

ACTION NO. 2101-00793  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY  
APPLICANT THOMAS H. FERGUSON  
RESPONDENTS ALI TEJPAN, ZAHRA TEJPAN, REGISTRAR OF TITLES for the LAND TITLES OFFICE, JOHN DOE, JANE DOE, ABC CORPORATION  
DOCUMENT CONSENT ORDER



ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

CARBERT WAITE LLP  
Attn: Curtis E. Marble  
Suite 2300, Encor Place  
645, 7th Avenue SW  
Calgary, AB T2P 4G8

Phone: 403-705-3642 Fax: 403-263-5553

File: 120632.001

**DATE ON WHICH ORDER WAS PRONOUNCED:** July 13, 2021  
**LOCATION AT WHICH ORDER WAS MADE:** CALGARY, ALBERTA  
**NAME OF MASTER WHO MADE THIS ORDER:** J.T. Prowse

**UPON THE APPLICATION** of the Applicant and Cross-Respondent Thomas H. Ferguson for an Order declaring that notice of the Applicant's and Cross-Respondent's Application filed April 13, 2021 (the "**Application**") is sufficient, and for leave to amend the Application; **AND UPON THE APPLICATION** of the Respondents and Cross-Applicants Ali Tejpar and Zahra Tejpar for an Order declaring that notice of the Respondents' and Cross-Applicants' Cross-Application filed April 13, 2021 (the "**Cross-Application**") is sufficient, and for leave to amend the Cross-Application; **AND UPON** noting the consent of counsel for both the Applicant and Cross-Respondent and Respondents and Cross-Applicants; **AND UPON** noting that a letter containing details regarding the Application and Cross-Application was delivered in person by Hugoline Morton, or alternatively by courier, to the address for service on the Certificates of Title for the properties in Plan 3605FO against which the caveat at issue in these proceedings is registered (the "**Plan 3605FO Caveat Holders**"); **AND UPON** reading the Affidavit of Service of Hugoline Morton, sworn June 7, 2021; **AND UPON** reading the Affidavit of Service of Penny McConnell, sworn June 7, 2021;

**IT IS HEREBY ORDERED THAT:**

1. The Amended Application attached hereto as Schedule A shall be filed.
2. The Amended Cross-Application attached hereto as Schedule B shall be filed.

3. The letter sent to the Plan 3605FO Caveat Holders by way of in person delivery, or alternatively courier delivery as set out in the Affidavit of Service of Hugoline Morton sworn June 7, 2021 and in the Affidavit of Service of Penny McConnell, sworn June 7, 2021, to the address for service on the Certificate of Title of the relevant properties affected by the caveat at issue in the within action is hereby deemed good and sufficient notice of the Application and the Cross-Application;
4. The Amended Application and the Amended Cross Application may be served in the same manner as set out above, and shall be deemed good and sufficient notice of the Amended Application and the Amended Cross-Application 5 days after delivery of such letter and posting of the Amended Application and the Amended Cross-Application on the Elbow Park Resident's Association web page.

  
M.C.Q.B.A

CONSENTED TO BY:

CARBERT WAITE LLP

BLAKE, CASSELS & GRAYDON LLP



For:



**Curtis Marble**  
Counsel for the Applicant

**Renee Reichelt**  
Counsel for the Respondents

Schedule "A"

**Form 7**  
[Rule 3.8]

COURT FILE NUMBER 2101-00793  
COURT COURT OF QUEEN'S BENCH OF ALBERTA  
JUDICIAL CENTRE CALGARY  
APPLICANT(S) THOMAS H. FERGUSON  
RESPONDENT(S) ALI TEJPAN, ZAHRA TEJPAN, REGISTRAR  
OF TITLES for the LAND TITLES OFFICE,  
JOHN DOE, JANE DOE, ABC CORPORATION  
DOCUMENT **AMENDED APPLICATION**

Clerk's Stamp

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT CARBERT WAITE LLP  
Attn: Curtis E. Marble  
Suite 2300, Encor Place  
645, 7<sup>th</sup> Avenue SW  
Calgary, AB T2P 4G8  
Phone: 403-705-3642 Fax: 403-263-5553  
File: 120632.001

**NOTICE TO THE RESPONDENT(S)**

This Application is made against you. You are a Respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the Application is heard as shown below:

Date: July 23, 2021

Time: 10:00 AM

Where: Calgary Courts Centre, 601 5<sup>th</sup> Street SW, Calgary AB

Before: The Presiding Justice in Chambers

Go to the end of this document to see what you can do and when you must do it.

