Case Name:

Strata Plan LMS 888 v. Coquitlam (City)

Between
The Owners, Strata Plan LMS 888, plaintiff, and
The City of Coquitlam, Winchester Investments Ltd., Polygon Town Centre Development Limited, Polygon Construction Ltd., Graham F. Crockart, Graham F. Crockart Architect Inc., Dec Design Mechanical Consultants Ltd., W.T. Vaughan, Thomas Leung Structural Engineering Inc., Thomas Leung, Inter-provincial Inspectors (1982) Ltd., East & West Alum Craft Ltd., W.L.S. Forming & Framing Ltd., Centra Siding Ltd., Metro Roofing & Sheet Metal Ltd., Peter Ross Limited, L & S Stucco Ltd., Almetco Building Products Ltd., 481516 B.C. Ltd., Dueck Cobblestones Ltd., Systems I Mechanical Limited, Team Glass Co. Ltd., Alliance Sheet Metal Works Ltd., and H. Van Leeuwan Landscaping Ltd., defendants and third parties, and
Matthew Mok, third party

[2003] B.C.J. No. 1422
2003 BCSC 941
Vancouver Registry No. S015129

British Columbia Supreme Court
Vancouver, British Columbia
Cohen J.
(In Chambers)

Heard: January 27 - 29, 2003.
Judgment: June 17, 2003.
(43 paras.)

Counsel:

A. De Jong and M.S. Oulton, for the plaintiff.
R. Basham, Q.C., for the defendants, Winchester Investments Ltd., Polygon Town Centre Development Limited and Polygon Construction Ltd.

COHEN J.:—

I THE APPLICATION

¶ 1 The Jefferson condominium and townhouse development in Coquitlam, was constructed between July 1992, and August 1993. Remedial repairs have been ongoing to the development since February 2001.

¶ 2 The Owners, Strata Plan LMS 888, the plaintiff, seeks to recoup the costs incurred investigating and fixing water ingress problems. To that end, the plaintiff commenced this action on October 10, 2000, alleging, inter alia, negligence against the defendants Winchester Investments Ltd., Polygon Town Centre Development Limited and Polygon Construction Ltd. (the "Polygon Defendants").

¶ 3 On September 6, 2001, the plaintiff passed the following special resolution:

> Be it resolved that the Strata Corporation LMS 888 be authorized to proceed with legal action and use funds from the building envelope repair up to $100,000 to bring material and information to a decision ready status for possible litigation.

¶ 4 On January 8, 2003, the plaintiff passed a second special resolution:

> BE IT FURTHER RESOLVED, pursuant to section 171 and/or 172 of the Strata Property Act, S.B.C. 1998, c. 43...that the Strata Corporation is hereby duly authorized, as a representative of all owners and/or on behalf of each individual owner...to continue with the Action and to proceed to mediation or engage in other settlement negotiations or proceedings in connection with the Action or, if necessary, to commence and maintain any other action against any responsible parties for damages and costs related to the investigation and repair of building envelope and other design and construction related deficiencies in the Strata Corporation's buildings;...

¶ 5 Sections 171 and 172 of the Strata Property Act, S.B.C. 1998, c. 43 ("SPA") provide, as follows:

> 171 (1) The strata corporation may sue as representative of all owners...about any matter affecting the strata corporation, including any of the following matters:
>
> (a) the interpretation or application of this Act, the regulations, the bylaws or the rules;
>
> (b) the common property or common assets;
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> (c) the use or enjoyment of a strata lot;
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> ***
>
> (2) Before the strata corporation sues under this section, the suit must be authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.
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> ***
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> (5) All owners...must contribute to the expense of suing under this section.
>
> (6) A strata lot's share of the total contribution to the expense of suing is calculated in accordance with section 99(2) or 100(1)...

172 (1) The strata corporation may sue on behalf of one or more owners about matters affecting only their strata lots if, before beginning the suit,

(a) it obtains the written consent of those owners, and

(b) the suit is authorized by a resolution passed by a 3/4 vote at an annual or special general meeting.

(2) Only those owners on whose behalf the suit is brought must contribute to the expense of suing under this section.

(3) A strata lot's share of the total contribution to the expense of suing is calculated in accordance with section 99(2) or 100(1) except that

(a) only owners on whose behalf the suit is brought are required to contribute, and

(b) only the unit entitlement of strata lots owned by owners on whose behalf the suit is brought are used in the calculations. [emphasis mine]

¶ 6 The Polygon Defendants apply under Rules 18A and 19(24) to strike the plaintiff's action on the basis that the plaintiff does not have the right, power or entitlement to bring the action.

