



# Civil Resolution Tribunal

Date Issued: June 10, 2019

File: ST-2018-001847

Type: Strata

Civil Resolution Tribunal

Indexed as: *Section 1 of The Owners, Strata Plan BCS 3495 et al v. The Owners, Strata Plan BCS 3495, 2019 BCCRT 707*

**B E T W E E N :**

Section 1 of The Owners, Strata Plan BCS 3495, Nesha Enterprises Ltd., and Coquitlam Holding Ltd.

**APPLICANTS**

**A N D :**

The Owners, Strata Plan BCS 3495

**RESPONDENT**

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## **REASONS FOR DECISION**

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Tribunal Member:

J. Garth Cambrey, Vice Chair

## **INTRODUCTION**

1. This dispute is about the apportionment of expenses between a strata corporation and one of its sections.

2. The respondent, The Owners, Strata Plan BCS 3495 (strata), is a strata corporation existing under the *Strata Property Act* (SPA) and is represented by a strata council member.
3. The applicant, Section 1 of The Owners, Strata Plan BCS 3495 (commercial section), is a section within the strata consisting of all 14 non-residential strata lots in the strata. The applicants, Nesha Enterprises Ltd. (Nesha) and Coquitlam Holding Ltd (CHL), each own strata lots in the commercial section. The applicants are represented by a lawyer, Oscar Miklos.
4. The applicants say the strata is acting in a significantly unfair manner in apportioning water expenses associated to a City of Coquitlam water meter (city-metered water expenses) to the strata lots in the commercial section.
5. The applicants ask for orders that the strata, at its expense, physically alter an alleged unfair water distribution system and reimburse the commercial section \$136,832.80 for an alleged overpayment of water consumption expenses. In the alternative, the applicants request an order that the water consumption expenses be borne entirely by the strata.
6. For the reasons that follow, I find the strata must allocate the water expenses among all strata lots and reimburse the commercial section a portion of its claimed overpayment of water expenses.

## **JURISDICTION AND PROCEDURE**

7. These are the formal written reasons of the Civil Resolution Tribunal (tribunal). The tribunal has jurisdiction over strata property claims brought under section 121 of the *Civil Resolution Tribunal Act* (Act). The tribunal's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the tribunal must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

8. The tribunal has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
9. The tribunal may accept as evidence information that it considers relevant, necessary, and appropriate, whether or not the information would be admissible in a court of law. The tribunal may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
10. Under section 61 of the Act, the tribunal may make any order or give any direction in relation to a tribunal proceeding it thinks necessary to achieve the objects of the tribunal in accordance with its mandate. In particular, the tribunal may make such an order on its own initiative, on request by a party, or on recommendation by a case manager (also known as a tribunal facilitator).
11. Tribunal documents incorrectly show the name of the commercial section as Strata Corporation Commercial Section of The Owners, Strata Plan BCS 3495, whereas, based on sections 2 and 195(4) of the SPA, the correct legal name of the commercial section is Section 1 of The Owners, Strata Plan BCS 3495. Given the parties operated on the basis that the correct name of the commercial section was used in their documents and submissions, I have exercised my discretion under section 61 to direct the use of the commercial section's correct legal name in these proceedings. Accordingly, I have amended the style of cause above.
12. Under section 123 of the Act and the tribunal rules, in resolving this dispute the tribunal may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

## **ISSUES**

13. The issues in this dispute are:

- a. Has the strata acted in accordance with the SPA by apportioning all city-metered water expenses to the commercial section strata lots?
- b. If so, have the actions of the strata been significantly unfair to the applicant owners?
- c. Should I order the strata to reimburse the commercial section strata lot owners prior years' water expenses or grant any other remedies?

