be levied.

47 Bylaw 42.5 as amended at the March 2010 AGM now provides for a different move-in fee depending on whether furniture is involved. The smaller fee is payable by an owner each time a tenant moves into a suite where only luggage is moved. The reference to delivery of a Form K has been deleted. The Unit Owners had previously offered voluntarily to provide to the **Strata Corpo-**

ration the names of new occupants of suite 604. That offer, if maintained, together with the now reduced move-in fee applicable to furnished suites would appear to satisfy the concerns expressed by the **Strata Corporation** at this hearing.

48 However, I conclude that the *Act* and bylaws as presently constituted did not require the delivery to the **Strata Corporation** of a Form K nor did the bylaw 6.1 authorize the assessment of a move-in fee in the circumstances of the change in occupancy of unit 604 as described in the evidence.

49 The **Strata Corporation's** claim is dismissed. I direct that the move-in fees and strata fines charged to the Unit Owners be reversed.

50 Because this dispute appears to have been a form of "test case" and both parties acted responsibly in bringing the matter forward for an opinion, I consider it appropriate if each side bear their own costs.

D.W. YULE J.P.

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