**Basis for this claim:**

**Overview**

**THE PARTIES**

1. The Applicant, Thomas H. Ferguson, is one of the owners of the land located at 1013 32 Avenue SW, Calgary, Alberta. The legal description of the land is Plan 3605FO Block 92



Lot 9 excepting thereout all mines and minerals (the "**Ferguson Lands**").

2. The Respondents, Ali Tejpar and Zahra Tejpar (the "**Tejpars**"), are the registered owners of the land located at 1023 32 Avenue SW, Calgary, Alberta which has the legal description of Plan 3605FO Block 91 Lot 1 excepting thereout all mines and minerals (the "**Respondent Lands**"). The Tejpars are shareholders in a development company and are in the process of subdividing the Respondent Lands, constructing multiple dwellings on the Respondent Lands, and either have sold, or are selling, the Respondent Lands after receiving notice of the Applicant's intention to enforce the Caveat.
3. The Respondents, John Doe, Jane Doe and ABC Corporation, are the presently unknown parties who are the purchasers of the most westerly portion of Respondent Lands pursuant to an agreement for purchase. John Doe, Jane Doe and ABC Corporation either have, or are in the process of, purchasing, subdividing and developing the Respondent Lands.

#### THE TERMS OF THE RESTRICTIVE COVENANT

4. The Ferguson Lands and the Respondent Lands are both subject to a restrictive covenant, being Instrument 7648 FT which has been registered against the relevant land titles since 1948 (the "**Caveat**").
5. The Caveat makes clear that it applies to all future developments on lands subject to the Caveat. Among other things, the Caveat places several restrictions on any subject lot. In particular, only one single family dwelling may be built:

3. The Owner hereby agrees to insert in all Agreements for Sale entered into by the Owner for the sale of any one of the following lots or parcels or land [...] restrictive covenants similar to the covenants hereinafter contained.

IT IS HEREBY COVENANTED AND AGREED with the Owner by the above mentioned Purchasers on behalf of themselves, their executors, administrators and assigns, and successors in title as follows:

(a) That there shall not be erected or suffered or permitted to be erected or used or placed upon the said Lot Seven (7), Block Ninety (90), Plan 3605 F.O., any building whatsoever except for the purposes of a private residence and building garage in connection therewith.

(b) That there shall not be erected upon the said Lot more than one (1) such residence and garage.

6. The Tejpars received conditional approval from the City of Calgary to subdivide the Respondent Lands. ^ In its approval at paragraph 6, the City of Calgary approval specifically draws attention to the Caveat stating that “[t]he developer should be aware that Caveat #7648FT may preclude the registration of this subdivision at the Land Titles Office.”
7. At paragraph 7, the City of Calgary approval goes on to state that the City of Calgary has not reviewed or considered all instruments registered on the title to the property and that the property owners must evaluate whether the application to subdivide is in compliance with any documents registered on the title.
8. ^
9. The subdivision was appealed to the Calgary Subdivision and Development Appeal Board (the “SDAB”). ^ This hearing is discussed further below.
10. ^
11. ^

### THE TEJPARS HAD NOTICE OF MR. FERGUSON’S INTENTION TO ENFORCE THE CAVEAT

12. The Tejpars had notice of Mr. Ferguson’s intention to enforce the Caveat on multiple occasions. In particular:
  - (a) During a September 22, 2020 Zoom Meeting with members of the Elbow Park Resident’s Association, Ms. Tejpar was emailed a copy of the Caveat.
  - (b) On October 8, 2020 Jane Virtue, President of the Elbow Park Resident’s Association, sent a letter to the Tejpars advising that members of the community would enforce the covenant.
  - (c) On October 22, 2020 the Applicant attended at the SDAB hearing in support of the appeal, and made a presentation to the SDAB including specifically advising that he would enforce the Caveat. Despite the Applicant’s October 20, 2020



argument that the Caveat prohibited the subdivision, the SDAB dismissed the appeal.