## **BACKGROUND, EVIDENCE AND ANALYSIS**

14. I have read all the submissions and evidence provided but refer only to information I find relevant to provide context for my decision.
15. In a civil proceeding such as this, the applicants must prove their claims on a balance of probabilities.
16. The strata is a mixed-use strata corporation located in Coquitlam, B.C. comprising 656 strata lots in 3 high-rise towers plus common facilities. The strata was created in July 2009, at which time bylaw amendments were filed at the Land Title Office (LTO) creating the commercial section and another section that includes all 642 residential strata lots (residential section). There are 14 commercial strata lots that form the commercial section. They are all located at ground level.
17. The strata was built in 3 phases completed about July 2009, July 2012, and October 2014 respectively. The applicant CHL owns 3 commercial strata lots that were part phase 1, being strata lots 7, 8 and 9. Nesha owns strata lot 183 that was part of phase 2. There were no commercial strata lots in phase 3.
18. The relevant bylaws are those filed in the LTO on July 13, 2009, which replace the Standard Bylaws. Subsequent bylaw amendments have been filed but are not relevant to this dispute. In particular, I find the following bylaws are relevant:
  - a. Bylaws 1.1 and 1.2: create the commercial section and residential section respectively.

- b. Bylaw 3.1: requires the strata corporation to repair and maintain common property.
- c. Bylaw 6.3: sets out how common expenses are to be apportioned between the residential and commercial sections. It says, subject to bylaw 6.5 (which relates to LCP expenses and does not apply), common expenses attributable to either separate section will be allocated to the strata lots in that section and common expenses that are not attributable to either separate section will be allocated to all strata lots in the strata.
- d. Bylaw 6.4: sets out specific allocations of common expenses stating “without limiting the generality of bylaw 6.3 and unless otherwise determined by the executives of each of the Residential Section and Commercial Section acting reasonably” that include:
  - i. Expenses relating to areas designated as limited common property (LCP) for each separate section will be allocated to the strata lots in the section,
  - ii. Expenses relating to the exterior of the building will be allocated to all strata lots in the strata, and
  - iii. Expenses relating to the underground parking facility will be apportioned between the 2 sections based on the respective number of parking stalls allocated as LCP for each section.
- e. Bylaw 12.1: says that certain common areas and facilities are intended to be for the use of residential strata lot owners and occupants as may be identified as LCP under section 74 of the SPA or designated for exclusive use under section 76 of the SPA, and not for use by non-residential owners or occupants. The bylaw further states that all costs associated with these areas are for the residential section. However, despite submissions to the contrary, the common facilities included in phase 2 such as the pool, have not been designated as LCP and are shown on the strata plan as CP.

19. The strata council includes 1 commercial strata lot owner, the director of Nesha and 4 residential strata lot owners.
20. There are 3 water meters in the strata. One is a private meter (sub-meter) that is installed downstream from a second meter that the City of Coquitlam (City) maintains and uses to render its billings (city meter). The third is a meter that monitors water use for fire suppression. It is only the city meter that forms the subject of this dispute.
21. The parties agree that for the first 5 years of the strata up until about November 2014, the parties mistakenly thought the city meter monitored only water used by the commercial section. As a result, the commercial section paid for the water expenses associated with the city meter. It was about November 2014 following the addition of phase 3, when the commercial section complained about a dramatic increase in metered water consumption, the issue was first raised.
22. In June 2015, the strata council retained a plumbing contractor (Milani) to investigate the increase in metered water consumption. Milani investigated the issue but did not have “as-built” drawings and focused its attention on the private meter. It was unaware of the city meter. Milani concluded the private meter measured consumption for the commercial strata lots but did not further investigate the city meter. It appears that about the same time, in September 2015, the City agreed to read the private meter until the consumption issue was resolved.
23. In November 2017, the City advised it would no longer read the private meter and would begin to read the city meter and issue billings based on readings of that meter. About this time, the strata and the commercial section each retained independent plumbing contractors to investigate the water consumption measured by the city meter. Both contractors concluded that the city meter measures not only the water consumption of the 14 commercial strata lots, but water used in connection with a residential swimming pool not accessible by the commercial strata lots, residential meeting room washrooms, hose bibbs located in the

underground parking garage accessible by all owners, and hose bibbs located on the exterior of some of the commercial strata lots.

24. As a result of these opinions, and a further opinion obtained by the strata, the parties agree, and I find, the city meter measures water used by both commercial and residential strata lots.
25. The City has advised the parties it will not interfere with the strata's internal operations and will continue to bill the strata based on the city meter readings.

