

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan KAS 53 v. Ireson*,
2026 BCSC 1472

Date: 20260804
Docket: S144661
Registry: Kelowna

2026 BCSC 1472 (CanLII)

Between:

The Owners, Strata Plan KAS 53

Petitioner

And:

Kenneth Ireson

Respondent

Before: The Honourable Justice Young

Reasons for Judgment

Counsel for the Petitioner:

M. D. Fischer
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Counsel for the Respondent :

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Place and Dates of Hearing:

Kelowna, B.C.
July 8 - 9 2026

Place and Date of Judgment:

Kelowna, B.C.
August 4, 2026

Introduction

[1] The petitioner Kenneth Ireson is one of two owners of strata lot 59 within Strata Plan KAS 53, the other being Gail Sisson. In a previous action, Gail Sisson applied to this court to determine who was responsible for the maintenance of her attic in strata lot 59. Her action was dismissed for want of prosecution by Justice Wilson on June 24, 2024 (*Sisson v. The Owners, Strata Plan KAS 53*, 2024 BCSC 1098 [*Sisson*]). The petitioner says that this was a final decision.

[2] Weeks after Justice Wilson's decision was released in *Sisson*, the petitioner filed a Dispute Notice against the Strata Corporation in the Civil Resolutions Tribunal ("CRT") requesting the same relief related to determining "common property" status and strata repair responsibility of the attic for SL 59 (the "Ireson CRT Claim").

[3] On or about August 15, 2025, the Strata commenced this Supreme Court Action No. by way of Petition, seeking the following relief:

1. An order that pursuant to sections 16.2 and 16.3 of the Civil Resolution Tribunal Act [SBC 2012] CH 25 (the "CRTA") that the Civil Resolution Tribunal (the "CRT") not adjudicate Civil Resolution Tribunal Dispute Notice #ST-2024-007660 (the "CRT Claim") as not being in the interests of justice and fairness for the CRT to adjudicate the claim as the subject of the claim was previously ordered dismissed by the BC Supreme Court with prejudice.
2. In the alternative or additionally, an order that the CRT Claim is quashed and the CRT is directed to dismiss the CRT Claim based on this Court's inherent jurisdiction to enforce its own Order dismissing the 2012 Notice of Civil Claim Proceeding, Penticton file No. 35551 filed by Ms. Sisson (the "2012 Proceeding") with prejudice; on the basis that the CRT Claim was commenced by Mr. Ireson on the same subject matter of the 2012 Proceeding, and Mr. Ireson was a privy of Ms. Sisson, a participant in the 2012 Proceeding throughout, and was a registered owner of the subject strata lot at the time as the 2012 Proceeding was dismissed.
3. A declaration that the CRT Claim constitutes an abuse of process and/or contempt of or breach of this Court's June 26, 2024, Order dismissing the 2012 Proceeding.

[4] I have intentionally not mentioned a counterclaim brought by Mr. Ireson on October 7, 2025 when he was self-represented. Once he had representation by legal counsel that counterclaim was withdrawn.

[5] The petitioner relies on cause of action estoppel as recently articulated by the Supreme Court of Canada in *Patrick Street Holdings Ltd. v. 11368 NL Inc.*, 2026 SCC 15 [*Patrick Street*].

[6] The respondent submits that the petitioner's plea for *res judicata*, whether by cause of action estoppel or issue estoppel, fails because the dismissal of the British Columbia Supreme Court action for want of prosecution is not a final decision made on the merits of the claim.

Procedural History

[7] There is a long procedural history leading to the dismissal in *Sisson*.

[8] By the time Justice Wilson dismissed the case for want of prosecution in *Sisson*, the litigation of the issue of the status of the attic had been ongoing for 14 years.

[9] Ms. Sisson commenced a Small Claims action, on March 8, 2010, and on August 10, 2011, Judge Shaw of the Provincial Court struck the claim because it was outside the scope of the Provincial Court's jurisdiction, confirming that the Sisson claim should be brought in the Supreme Court.