- (d) On October 27, 2020, Curtis Marble of Carbert Waite LLP sent correspondence to the Tejpars via their agent Mr. Rick Grol by email, and by registered mail to Mr. Kamil Lalji, their realtor, attaching a copy of the Caveat an advising of Mr. Ferguson's intention to enforce the Caveat.
13. On December 16, 2020, in Court of Queen's Bench Action Number 2001-14291, the Applicant in the within Action was granted an Order pursuant to section 21 of the *Land Titles Act*. The purpose of this application and Order was to rectify the Caveat's previous missing document status for all titles against which the Caveat was registered. This Order required the Registrar of Land Titles to restore a true copy of the Caveat on the land titles system (the "**Section 21 Application**"). Following this application, the image of the Caveat has been restored on the land titles system.
14. As set out above, the Tejpars applied for a development permit for the Respondent Lands and a development permit has been granted with respect to the easterly portion. The appeal of this development permit was heard on April 1, 2021. At that appeal, the Board was advised that Mr. Ferguson intended to enforce the Caveat. That Appeal was denied, however the issue of the Caveat was not considered by the SDAB.

### THE TEJPARS HAVE BREACHED THE CAVEAT IN MULTIPLE INSTANCES

15. Subdividing and developing the Respondent Lands ^ for the purpose of developing the lands by constructing multiple dwelling houses will breach condition numbers 3(a) and (b) of ^ the Caveat which restrict development on the Respondent Lands to a single private dwelling and garage. The sale of the westerly portion is also a clear breach of the ^ Caveat. Steps towards subdivision, and the sale of the westerly portion have been taken notwithstanding the Tejpars having actual notice of the Applicant's intention to enforce the Caveat.
16. On January 13, 2021, with the Tejpars, and Ms. Tejpar in particular having full knowledge of the Applicant's intention to enforce the terms of the Caveat as set out at paragraphs 5 and 15, above, the Tejpars made an Application (the "**Tejpar Application**") with Ms. Zahra Tejpar providing the supporting affidavit, and were granted

an Order directing that the Caveat be removed from title to the Respondent Lands. The Tejpar Application proceeded with notice to CP Rail only. The Tejpars failed to provide notice to other affected Caveat holders, despite an obligation to do so and while knowing that certain Caveat holders, including the Applicant, intended to enforce the terms of the Caveat and opposed the proposed subdivision and redevelopment of the Respondent Lands.

17. The Tejpar Application was brought under the name of the Respondent Zahra Tejpar, who is a lawyer and active member of the Law Society of Alberta.
18. The Tejpar Application proceeded notwithstanding that the Tejpars failed to give notice to the other Caveat holders and, as set out above, the Tejpars had been provided with a copy of the Caveat on multiple occasions, and notice of Mr. Ferguson's intention to enforce the Caveat.
19. As outlined above, despite having been provided a copy of the Caveat on numerous occasions as outlined at paragraphs 9 through 11 prior to swearing Ms. Tejpar's Affidavit and the date of the Tejpar Application, the Tejpars knowingly failed to provide a copy of the Caveat to this Honourable Court for their January 13 application, and failed to advise the Court of the nature of the Caveat and Mr. Ferguson's expressed intention to enforce the Caveat.
20. As a result, the Applicant in these proceedings disputes the validity and enforceability of the Order granted as a result of the Tejpar Application, and takes the position that the order granted by Master Farrington should be set aside.
21. The Tejpars withheld information regarding the Tejpar Application until on or about April 14, 2021, thereby depriving the Applicant of the ability to speak to the Tejpar Application, notwithstanding that the Applicant had specifically provided notice of his intention to enforce the Caveat. It is as a result of these actions, and the finding of the SDAB, that the Applicant now has no recourse but to apply to this Honourable Court for the present relief. Without this relief, the Tejpars are otherwise in a position to proceed with the subdivision of the Respondent Lands, or sell the Respondent Lands without providing notice of the Caveat.
22. ^  
\_