## **POSITIONS OF THE PARTIES**

26. The applicants say the strata council routinely acts in the interests of the residential section, given there is only 1 commercial strata lot represented on the 5-member strata council. They say that the commercial section pays 100% of the metered water but the residential section strata lots use a portion of the metered water, which is significantly unfair to the commercial section.
27. The applicants seek the following orders:
  - a. the strata, at its cost, arrange for the water distribution piping metered by the city, to include only water that is used by the commercial section strata lots,
  - b. the metered water, including any unpaid expenses charged to the commercial section, be a common expense of the strata, at least until the distribution piping can be altered, and
  - c. the strata reimburse the commercial section \$136,832.80 for alleged overpayment of water expenses from 2010 to 2017.
28. The strata says it does not operate to the detriment of the commercial section and denies it has acted in a significantly unfair manner towards the commercial section. It does not dispute the city meter includes readings from non-commercial areas but says that such usage is minimal.

29. It opposes the relief sought by the applicants but says that if relief is granted for pipe alterations, it should be paid by the commercial section, and any relief for water expenses paid should not include penalties or interest because the penalties and interest charged by the city for metered water expenses resulted from the commercial section not paying the water utility invoices.
30. Even though the strata denies the applicants' claims, it says it is prepared to accept a reasonable solution such as capping off the piping used for non-commercial areas or installing individual water meters for each commercial strata lot. The strata argues the commercial section should pay for the costs of either remedy.
31. The applicants say they would accept capping off the residential water lines but not the exterior hose bibs at the commercial strata lots. They also disagree that the installation of individual water meters would resolve the dispute and say that it would only be cause for additional disputes.

## **ANALYSIS**

### ***Has the strata acted in accordance with the SPA and bylaws by apportioning all city-metered water expenses to the commercial section strata lots?***

32. The courts have found that common expenses of a strata corporation under the SPA are allocable in proportion to unit entitlement, unless:
  - a. the strata corporation has by a unanimous vote agreed to use a different formula for the allocation of contributions to the operating fund and contingency reserve fund, other than those set out in s. 99 and the regulations (SPA, s. 100);
  - b. the strata corporation has by a unanimous vote established a "fair division" of expenses for that particular levy (SPA, s. 108(2)); or
  - c. "sections" have been created under Part 11 of the [*Strata Property Regulation* (regulations)] (SPA, s. 195).



(See *Coupal v. Strata Plan LMS 2503*, 2003 BCCA 552 at paragraph 34, citing *The Owners, Strata Plan LMS 1537 v. Alvarez*, 2003 BCSC 1085 at paragraph 55 and *Poloway v. Owners, Strata Plan K69*, 2012 BCSC 726 at paragraph 54.)

33. Section 99 of the SPA requires strata lots to contribute to the operating fund and contingency reserve fund by unit entitlement. Section 100 of the SPA allows a strata to calculate strata fees using a different formula by a unanimous vote at an annual general meeting or special general meeting.
34. The strata has not passed a resolution under section 100 of the SPA to calculate strata fees by a method other than by unit entitlement.
35. As earlier noted, the strata has passed bylaws creating sections. Section 195 of the SPA states that any “expenses of the strata corporation that relate solely to the strata lots in a section are shared by the owners of the strata lots in the section” based on unit entitlement. [My emphasis]
36. I could not locate any case law that directly interprets section 195 of the SPA and find the SPA is silent on expenses that do not solely relate to strata lots one section of a strata corporation.
37. I find the use of the word “solely” in section 195 restricts the strata from causing the commercial section strata lot owners to pay for the city-metered water expenses. The meaning of the word “solely” is “to the exclusion of all else” as defined in the Merriam-Webster dictionary. Therefore, on a plain reading of section 195 of the SPA, I find the strata cannot limit the contribution to the city-metered water expenses to only the strata lot owners in the commercial section. If the city meter measured only water consumption of all the commercial strata lots, the allocation to the commercial strata lots would be permitted. However, this is clearly not the case as the parties’ contractors have determined.
38. Although not directly on point, I find support in my decision from the BC Court of Appeal in *Ernest & Twins Ventures (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA

3259, where the court found that expenses of a sectioned strata corporation that benefit more than one type of strata lot must be paid by all strata lots.