[10] Ms. Sisson filed a notice of civil claim on February 1, 2012 (the "2012 Proceeding").

[11] In or about November 2019, Ms. Sisson added the petitioner to the title of the Property.

[12] On October 8, 2020, Ms. Sisson brought a Notice of Application to add Mr. Ireson as a plaintiff to the 2012 Proceeding and sought a summary trial on the issue of the interpretation of the strata plan in relation to the status of the attic being common property or part of the strata lot. That application was never reset for hearing. Mr. Ireson never became a party to the 2012 Proceeding but did assist Ms. Sisson with the litigation throughout. The petitioner says that this makes him "in privity" with her.

[13] Justice Wilson dismissed the 2012 Proceeding on June 24, 2024 for want of prosecution. He did not assess the merits of the claim.

[14] On July 11, 2024, the respondent commenced the Ireson CRT Claim seeking a determination as to the ownership of the attic above unit 59, a definition of what constitutes common property of the building envelope, and an order that the Strata Corporation maintain the attic of unit 59 as part of the building envelope. He sought a clear definition of what constitutes the structural elements in building envelope of the attic as it pertains to Strata. He further sought an order that the Strata Plan for K53 be corrected to show that the attics are common property by adding the second floor ceiling line on the side view to reflect “as built”. He wanted a clear and concise definition of the boundaries of his strata unit.

[15] The Strata Corporation filed a response on February 17, 2025 taking the position that the dispute should be dismissed by the CRT in its entirety because it is statute barred pursuant to s. 6(1) of the *Limitation Act*, constitutes an abuse of process, is estopped and barred from proceeding based on the dismissal of the claim in BCSC and is beyond the jurisdiction of the CRT based on the relief sought. I note at the hearing before me the petitioner no longer relies on a limitations defence.

[16] On March 19, 2025, the CRT issued a preliminary decision finding that it was entirely possible that Justice Wilson’s order in *Sisson* intended to apply to both owners of strata lot 59 (para. 12). Furthermore, the CRT ordered that the Ireson CRT Claim be paused until the earlier of the date the CRT receives a copy of a B.C. Supreme Court decision regarding whether the CRT can adjudicate the claim or within six months of the date of the decision (para. 15). On January 26, 2026, the CRT issued another preliminary decision extending the March 19, 2025 decision for another six months (para. 28).

[17] On January 26, 2026, a further preliminary decision was made by the CRT, whereby the CRT issued a further pause of the New CRT Action until the earlier of:

- a) The date the CRT receives a copy of a BCSC decision about whether this CRT dispute can proceed, or

- b) July 23, 2026, which is 6 months from the date of the decision.

[18] In the January 26, 2026 preliminary decision the CRT held the following:

- 21. Based on the above court decisions, I find that the order dismissing Ms. Sisson's BCSC action for want of prosecution does not necessarily preclude Ms. Sisson or Mr. Ireson from starting a new dispute about the same issues, subject to any applicable limitation period. That is, at this preliminary stage, I find this CRT dispute is *not res judicata* or an abuse of process.
- 22. I acknowledge the strata's argument that Justice Wilson's reasons should be interpreted as intending to bring a final resolution to the matters that were the subject of BCSC action. However, I decline to make a finding about Justice Wilson's intention. Rather, I will defer to the court's interpretation in the petition proceedings about whether Justice Wilson intended to preclude SL59's owners from pursuing a CRT dispute about the attics.

The Law

[19] Sections 16.2 and 16.3 of the *Civil Resolution Tribunal Act* ("CRTA") provide as follows:

16.2 (1) Subject to subsection (2), the court may order that the tribunal not adjudicate a claim that is or purports to be in one of the claim categories if

- a) the tribunal does not have jurisdiction to adjudicate the claim, or
- b) it is not in the interests of justice and fairness for the tribunal to adjudicate the claim.

(2) Subsection (1)(b) does not apply if the tribunal has exclusive jurisdiction in respect of the claim.