~~23.~~ ^

### INJUNCTIVE RELIEF IS APPROPRIATE IN THESE CIRCUMSTANCES

24. On or about April 14, 2021, the Applicant Thomas H. Ferguson became aware that the Tejpars appeared before Master Farrington on January 13, 2021 ^ as set out above, obtaining an Order directing the Registrar to remove the Caveat from title to the Respondent Lands. The Tejpars failed to provide notice of these proceedings to the Applicant or other caveat holders, and also failed to advise the Master of the intention of the Applicant to enforce the Caveat.
25. The Caveat is a restrictive covenant which runs with the land and is part of a valid building scheme registered to shape development in the Elbow Park community.
26. Construction of multiple dwelling units on the Respondent Lands constitutes a breach of the Caveat. Injunctive relief is the presumptive remedy for a breach of a restrictive covenant of this nature.
27. The Ferguson Lands are a dominant tenement and the Respondent Lands are the servient tenement under the restrictive covenant that is registered by way of the Caveat. As a result, the Applicant is entitled to enforce the terms and conditions of the Caveat.
28. There have been no events after registration of the Caveat that suggest the Caveat has become unenforceable.
29. As subdivision and construction of multiple dwelling units on the Respondent Lands is imminent, the Court's equitable discretion ought to be exercised in favour of granting an injunction.
30. Such further and other grounds as counsel may advise and this Honourable Court may permit.

#### Remedy sought:

31. The Applicant seeks ^:

(a) A declaration

(i) that the Instrument Number 7648 FT is valid and enforceable; and,



- (ii) that the Respondent Lands are subject to Instrument Number 7648 FT;
- (b) ^
- (c) An Order setting aside the Order of Master Farrington pronounced January 13, 2021 and ^ directing the Registrar of Land Titles to reinstate the Caveat on the Certificate of Title to the Respondent Lands in the same order of priority as of the Caveat's original registration being May 21, 1948;
- (d) A declaration that the subdivision of the Respondent Lands and the development of multiple dwellings on the Respondent Lands constitutes a breach of Clause 3(b) of the ^ Caveat;
- (e) A permanent injunction:
  - (i) Requiring the Respondents, the Tejpars, John Doe, Jane Doe and ABC Corporation to comply with the Caveat including halting any subdivision ^ and prohibiting construction of ^ more than one private residence and one private garage in connection therewith on the Respondent Lands; and
  - (ii) Restraining the Registrar from registering any subdivision or other instruments contrary to the Caveat with respect to the Respondent Lands.
- (f) ^
- (g) Further, an Order declaring the copy of the Caveat as appended to the Affidavit of Robert Engbloom sworn March 30, 2021 to be a true copy of that instrument; and
- (h) Costs of this Originating Application; and,
- (i) Such further and other relief as counsel may advise and this honourable Court may deem appropriate.

**Affidavit or other evidence to be used in support of this application:**

- 32. Affidavit of Thomas H. Ferguson, sworn January 25, 2021;
- 33. Affidavit of Robert Engbloom, sworn March 30, 2021;

34. Affidavit of Zahra Tejpar, affirmed April 13, 2021;
35. Affidavit of David Schulli, sworn April 22, 2021;
36. Affidavit of Jane Virtue, sworn April 24, 2021;
37. Affidavit of Zahra Tejpar, affirmed May 13, 2021;
38. Transcript of Cross-Examination of Robert Engbloom, on an Affidavit sworn March 30, 2021, held on April 6, 2021;
39. Transcript of Cross-Examination of Thomas Ferguson, on an Affidavit sworn January 25, 2021, held on April 7, 2021;
40. Transcript of Cross-Examination of Zahra Tejpar, on an Affidavit sworn on April 13, 2021;
41. Transcript of Cross-Examination of David Schulli, on an Affidavit sworn on April 22, 2021;
42. Transcript of Cross-Examination of Jane Virtue, on an Affidavit sworn on April 13, 2021;
43. Affidavit of James Durant, sworn June 4, 2021;
44. Affidavit of Peter Johnson, sworn June 18, 2021;
45. Affidavit of Bob Engbloom, sworn June 21, 2021;
46. Affidavit of Bob Engbloom, sworn July 4, 2021; and
47. Such further and other materials as counsel may advise and this Honourable Court may permit.

**Applicable Acts and regulations:**

48. *Land Titles Act*, R.S.A. 2000 c. L-4;
49. *Alberta Rules of Court*, A.R. 124/2010;
50. *Judicature Act*, RSA 2000, c. J-2 at sections 8 and 13; and

51. Such further acts and regulations as counsel may advise and this Honourable Court may permit.

**WARNING**

You are named as a respondent because you have made or are expected to make an adverse claim in respect of this originating application. If you do not come to Court either in person or by your lawyer, the Court may make an order declaring you and all persons claiming under you to be barred from taking any further proceedings against the applicant(s) and against all persons claiming under the applicant(s). You will be bound by any order the Court makes, or another order might be given or other proceedings taken which the applicant(s) is/are entitled to make without any further notice to you. If you want to take part in the application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of this form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