39. As for the strata's bylaws, I find that bylaw 6.3 reflects the requirements set out in the SPA.
40. I also find the strata's bylaw 6.4, that purports to allow the section executives to reach a different conclusion on apportionment of the common expenses from that set out in the SPA, is in conflict with the SPA. The strata's bylaws cannot override the SPA and I encourage the strata to seek advice on addressing its conflicting bylaws.
41. For these reasons, I find the strata has not followed sections 99 and 195 of the SPA (or its bylaw 6.3) by requiring the commercial section strata lot owners to pay the water utility billing for the city meter. As discussed below, I find the applicants' requested remedy to separate the residential piping from the commercial piping to be premature and that the appropriate remedy is to order the strata to pay the City water billings.
42. The strata submits that the amount of water consumption measured by the city meter for use by non-commercial strata lots or common property is minimal. However, given my finding the metered water is not an expense solely for the commercial strata lot owners, the amount of water that is used in other areas does not matter.
43. The strata also submits that residential strata lots are charged a flat rate for water consumption directly by the City, however, I find that does change the requirements of the SPA or bylaws discussed above.

***Is the strata acting in a significantly unfair manner?***

44. Having found the strata has contravened the SPA and its bylaw 6.3, I find it is not necessary for me to consider the parties' arguments on significant unfairness.

***Should I order the strata to reimburse the commercial section strata lot owners prior years' water expenses or grant any other remedies?***

45. Before considering appropriate remedies, I will first address the various applicants.
46. Had I found a need to consider the significant unfairness issue, I find that only the applicant owners, Nesha Enterprises Ltd. and Coquitlam Holding Ltd. and not the applicant commercial section, would have been able to advance their arguments. I say this because I find the tribunal's jurisdiction with respect to significant unfairness applies only to owners and tenants under sections 121 (1)(e) and (f), and 123(2) of the Act.
47. Having found I did not have to consider the significant unfairness issue, and for reasons explained below that the alleged overpayment of city-metered billings involves only the commercial section and not the owners, I dismiss the claims of Nesha Enterprises Ltd. and Coquitlam Holding Ltd.
48. I will now address the applicants' claim for reimbursement of prior years' water expenses before I offer comments to the parties about their stated options.

***The strata's noncompliance with the SPA and bylaw 6.3***

49. I find the strata must immediately comply with the SPA and its bylaws by allocating City billings for city-metered water charges to all strata lots. I find the most efficient way for the strata to do this is to pay the City water billings, including any that are currently unpaid. If the unpaid billings have been charged to the commercial section or to commercial strata lot owners, I order the strata to reverse those charges.
50. I do not agree with the strata that any penalties or interest resulting from the non-payment of the water billings, should properly paid by the commercial section. I say this because I have found the strata to be responsible for payment of the billings. Therefore, I find any penalties or interest reflected on any unpaid water billings is also the responsibility of the strata.

***The alleged overpayment of city-metered billings by the commercial section strata lots***

51. As for the applicants' request for reimbursement of \$130,600.28 for alleged overpayment of water expenses from 2010 to 2017, I find only the commercial section is entitled to recover a portion of these expenses as I explain below, and not individual strata lot owners. I say only the commercial section is entitled to be reimbursed because, based on the submissions, I find it was the commercial section that paid the city-metered water expenses. This is true despite the awkward wording of section 195 of the SPA that says the expenses of a section are to be shared by the owners of the strata lots in the section.
52. I find the commercial section's claim for reimbursement is limited because of the *Limitation Act* (LA), which applies to the tribunal.
53. Section 13 of the Act states that the LA applies to the tribunal as if it were a court. It also says reference to a claim in the LA is deemed to include a claim under the Act. The LA defines a "claim" as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". The limitation period only applies to claims, as defined, which I find includes the applicants' claim for reimbursement of the water expenses paid.
54. Section 6 of the LA says of the basic limitation period is 2 years, and that a claim may not be commenced more than 2 years after it is discovered.
55. Section 8 of the LA says that, except for special situations referred to in sections 9 to 11 that do not apply here, a claim is discovered by a person on the first day on which the person knew or reasonably ought to have known all of the following:
- a. that injury, loss or damage had occurred;
  - b. that the injury, loss or damage was caused by or contributed to by an act or omission;