16.3 (1) For the purposes of sections 16.1(1) and 16.2(1), when deciding whether it is in the interests of justice and fairness for the tribunal to adjudicate a claim, the court may consider the following:

- a) whether an issue raised by the claim or dispute is of such importance that the claim or dispute would benefit from being adjudicated by that court to establish a precedent;
- b) whether an issue raised by the claim or dispute relates to a constitutional question or the *Human Rights Code*;
- c) whether an issue raised by the claim or dispute is sufficiently complex to benefit from being adjudicated by that court;
- d) whether all of the parties to the claim or dispute agree that the claim or dispute should not be adjudicated by the tribunal;

- e) whether the claim or dispute should be heard together with a claim or dispute currently before that court;
- f) whether the use of electronic communication tools in the adjudication process of the tribunal would be unfair to a party in a way that cannot be accommodated by the tribunal.

(2) For the purposes of section 16.1(2), when deciding whether it is in the interests of justice and fairness for the tribunal to make the determination referred to in that subsection, the court may consider the principle of proportionality.

[20] The petitioner has not taken the position that the CRT does not have jurisdiction. The Court has concurrent jurisdiction over strata claims with the CRT, however, ss. 16.1, 16.3 and 16.4 of the *CRTA* “impose a rebuttable presumption” that the Court will dismiss a strata property claim in favour of the CRT exercising its specialized expertise, unless it is not in the interests of justice and fairness for the CRT to do so.

[21] The petitioner relies upon s. 16.2(2) for authority for the Court to prevent the respondent from proceeding with the CRT Claim on the basis that it is not in the interests of justice and fairness for the tribunal to adjudicate the claim. However, ss. 16.2 and 16.3 of the *CRTA* provide solely for a basis for the Court to assume jurisdictions over matters before the CRT, rather than a mechanism to stay such proceedings entirely: *Canadian Ramgarhia Society v. Panesar*, 2022 BCSC 751 at para. 29.

[22] At paras. 75 and 76 of the Supreme Court of Canada’s decision in *Patrick Steet*, the majority endorsed the wording of the fourth prong of the test as initially conceptualized “to bar relitigation of any matters that *were* raised or *could* have been raised with reasonable diligence in the prior proceeding”.

[23] This is further clarified at para. 102, where it is stated that the asserted “limited participation” by Patrick Street in the prior proceeding was not relevant to the correct determination that “a party is not bound to an outcome it did not have a reasonable chance to advocate for in the same capacity as the one in which it is estopped”. The test is whether there was mutuality of interest and effort.

[24] The criteria for establishing cause of action estoppel were previously summarized by the British Columbia Court of Appeal in *Re Cliffs Over Maple Bay Investments Ltd.*, 2011 BCCA 180 [*Cliffs*] at para. 28, confirmed in *Patrick Street* at para. 77:

1. There must be a final decision of a court of competent jurisdiction in the prior action [the requirement of “finality”];
2. The parties to the subsequent litigation must have been parties to or in privity with the parties to the prior action [the requirement of “mutuality”];
3. The cause of action and the prior action must not be separate and distinct; and
4. The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.

[25] In *Erschbamer v. Wallster*, 2013 BCCA 76 at para. 12 the B.C. Court of Appeal set out the two forms of res judicata:

[12] The general principles of the doctrine of *res judicata* were reviewed by this Court relatively recently in *Cliffs Over Maple Bay*. The doctrine has two aspects, issue estoppel and cause of action estoppel. In brief terms, issue estoppel prevents a litigant from raising an issue that has already been decided in a previous proceeding. Cause of action estoppel prevents a litigant from pursuing a matter that was or should have been the subject of a previous proceeding. If the technical requirements of issue estoppel or cause of action estoppel are not met, it may be possible to invoke the doctrine of abuse of process to prevent relitigation of matters.

[26] The Honourable Chief Justice Wagner of the Supreme Court of Canada writing for the majority in *Patrick Street* defined *res judicata* in the following terms:

[32] *Res judicata* is one of several common law doctrines — including the doctrine of collateral attack and the doctrine of abuse of process by relitigation — that exist to prevent abuse of the judicial decision-making process (*Danyluk*, at para. 20; *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 22). The doctrine provides that a dispute, **once decided finally between parties**, is not subject to relitigation by those parties (*Danyluk*, at para. 20; *Hoque v. Montreal Trust Co.*, 1997 NSCA 153, 162 N.S.R. (2d) 321, at para. 21).