Schedule "B"

**Form 27**  
Clerk's stamp:

COURT FILE NUMBER 2101 – 00793

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

APPLICANT/CROSS-RESPONDENT THOMAS H. FERGSUON

RESPONDENT/CROSS-APPLICANTS ALI TEJPAR, ZAHRA TEJPAR, REGISTRAR OF LAND TITLES FOR THE LAND TITLES OFFICE, JOHN DOE, JANE DOE, AND ABC CORPORATION

DOCUMENT **AMENDED CROSS – APPLICATION**

PARTIES FILING THIS DOCUMENT ALI TEJPAR AND ZAHRA TEJPAR

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT **BLAKE, CASSELS & GRAYDON LLP**  
3500, 855 – 2<sup>nd</sup> Street S.W.  
Calgary, AB T2P 4J8

Attention: Renee Reichelt  
Sophie Mansfield

Telephone: 403-260-9698  
403-260-9738

Facsimile: 403-260-9700

Email: renee.reichelt@blakes.com  
sophie.mansfield@blakes.com

File Ref.: 25569/1

**NOTICE TO THE CROSS-RESPONDENT: THOMAS H. FERGUSON**

This application is made against you. You are a respondent. You have the right to state your side of this matter before the Court. To do so, you must be in Court when the application is heard as shown below:

**Date:** TBD

**Time:** 10:00 a.m.

**Where:** Calgary Courts Centre Virtually via WebEx

**Before Whom:** The Presiding Justice in Chambers



Go to the end of this document to see what else you can do and when you must do it.

**Remedy claimed or sought:**

1. The Cross-Applicants, Ali Tejpar and Zahra Tejpar (the "**Tejpars**"), seek an Order:
  - (a) declaring that the Property municipally described as 1023 32 Avenue SW, Calgary, Alberta and legally described as:  
  
PLAN 3605FO  
BLOCK 91  
LOT 1  
Excepting Thereout All Mines and Minerals  
  
(the "**Subject Property**")  
  
is not subject to the Purported Caveat provided by the Applicant/Cross-Respondent, Thomas Ferguson in the within Action and identified as instrument 7648FT by the Registrar of Land Titles for Alberta (the "**Purported Caveat**");
  - (b) declaring that the Purported Caveat has no binding effect on the Subject Property;
  - (c) granting the Tejpars solicitor and own client costs of this Cross-Application; and
  - (d) Such further and other relief as counsel may advise and this Honourable Court may deem appropriate.
  
2. In the alternative, the Tejpars seek an Order:
  - (a) declaring that the Purported Caveat does not prevent subdivision of the Subject Property;
  - (b) declaring that the Tejpars may proceed with subdivision of the Subject Property and erect one dwelling house on each subdivided lot of the Subject Property;
  - (c) granting the Tejpars solicitor and own client costs of this Cross-Application; and
  - (d) Such further and other relief as counsel may advise and this Honourable Court may deem appropriate.

3. Further, the Tejpars seek an Order:

- (a) setting aside the December 16, 2020 Order of Justice Malik in which the status of the Instrument, as defined herein, was changed without notice to the Tejpars; and
- (b) directing the Registrar of Land Titles to rectify the status of the Instrument, as defined herein, to its status as of December 16, 2020. More particularly, to change the status of the Instrument to lost or missing.

**Grounds for making this application:**

**The Parties**

- 4. The Tejpars are the Registered Owners of the Subject Property. The Tejpars have obtained approval to subdivide the Subject Property from the City of Calgary.
- 5. The Applicant/Cross-Respondent, Thomas H. Ferguson, is the owner of the property municipally described as 1013 32 Avenue SW and legally described as Plan 3605FO, Block 92, Lot 9 (the "**Ferguson Property**").
- 6. The Ferguson Property is located to the east of the Subject Property.

**The Purchase of the Subject Property**

- 7. In December 2019, the Tejpars became aware that the Subject Property was for sale and viewed the Subject Property. At that time, they understood the Subject Property could be subdivided into two lots due to its size and other subdivided properties in the area.
- 8. On December 18, 2019, prior to placing an offer on the Subject Property, the Tejpars obtained a copy of the Certificate of Title to the Subject Property. The Certificate of Title showed one instrument registered on the Certificate of Title as follows:

<b>REGISTRATION NUMBER</b>	<b>DATE D/M/Y</b>	<b>PARTICULARS</b>
7648FT	21/05/1948	CAVEAT RE : SEE CAVEAT CAVEATOR - CANADIAN PACIFIC RAILWAY COMPANY 2000, 401-9 AVE SW CALGARY ALBERTA T2P 4Z4

(the "**Instrument**").