II THE ISSUE

¶ 7 At the hearing, counsel agreed that the issue for the court to decide is whether the failure of the plaintiff to obtain a special resolution under s. 171, and to obtain a special resolution and the written consent of each individual owner under s. 172 prior to commencing its action on October 10, 2000, is a procedural defect capable of being cured.

III SUMMARY OF THE PLAINTIFF'S POSITION

¶ 8 In a nutshell, the plaintiff opposed the Polygon Defendants' application and submitted that the plaintiff's claims against them are properly brought pursuant to the provisions of the SPA and that any deficiency in the process mandated by the SPA is a procedural matter and a matter of internal governance that can be and has been rectified by the passage of the resolutions. The plaintiff raised several arguments in support of its position. First, under the heading "Object of the Strata Property Act", the plaintiff submitted that when imperative language is used in a statute, no discretion is left in the decision maker or actor; the statutory condition must be fulfilled. However, the use of the imperative "shall" or "must" is not determinative of the consequences that flow from failure to comply with conditions imposed by a statute. In the plaintiff's view, the consequences flowing from non-compliance depends on whether the provision is interpreted as "mandatory" or "directory". Counsel referred to W. Wade and C. Forsyth, Administrative Law, 7th ed. (Oxford: Clarendon Press, 1994) where, at p. 253, under the heading "Mandatory or Directory Conditions" the authors state, as follows:

> If the authority fails to observe such a condition, is its action ultra vires? The answer depends on whether the condition is held to be mandatory or directory. Non-observance of a mandatory condition is fatal to the validity of the action. But if the condition is held to be merely directory, its non-observance will not matter for this purpose. In other words, it is not every omission or

defect which entails the drastic penalty of invalidity.

¶ 9 The plaintiff's position is that the requirements set out in ss. 171 and 172 are directory in nature, and any failure to satisfy these requirements before commencing an action is a mere irregularity that may be, and has been in the instant case, rectified.

¶ 10 Plaintiff's counsel submitted that the inquiry into whether a statutory provision is "mandatory" or "directory" is a "blatantly result-oriented" exercise: See the words of Iacobucci J. in British Columbia (Attorney General) v. Canada (Attorney General), [1994] 2 S.C.R. 41; (1994), 91 B.C.L.R. (2d) 1, (S.C.C.), where, at para. 44 he stated that the decision of what is mandatory, and what is directory, "is informed by the usual process of statutory interpretation. But the process perhaps evokes a special concern for 'inconvenient' effects, both public and private, which will emanate from the interpretive result".

¶ 11 Plaintiff's counsel submitted that ss. 171 and 172, and Part 10 of the SPA more generally, govern the circumstances in which a strata corporation may initiate legal proceedings for the owners, and the procedure that must be followed to do so. Counsel said that ss. 171 and 172 do not create a cause of action in a strata corporation, but rather set out the procedure whereby a strata corporation may advance the cause of action held by the owners. These sections, claimed counsel, each require that a strata corporation obtain the consent of a 3/4 majority of the owners present in person, or by proxy, at an annual or special general meeting in order to bring an action pursuant to these sections. Section 172 also requires that a strata corporation obtain the written consent of the individual owners on whose behalf an action is brought if it wishes to bring an action in respect of matters affecting only their strata lots.

¶ 12 Counsel asserted that the purpose of these sections is clear: it is to ensure that the approval of a majority of the owners is obtained before a strata corporation commences an action as their representative, or on their behalf. The requirement for owner approval is consistent with the fact that a strata corporation is only the nominal plaintiff in such actions. The true plaintiffs are the owners themselves. The strata corporation, thus, is the vehicle to advance the true plaintiffs' interests, and, to that end, s. 2(2) of the SPA affords the strata corporation "the power and capacity of a natural person of full capacity", subject only to any limitations found in the SPA or its regulations. The requirement for owner approval serves to protect the owners from the possible dissipation of their assets through unauthorized legal proceedings. Thus, counsel submitted, a mandatory interpretation of the procedural requirements set out in ss. 171 and 172 is not necessary to satisfy the purpose of these sections and, furthermore, is inconsistent with the broader purpose of the SPA.

¶ 13 Counsel also submitted that the procedural requirements in ss. 171 and 172 must be directory in nature, because to hold otherwise would unduly restrict the ability of a strata corporation to take immediate legal action: for example, to prevent the expiry of a limitation period, or to seek an injunction to protect the owners' interests. As directory provisions, a failure to obtain the approval of the owners prior to commencing an action pursuant to ss. 171 and 172 would not be fatal. The owners could subsequently ratify the decision of a strata corporation to commence an action, as has been done in the instant case.