[Emphasis added.]

[27] The doctrine of abuse of process by relitigation is different from *res judicata*, whereby the doctrine of abuse of process derives from a Court's "inherent jurisdiction to manage its own procedures and it applies based on a judge's appreciation of the impact of relitigation on the reputation of the administration of justice." Abuse of process is invoked where the strict preconditions to apply one of the branches of *res judicata* are not met, "but where permitting relitigation of an issue or cause of action would nonetheless constitute a misuse of a court's procedures". The Supreme Court of Canada was clear in *Patrick Street* at para. 43. that abuse of process by relitigation is to be "applied as a last resort to protect the reputation of the administration of justice".

Petitioner's submission

[28] The petitioner submits that Ms. Sisson and Mr. Ireson have both had ample opportunity to bring a hearing on the merits of the cause of action regarding the ownership and responsibility of the attic of strata lot 59 but Ms. Sisson was found by Justice Wilson to have failed to bring that hearing within reasonable diligence in the 2012 Proceeding. Mr. Ireson elected not to complete an application to be added as a party despite being centrally and continuously involved. The petitioner submits that Mr. Ireson was a privy to the proceeding.

[29] The first element for cause of action estoppel requires there be a final decision of a court on the prior action (*Cliffs* at para. 28 *Patrick Street* at para. 97). The petitioner submits it is clear from Justice Wilson's decision in *Sisson* that it was intended to be a final determination which prohibits any further proceedings regarding the same issue or cause of action.

[30] In response to Mr. Ireson's submission that *res judicata* does not apply to this dismissal for want of prosecution, the petitioner relies on *0790482 B.C. Ltd. v. KBK No. 11 Ventures Ltd.*, 2021 BCSC 258 where the court found dismissal of an action is final which gives the plaintiff a right to appeal. He also refers to *Boucher v. Garnett*, 2026 BCSC 746 [*Boucher*] at para. 51 where the court made a

determination that dismissal for want of prosecution was a final decision dismissing a claim and therefore cause of action estoppel applied.

[31] In *Timleck v. Beltrano*, 2014 ONCA 585 [*Timleck*] the Ontario Court of Appeal found that dismissal for want of prosecution was considered a final order. This was a complicated family law case where the appellant did not perfect her appeal although given ample time to do so and applied instead to the trial judge to set aside the trial judgment. The trial judge dismissed her application for want of prosecution. She had been ordered to obtain the transcripts of the trial and had not done so, and the Ontario Court of Appeal found that was a final order although never heard on the merits.

[32] In *Marché D'Alimentation Denis Thériault Ltée v. Giant Tiger Stores Limited*, 2007 ONCA 695 [*Marché*] at para. 38 the Ontario Court of Appeal said:

... Even when the order dismissing the action was made for delay or default and not on the merits, and even when the party relying on the order could still defend itself despite the delay, it seems to me that at some point the interest in finality must truck the opposite party's plea for an indulgence.

[33] The petitioner submits that Justice Wilson dismissed the claim without hearing it on its merits with the clear intention of concluding all litigation in this dispute when he said "there comes a time when the defendant is entitled to no longer be the subject of outstanding litigation, whether that litigation is resolved in its favour or not.": *Sisson* at para. 62.

[34] The petitioner says that the second element for cause of action estoppel requires that the parties in the subsequent litigation be the same or privy with the parties to the prior action: *Cliffs* at para. 28 and *Patrick Street* at para. 77.