- c. that the act or omission was that of the person against whom the claim is or may be made,
  - d. that, having regard to the nature of the injury, loss or damage, a court (or tribunal) proceeding would be an appropriate means to seek remedy for the injury, loss or damage.
56. I find the date of discovery was November 2017, the date the parties received the plumbing reports. Therefore, the applicants' claim is not out of time because the Dispute Notice was issued on March 21, 2018, within the 2-year limitation period. However, given the 2-year limitation period, I find claims for the reimbursement of expenses prior to March 21, 2016, are out of time. Accordingly, I dismiss the applicants' claims for reimbursement of city-metered water expenses prior to March 21, 2018.
57. The applicants did not provide copies of all City water billings but did provide a summary of claimed expenses. The summary for the period January 1, 2010 through December 13, 2017 totaled \$130,600.28. The applicants do not explain the difference in the amount calculated and the amount claimed of \$136,832.80. The strata notes a different discrepancy on the summary but then states it "assumes the applicants are seeking reimbursement for their total water and sewer used since February 23, 2010".
58. Given the strata's statement, I find it reasonable for me to accept the calculated total of \$130,600.28 claimed by the applicants on the summary as a starting point for my calculations. Subtracting the amount claimed for the period prior to March 21, 2016 that is out of time under the LA results in a revised amount of \$35,037.13.
59. I note the summary provided by the applicants includes sewer charges, but I find those charges do not form part of this dispute. The limited number of City water billings provided show only meter readings for water consumption and do not show sewer charges. Nor did the applicants provide any arguments about sewer charges. Therefore, I deduct the claimed expenses of \$16,771.33 that relate to sewer charges to get a further revised amount of \$18,265.80.

60. The only objection the strata had to the reimbursement of expenses, if I was to give such an order, is that the strata should not be ordered to reimburse the late charges given it was the commercial section that did not pay the invoice by its due date. As I have earlier noted, I do not agree. Therefore, the final revised amount of the applicants' claim totals \$18,265.80. I find this sum to be the appropriate amount the strata must reimburse the commercial section and I so order.
61. Nothing in this decision restricts the parties from pursuing other arrangements going forward as I discuss below.

### ***Aiding the parties***

62. In submissions, the parties have essentially agreed that an alternate arrangement for payment of the city-metered water is preferable, but that they cannot agree on a solution. Aside from the allocation of water expenses as a strata expense, which is what I have ordered, the parties set out 2 other possible remedies as follows:
- a. Separation of the residential and commercial water lines to allow only the water used by the commercial sections to be metered by the city-meter, and
  - b. The installation of individual water meters for each commercial strata lot.
63. I find that to make further orders involving either the separation of the water lines or installation of individual water meters would be premature. I find the orders I have made are sufficient to resolve this dispute and I make no further orders in this decision.
64. However, I offer the following comments on the 2 remaining options raised by the parties. I find input I might give aligns with the mandate of the tribunal to recognize the ongoing relationship of the parties.
65. It is unclear how the exterior hose bibbs next to the commercial strata lots are plumbed, and, in both remaining options, it would be prudent for the parties to determine if the hose bibb plumbing comes is connected directly to the adjacent commercial strata lot. Further investigation would be required.