9. The Tejpars requested a copy of the Instrument from Land Titles and in response received a Certificate pursuant to Section 21 of the *Land Titles Act*, RSA 2000, c L-4 which advised that the Instrument had been lost, mislaid, or destroyed and had not been microphotographed (the "**Section 21 Certificate**").
10. Once the Tejpars received the Section 21 Certificate, they undertook significant efforts in an attempt to ascertain the nature of the interest related to the Instrument prior to waiving the conditions on their offer of the Subject Property (the "**Conditions**"). These efforts included:
  - (a) Contacting the Land Titles Office on multiple occasions in an attempt to obtain further information about the Instrument;
  - (b) Contacting the Caveator, Canadian Pacific Railway Company ("**CP Rail**") on multiple occasions in an attempt to obtain further information about the Instrument;
  - (c) Inquiring with the seller and the seller's realtor for information related to the Instrument; and
  - (d) Contacting the Elbow Park Residents' Association (the "**EPRA**") to advise of the proposed plans of subdivision for the Subject Property
11. On January 8, 2020, after conducting numerous investigations into the Instrument and the nature of the interest the Instrument may relate to, the Tejpars waived the Conditions.
12. Even after waiving the Conditions, the Tejpars continued to investigate the Instrument and continued to contact CP Rail in an attempt to determine the nature of the interest the Instrument may relate to.
13. On January 31, 2020, the Tejpars completed their purchase of the Subject Property.

#### **Interactions with the EPRA and Residents**

14. In June 2020, the Tejpars were contacted by Margo Coppus, the Chair of the Elbow Park Development Committee (the "**EPDC**") regarding the Subject Property. In June 2020, the Tejpars discussed their plans to subdivide the Subject Property with Ms. Coppus in her capacity as Chair of the EPDC. At no time in June 2020 did Ms. Coppus advise that there



were any restrictions or prohibitions to subdividing the Subject Property due to a caveat, restrictive covenant, or otherwise.

15. In August 2020, the Tejpars submitted their Subdivision Plan to the City of Calgary Subdivision Authority after approving the subdivision plan and design for the Subject Property in March 2020. The plan was to subdivide the Subject Property into two lots: one lot that was approximately 60 feet and one lot that was approximately 50 feet.
16. In August 2020, the Tejpars attended a Zoom Meeting organized by the EPRA to discuss the subdivision application for the Subject Property. During the meeting, no one raised any restrictions to a subdivision of the Subject Property, by way of caveat, restrictive covenant, or otherwise.
17. On September 7, 2020, residents of the Elbow Park Neighborhood submitted a letter of opposition to the Tejpars proposed subdivision of the Subject Property. This letter stated the Tejpar's proposed subdivision should not proceed because of the contextual sensitivities in the neighborhood and the fact that prior subdivision applications had not been approved. At no point did the September 7, 2020 letter raise the existence of any restrictions to a subdivision of the Subject Property, by way of caveat, restrictive covenant, or otherwise.
18. Further, on September 7, 2020, Jane Virtue, President of the EPRA sent a letter to the City of Calgary regarding the subdivision of the Subject Property (the "EPRA Letter"). The EPRA Letter replaced a prior August 27, 2020 letter sent to the City of Calgary by the EPRA. The EPRA Letter lists five reasons the subdivision should not be approved. These reasons included contextual sensitivities in the neighborhood, the retaining wall between the Subject Property and the neighboring property, the preservation of mature trees and flood mitigation, the potential existence of a utility easement, and ensuring privacy for neighboring properties. Despite providing a list of reasons for why the subdivision of the Subject Property should not be approved, at no point did the EPRA Letter raise the existence of any restrictions to a subdivision of the Subject Property, by way of caveat, restrictive covenant, or otherwise.
19. The Tejpars' subdivision of the Subject Property was approved by the City of Calgary Subdivision Authority on September 11, 2020.