[35] In *Giles v. New Westminster Savings Credit Union*, 2006 BCSC 1600 affirmed by the B.C. Court of Appeal 2010 BCCA 282, the author of *The Doctrines of Res Judicata in Canada* described a privy as follows at para. 45:

Before a person can be a privy of a party there must be community or privity of interest between them, or a unity of interest between them. They cannot be different in substance. Privity can be of one blood, title or interest. A person

who is privy in interest to a party in an action and has notice of that action is equally bound by the findings in that action. A privy is a person who has a right to participate with the party in the preceding or who has a participatory interest in its outcome. A person who has no right to participate as a party in the proceeding lacks the due process requirement to make a finding of privy of interest. To determine whether a person has a participatory interest in the outcome of the proceeding is to determine whether the outcome could affect the liability of that person. Privy requires parallel interest in the merits of the proceeding, not simply as a financial interest in the result. However a non-party who enters into a formal agreement with the party in the proceeding for disposing of the proceeds is a privy of that party bound by the first proceeding.

[36] The petitioner submits that Mr. Ireson was participatory in all four proceedings (the petitioner includes the counterclaim as a proceeding). Four years before Mr. Justice Wilson dismissed the notice of civil claim in 2024 Mr. Ireson had been added to the title of strata lot 59 and therefore had common interests with Ms. Sisson.

[37] Mr. Ireson has a *bona fide* interest in strata lot 59. He established that interest well in advance of the circumstances in which Justice Wilson considered it appropriate to dismiss the claim with finality in 2024.

[38] Mr. Ireson does not deny that he was privy in his amended response to petition nor in his affidavit.

[39] Mr. Ireson made it clear in his response that he acted as Ms. Sisson's agent throughout the previous proceeding. He is not a lawyer and he was concerned about a potential claim against him under the *Legal Profession Act*. Mr. Ireson was only added to the property title in an effort to avoid the *Legal Profession Act* claim against him. In Mr. Ireson's initial response to petition filed October 1, 2025 at para. 29 he stated "in November 2019 Ms. Sisson had Mr. Ireson added on title [to] her strata property for fear that Mr. Fischer [counsel for the Strata Corporation] would delay her case again by starting an action against Mr. Ireson."

[40] The petitioner submits that the Ireson CRT Claim is duplicative of the 2012 Proceeding. For cause of action estoppel to apply the subsequent action must arise from the same relationship between the parties on the same subject matter of the

initial proceeding: *Patrick Street* at para. 143. In both actions the relief sought is to have the status of the attic declared common property.

[41] The petitioner submits that the final element for cause of action estoppel is that the basis of the cause of action and subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence: *Cliffs* at para. 28. There were many opportunities for Ms. Sisson to advance the 2012 Proceeding. She could have completed her efforts to have Mr. Ireson added as a party and could have argued the status of the attic any time between filing the 2012 Proceeding and Justice Wilson's decision, however, she did not exercise any reasonable diligence in doing so.

[42] The petitioner also relies on the doctrines of abuse of process which is often invoked when the strict preconditions to apply one of the branches of *res judicata* are not met but where permitting relitigation of an issue or cause of action would nonetheless constitute a misuse of the court's procedures: *Patrick Street* at para. 43.

Respondent's submissions

[43] The respondent submits that the issue of whether the Ireson CRT Action is *res judicata* has been decided by the CRT in the January 26, 2026 preliminary decision which said:

Based on the above court decisions, I find that the order dismissing Ms. Sisson's BCSC action for want of prosecution does not necessarily preclude Ms. Sisson or Mr. Ireson from starting a new dispute about the same issues, subject to any applicable limitation period. That is, at this preliminary stage, I find this CRT dispute is not *res judicata* or an abuse of process.

[44] The petitioner submits that the January 26 preliminary decision was not intended to be anything other than a preliminary determination on a topic deferred for subsequent consideration by the B.C. Supreme Court. The adjudicator said she is not seized of the dispute and her findings in the preliminary decision do not bind other CRT team members making subsequent decisions in this dispute. The petitioner submits if it is not intended to bind subsequent consideration by the CRT it

cannot be interpreted as being intended to bind the court. The CRT's finding that this issue has not raised *res judicata* or an abuse of process was made at a preliminary stage only.