66. As for the separation of the residential and commercial water lines, the parties have a cost estimate from a plumbing contractor to do this work for about \$10,600 plus taxes. The expense would likely need to be put to all strata lot owners for approval by a special levy or as an expense from the contingency reserve fund, both of which require a  $\frac{3}{4}$  vote. Such a vote has not yet been put to the ownership. The parties also disagree about who should pay for this work and I suggest they determine whether the pipes that need to be altered, which are not readily identifiable from submissions, are common property. If they are common property, I suggest the cost of any re-piping would be the responsibility of the strata under section 72 of the SPA and the strata's bylaw 3.1.
67. A further consideration about the separation of the water lines is whether the work involves a significant change in use or appearance of common property under section 71 of the SPA, which would also require a  $\frac{3}{4}$  vote of the ownership.
68. As for the installation of individual meters, the parties would likely need to consult with the City if the intention is for the City to read the meters and bill the commercial strata lot owners directly. The cost of installing new meters, and whether the City would cover some of the expense, would also need to be determined. As with separating the plumbing, the cost to the strata would likely need to be put to the ownership by way of a  $\frac{3}{4}$  vote. The parties would also need to determine whether the new or altered piping required to accommodate the new meters is common property or a common asset under the SPA and bylaws, and therefore a strata expense. Section 71 of the SPA would also need to be considered.

## **TRIBUNAL FEES, EXPENSES AND INTEREST**

69. Under section 49 of the Act, and the tribunal rules, the tribunal will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason to deviate from the general rule in this case. I find the applicant commercial section was the most successful party, but it is unclear which applicant paid the tribunal fees of \$225.00. Given the commercial section is the primary applicant, I order the strata to reimburse it

\$225.00 in tribunal fees on the understanding that the applicants will arrange for the appropriate distribution among themselves.

70. The applicants also claimed \$2,174.70 in dispute-related expenses for the expense in obtaining 2 expert opinions from High Mark Mechanical Services Ltd. (High Mark) and BMAC Technologies & Consulting (BMAC). The invoice provided from High Mark shows a zero balance and the BMAC invoice shows a total of \$2,163.00. I find the applicants did not prove any payment to High Mark because of the zero balance. I find the BMAC invoice amount to be a dispute-related expense and I order the strata to reimburse the commercial section the amount of \$2,163.00.
71. The *Court Order Interest Act* (COIA) applies to the tribunal. The applicants are entitled to pre-judgement interest on the \$18,265.80 ordered for past water billings. I find it reasonable for me to base my calculations on the invoice dates provided in the summary and, on this basis, I calculate the pre-judgement interest to be \$447.43.
72. The strata corporation must comply with the provisions in section 189.4 of the SPA, such as not charging dispute-related expenses against the owner

## **DECISION AND ORDERS**

73. I dismiss the claims of Nesha and CHL.
74. I order the strata to:
  - a. immediately comply with the SPA and its bylaw 6.3 by allocating city-metered water billings to all strata lots within the strata,
  - b. pay the city-metered water billings, including any that are currently unpaid and including any late payment or interest charges assessed by the City,
  - c. reverse all charges of city-metered water billings, if any, charged to the commercial section or to individual commercial strata lot owners, including Nesha and CHL,



- d. pay the commercial section \$21,101.23 broken down as follows:
  - i. \$18,265.80 for reimbursement of paid city-metered water billings,
  - ii. \$225.00 for tribunal fees,
  - iii. \$2,163.00 for dispute-related expenses, and
  - iv. \$447.43 in pre-judgement interest under the COIA.

75. The applicants are entitled to post-judgement interest under the COIA, as applicable.

76. I order the commercial section's remaining claims dismissed.

77. Under section 57 of the Act, a party can enforce this final tribunal decision by filing, in the Supreme Court of British Columbia, a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Supreme Court of British Columbia.

78. Orders for financial compensation or the return of personal property can also be enforced through the Provincial Court of British Columbia. However, the principal amount or the value of the personal property must be within the Provincial Court of British Columbia's monetary limit for claims under the *Small Claims Act* (currently \$35,000). Under section 58 of the Act, the Applicant can enforce this final decision by filing in the Provincial Court of British Columbia a validated copy of the order which is attached to this decision. The order can only be filed if, among other things, the time for an appeal under section 123.1 of the Act has expired and leave to appeal has not been sought or consented to. Once filed, a tribunal order has the same force and effect as an order of the Provincial Court of British Columbia.

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J. Garth Cambrey, Vice Chair