### The Purported Caveat

20. On September 22, 2020, the Tejpars attended a Development Permit Review Meeting organized by the EPRA regarding the development of the Tejpar's single family home on the Subject Property. During this meeting, members in attendance, stated there was a caveat in the Elbow Park Community which may prevent the Tejpars from building two homes on the Subject Property and emailed a copy of this document, the Purported Caveat, to the Tejpars. This was the **first** time that anyone had mentioned the existence of such restrictions or raised the Purported Caveat to the Tejpars.
21. Despite numerous inquiries by the Tejpars as to where and how the Purported Caveat had been obtained, no information was provided by the EPRA or other individuals on the September 22, 2020 call. The Tejpars had no way to authenticate the Purported Caveat or validate and verify that it was in fact a true copy of the Instrument.
22. The Purported Caveat contains an agreement which is a purchase and sale agreement between Canadian Pacific Railway Company, as owner and Joseph J. Greenan and Mary P. Greenan, as purchasers (the "Greenan Agreement"). The Greenan Agreement relates to the sale of a property legally described as Plan 3605FO, Block 90, Lot 7 (the "Greenan Property"). The Greenan Agreement underlies the Purported Caveat.
23. In the within proceedings, Mr. Ferguson testified that he has seen agreements associated with the Purported Caveat that specifically reference the Subject Property and his own property in place of the legal description of the Greenan Property in the Greenan Agreement.
24. As no information was provided to authenticate the Purported Caveat, the Tejpars contacted Land Titles and the caveator, CP Rail to attempt to determine if the Purported Caveat was a true and authentic copy. Both CP Rail and Land Titles advised the Tejpars that they could not verify the authenticity of the Purported Caveat.
25. On October 27, 2020, approximately 10 months after completing the purchase of the Subject Property, the Tejpars received a letter on behalf of the Cross-Respondent, Thomas Ferguson, which stated that they were deemed to have notice that the Purported



Caveat was a restrictive covenant. No information was provided which would assist the Tejpars in authenticating or validating the Purported Caveat.

**Other Subdivisions and Non-Compliance in Elbow Park**

26. There are several other subdivided properties in the Elbow Park Neighborhood that are in the immediate vicinity of the Subject Property, including:
- (a) Plan 3605FO, Block 80, Lot 1;
  - (b) Plan 3605FO, Block 91, Lot 11;
  - (c) Plan 3605FO, Block 91, Lot 3;
  - (d) Plan 3605FO, Block 93, Lot 9; and
  - (e) Plan 3605FO, Block 93, Lot 10.
27. The Purported Caveat includes restrictions for developments on lands subject to the Purported Caveat. These restrictions include:
- 3. The Owner hereby agrees to insert in all Agreements for sale of any one of the following lots of parcels of land [...] restrictive covenants similar to the covenants hereinafter contained:  
  
[...]
  - (e) That no house or other building shall be located or placed on the said lot within Twenty-five (25) feet of the Street or Avenue, and any dwelling house shall be not less than Twenty-five (25) feet from the rear of said lot.
28. In breach of the Purported Caveat, 29 properties that are allegedly subject to the Purported Caveat have buildings that are located within 25 feet of the Street or Avenue.
29. The Purported Caveat does not state that there are any restrictions against subdividing a lot which may have been subject to the Purported Caveat. Further, there are no restrictions in the Purported Caveat against selling a portion of a lot which may have been subject to the Purported Caveat. Therefore, the Tejpars subdivision of the Subject Property does not breach the terms of the Purported Caveat.

**The Tejpars Are not Bound by the Purported Caveat**

30. The Instrument was validly discharged from the Subject Property on January 13, 2021 by Order of this Honourable Court.
31. The Caveator, CP Rail did not take a position on the discharge of the Instrument.
32. The Subject Property is not subject to the Purported Caveat as the Tejpars had no knowledge or notice of its existence at the time of the purchase of the Subject Property.
33. Specifically, at the time prior to purchasing the Subject Property, at the time the Tejpars purchased the Subject Property, and in the 10 months after the purchase was complete, the Tejpars had no notice, deemed or otherwise, that the Instrument registered on title may have contained restrictions to development or was a restrictive covenant.
34. This lack of notice was despite numerous investigations commenced by the Tejpars in an attempt to determine the nature of the interest that the Instrument registered on title may have related to.
35. Even when a copy of the Purported Caveat was provided to the Tejpars, the Tejpars have not been able to validate or verify its authenticity. There is conflicting evidence as to whether multiple copies of the Purported Caveat may exist with similar, but not identical, terms and alleged restrictions.
36. As a result, the Purported Caveat has no binding effect on the Subject Property.
37. In the alternative, if the Purported Caveat is determined to affect the Subject Property, it does not include any restrictions to prevent subdivision of the Subject Property. Therefore, there is nothing to prevent subdivision of the Subject Property and the Tejpars are entitled to proceed with the approved subdivision.
- ~~38. —Such further and other grounds as counsel may advise and this Honourable Court may permit.~~