[45] When dealing with the issue of the precedential value of CRT decisions, the respondent submits that the CRT decision in *Lemire v. The Owners, Strata Plan K 53*, 2022 BCCRT 1051 [*Lemire*], in which the CRT found in favour of the Strata Corporation on a similar issue is also not binding on the CRT or the Court. *Lemire* relates to a different unit, but it is in the same development. The CRT made a finding that the attic was strata property but the issue was not in dispute and there is no discussion by the CRT on how it arrived at that finding. Accordingly it did not make a decision on the merits of the issue of the status of the attic.

[46] The respondent submits that the petitioner's plea for *res judicata* fails because the dismissal of the BCSC action for want of prosecution is not a final decision made on the merits of the claim. The Supreme Court of Canada was clear that *res judicata* applies where there is a final determination of a matter on its merits *Patrick Street* at para. 32.

[47] This is a misquote. *Patrick Street* says the doctrine provides that a dispute, once decided finally between parties, is not subject to relitigation. It does not make reference to decisions on its merits.

[48] The respondent relies on *Canadian National Railway Co. v. The Corporation of the City of Kitchener*, 2025 ONSC 73 at para. 25:

In my view, the preferable approach is to limit cause of action estoppel and issue estoppel to cases where there has been a determination on the merits. The concept of *res judicata* literally refers to a matter that has been adjudicated. Justice Myers did not adjudicate upon any of the causes of action or issues that CN raised in the 1989 action. Rather, what Justice Myers decided was that the 1989 action could not be tried fairly given the lapse of time.

[49] The respondent also relies on *Brkich v. Rasheed*, 2021 BCSC 531 [*Brkich*], the Court dealt with a situation where the plaintiff sought a determination before the

Human Rights Tribunal (“HRT”) and by way of a Notice of Civil Claim for wrongful termination. The matter before the HRT was dismissed for delay and non-compliance with its rules. The Court in this decision was asked to strike the NOCC on the basis of *res judicata* and abuse of process. The Court held that the dismissal by the HRT was not a final decision thus *res judicata* is of no assistance and there was no basis to dismiss the matter for abuse of process. In doing so, the Court relied on *674191 B.C. Ltd. v. Gold Spring Recreational Association*, 2013 BCSC 446 at para. 78 for the following proposition:

While there are circumstances where a second action may be struck as an abuse of process where the first has been struck for want of prosecution, *that occurs only in rare circumstances*, such as where a defendant has been induced to take steps that it never would have taken had the first action not been started. [Emphasis added.]

Brkich v. Rasheed, 2021 BCSC 531 at para. 46.

[50] Relying on *Brkich*, the respondent submits that there are no rare circumstances here that would merit the dismissal of a subsequent claim made within the appropriate limitation on the basis of abuse of process.

[51] The respondent refers to *Cowichan Tribes v. Canada (Attorney General)*, 2026 BCSC 1213 at paras. 75 to 81 where I reviewed the principles and decisions related to abuse of process and concluded that the task of the court is to focus on the integrity of the adjudicated process not the motives or interests of the party seeking to relitigate the issue. The Court will consider whether allowing litigation to proceed would violate the principles of judicial economy, consistency, finality or the integrity of the administration of justice. In that case there had been a final decision on the merits and I found that relitigation of the same issue with different parties would be an abuse of process.

[52] The respondent submits that although lack of finality is not a bar to a finding of abuse of process, the bar to dismissing the claim for abuse of process by relitigation is a high one and the discretion of the court should only be exercised in rare circumstances.

[53] In oral submissions the respondent addressed the issue of privy further. He submits that Mr. Ireson was not a privy to Ms. Sisson in the 2012 Proceeding. They are not the same person. Mr. Ireson was not the driving force in her litigation. He was a helper. He did not overbear the will of the party. It was Ms. Sisson who was the party. He was present when she instructed counsel but he did not instruct counsel on her behalf. He did not advocate. His presence at meetings to assist her is not enough to find that he is a privy.

[54] In the 2012 proceeding Ms. Sisson was claiming damages from the Strata Corporation. Mr. Ireson is not making this claim. He is asking for a determination of whether the attic is common property or not. As a result the causes of action are different.