The Ex-Parte Restoration Application

38. On or about February 3, 2021, the Tejpars became aware that Mr. Ferguson filed an Originating Application on November 26, 2020 (the "Restoration Application").
39. The Restoration Application was to change the status of the Instrument. The Subject Property was identified by Mr. Ferguson as a property affected by the Restoration Application. The Restoration Application was commenced as a precursor and in furtherance of the within injunction proceedings.
40. The Restoration Application was heard before Justice Malik on December 16, 2020 and Justice Malik granted an Order which changed the status of the Instrument. At no time did the Cross-Respondent advise the Court that there were issues relating to the authenticity of the document which was purported to be the Instrument.
41. While the December 16, 2020 Order changed the status of the Instrument to the Purported Caveat for the Subject Property, the Cross-Respondent provided evidence in the within proceedings that there are different forms of the agreement which underlies the Purported Caveat (the "Associated Agreement"). Specifically, in the within proceedings Mr. Ferguson testified that there is a specific form of an Associated Agreement for the Subject Property. Yet, Mr. Ferguson failed to advise the Court of this fact during the Restoration Application. Instead, Mr. Ferguson proceeded to have the Greenan Agreement registered to all properties, including the Subject Property despite the existence of different Associated Agreements.
42. Despite:
- (i) the Subject Property being affected by the Restoration Application;
  - (ii) the Cross-Respondent's belief that the Instrument was a restrictive covenant affecting multiple parties' rights; and
  - (ii) the Restoration Application being specifically brought with the intention to affect the Tejpars' rights
- the Applicant failed to provide notice of the Restoration Application to the Tejpars', or any of the other affected property owners.



43. Such further and other grounds as counsel may advise and this Honourable Court may permit.

**Material or evidence to be relied on:**

44. Affidavit of Thomas Ferguson, sworn January 25, 2021;
45. Affidavit of Robert Engbloom, sworn March 30, 2021;
46. Affidavit of Zahra Tejpar, affirmed on April 13, 2021;
47. Affidavit of David Schulli, sworn April 22, 2021;
48. Affidavit of Jane Virtue, sworn on April 24, 2021;
49. Affidavit of Zahra Tejpar, affirmed on May 13, 2021;
50. Affidavit of Zahra Tejpar, affirmed on June 30, 2021;
50. The transcript of Cross-Examination of Robert Engbloom, QC on an Affidavit sworn March 30, 2021, held on April 6, 2021;
51. The transcript of Cross-Examination of Thomas Ferguson, QC on an Affidavit sworn January 25, 2021, held on April 7, 2021;
52. The transcript of Cross-Examination of Zahra Tejpar, on an Affidavit sworn on April 13, 2021;
53. The transcript of Cross-Examination of David Schulli, on an Affidavit sworn on April 22, 2021;
54. The transcript of Cross-Examination of Jane Virtue, on an Affidavit sworn on April 13, 2021; and
55. Such further and other materials as counsel may advise and this Honourable Court may permit.

**Applicable Acts and regulations:**

56. *Land Titles Act*, RSA 2000 c L-4;

57. The Alberta *Rules of Court*, Alta Reg 124/2010;
58. *Judicature Act*, RSA 2000, c J-2, in particular sections 8, 13, 15, and 16.
59. Such further Acts and regulations as counsel may advise and this Honourable Court may permit.

**Any irregularity complained of or objection relied on:**

60. None.

**How the application is proposed to be heard or considered:**

61. It is proposed that the within Cross-Application be heard before the presiding Justice in Chambers at the same time as the Originating Application filed in the within Action by the Cross-Respondent on January 25, 2021.

**WARNING**

If you do not come to Court either in person or by your lawyer, the Court may give the applicants what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicants a reasonable time before the application is to be heard or considered.