[55] The respondent submits that there is nothing to bar a new owner from going to court for a declaration to clarify the status of the attic of the same unit. Given that any new owner can commence a similar action at the CRT with respect to the status of the attic Mr. Ireson should be permitted to do so.

Analysis

[56] I will consider the four elements of the test for cause of action estoppel as set out in para. 77 of *Patrick Street*.

There is a final decision of a court of competent jurisdiction in the prior action

[57] I find there was a final decision for Ms. Sisson in the B.C. Supreme Court in dismissing her claim for want of prosecution even though the legal issue before the Court was not decided on its merits. The dismissal of her claim for want of prosecution did not bind Mr. Ireson. He could have commenced a new application in the B.C. Supreme Court if his claim was not statute barred.

[58] The petitioner relies on the authorities which have found that dismissal for want of prosecution is a final decision. *Boucher* is distinguishable because in that case the parties in the preceding action and the new action were the same. In

Timleck the plaintiff applied to the trial judge to reopen the trial and seek a re-decision but did not comply with the trial judge's order to obtain the full transcript. The trial judge dismissed her application for want of prosecution. Again it was the same party proceeding in the prior action as in the present action. The same can be said for the *Marché* decision.

[59] I agree with the comments made in *Brkich*, that there may be circumstances where a second action may be struck as an abuse of process where the first has been struck for want of prosecution but *that occurs only in rare circumstances*. Rare circumstances do not exist here.

The parties to the subsequent litigation were parties to or in privy with parties to the prior action

[60] Mr. Ireson was not a party to the 2012 Proceeding. He was added as a 10% owner of strata lot 59 so that he could continue to assist Ms. Sisson without threat of penalty under the *Legal Profession Act*. He was not the person in control of the 2012 Proceeding. Ms. Sisson gave instructions to counsel. Ms. Sisson failed to apply to add Mr. Ireson as a party to her action. The Owners could have proceeded with this application to have Mr. Ireson added as a party so that he would be bound by the decision of the court. They did not do so.

[61] I find Mr. Ireson was not a privy even though he was aware of every step in the 2012 Proceeding. Mr. Ireson did not have the right to participate with Ms. Sisson until he was added as a party. This did not happen.

The cause of action in the prior action is not separate and distinct

[62] The cause of action in the 2012 Proceeding and in the Ireson CRT Claim are almost identical, however the Ireson CRT Claim does not include a claim for damages. Both proceedings deal with the same subject matter being the status of the attic in unit 59. This issue has not been resolved by the Supreme Court of British Columbia.

[63] The *Lemire* decision made a finding that the attic in the same complex was part of the strata property but this case is not binding on the courts or on the CRT. The issue was not in dispute and so there is no discussion about how the CRT arrived at this conclusion.

[64] I find that although the causes of action and the two proceedings are almost identical, there are some distinctions.

The basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence

[65] The basis of this cause of action was not argued in the 2012 Proceeding. It could have been if Ms. Sisson had exercised reasonable diligence. I find Mr. Ireson should not be prejudiced by Ms. Sisson's inaction.

[66] In this case I find that the dismissal for want of prosecution is final as against Ms. Sisson but not against Mr. Ireson. I find that Mr. Ireson was not a privy and therefore the test for cause of action estoppel is not met.

Abuse of Process

[67] I do not find that allowing the Ireson CRT claim to proceed would be an abuse of process. In exercising my discretion I am influenced by two factors. Firstly the legal issue has not been resolved. Secondly, if the strata unit were sold to a new owner that new owner could proceed to the CRT for an answer to the question of the status of the attic in unit 59. For that reason, I see no reason to prevent Mr. Ireson from seeking resolution of this issue once and for all. It could prevent future litigation and he will have an answer as to the status of the attic.

[68] Accordingly, I dismiss the petition. I find it is in the interest of justice that the CRT proceeds to adjudicate the claim.

[69] The parties have sought leave to make submissions as to costs and I grant them that leave.

"B. M. Young, J."
The Honourable Justice Young