¶ 14 Counsel argued that if the requirements of ss. 171 and 172 are held to be mandatory rather than directory, the action in the instant case will be rendered a nullity. The plaintiff will be forced to commence a new action after convening a further special general meeting and obtaining another special resolution or resolutions authorizing a new action. Counsel said that to the extent that claims are made in connection with individual strata lots only, the plaintiff will also be required to obtain written consents from those owners on whose behalf these claims are advanced. Such duplication of meetings and resolutions would work serious inconvenience. In commencing a new action, the owners would lose the benefit of most, if not all, of the legal fees expended in the action and would be required to duplicate most of its legal efforts to date. Such a result, claimed counsel, would be unjust in circumstances where the owners have clearly and repeatedly evidenced their consent to and intention to proceed

with the action.

¶ 15 The plaintiff also submitted that there is no evidence of any prejudice to either the Polygon Defendants who are attacking the procedure followed by the owners, or to the owners themselves. No owner has since come forward to protest the fact that the plaintiff commenced the action before obtaining the necessary special resolutions or written consents, or about the funds spent by the plaintiff in this regard. Counsel said that this is not a situation where the procedural safeguards contained in ss. 171 and 172 have been disregarded to the detriment of the owners. The purpose of the procedural requirements set out in ss. 171 and 172 is to protect the owners. However, the only parties complaining of the failure of the plaintiff to obtain the owners' approval before commencing the action are the Polygon Defendants. In such circumstances, it would be unjust to uphold the technical objections of the Polygon Defendants and find that the action is a nullity. Counsel said that to do so would frustrate the purpose of ss. 171 and 172, namely, to protect the owners.

¶ 16 Accordingly, counsel submitted that no effect should be given to the failure of the plaintiff to satisfy the requirements of ss. 171 and 172 before commencing the action. The procedural requirements set out in these provisions, claimed counsel, are directory in nature, and any failure to satisfy their strict requirements is an irregularity that can be rectified. He said that any defects in this regard have been rectified, and the action has been ratified by the owners' subsequent actions.

¶ 17 Secondly, under the heading of "Statutory Interpretation", counsel said that the modern approach to statutory interpretation is well-established. Citing Elmer Driedger, Construction of Statutes (2nd ed. 1983) at p. 87, the words in a statute "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention" of the Legislature: See Bell ExpressVu Limited Partnership v. Rex, [2002] S.C.J. No. 43, 2002 SCC 42; (2002), 100 B.C.L.R. (3d) 1 (S.C.C.) at para. 26 where the Supreme Court of Canada approved of this approach.

¶ 18 In CanadianOxy Chemicals Ltd. v. Canada (Attorney General), [1999], 1 S.C.R. 743, (1998) 171 D.L.R. (4th) 733 (S.C.C.) at para. 14, Major J. said, as follows:

> Statutory provisions should be read to give the words their most obvious ordinary meaning which accords with the context and purpose of the enactment in which they occur;.... It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids.

¶ 19 Counsel for the plaintiff argued that the plain language of ss. 171 and 172 states that the approval of the owners is required before a strata corporation commences an action on their behalf, or as their representative. The language of these provisions is imperative, and, therefore, the approval of the owners must be obtained. However, as counsel asserted, imperative provisions may be directory or mandatory. The issue before the court is not a question of the proper interpretation of the language of ss. 171 and 172, but rather of whether a failure to comply with the approval requirements prior to commencing an action is fatal to the proceeding, or is, instead, a mere irregularity.

¶ 20 Counsel submitted that the determination of whether a provision is "mandatory" or "directory" is informed by the regular principles of statutory interpretation; however, the most significant factors are the object of the statute and the effects of finding one way or the other. Counsel said that when these factors are considered, the procedural requirements in ss. 171 and 172 are directory rather than mandatory. Indeed, said counsel, this is the only interpretation that is consistent with the object and purpose of the SPA, namely to give a strata corporation the requisite flexibility to respond to different circumstances and to the needs of the owners.

¶ 21 Counsel also pointed out that the predecessor provisions to ss. 171 and 172 were ss. 15(1) and 15(7) of the Condominium Act, R.S.B.C. 1996, c. 64 respectively ("Condominium Act"). These latter provisions required that a strata corporation obtain owner approval by special resolution and written consent, where applicable, in order

to commence an action as a representative of, or on behalf of, the owners. Counsel said that although the Condominium Act did not contain imperative language and did not require that this approval be obtained before commencing an action expressly, the courts uniformly interpreted this requirement as a condition precedent to bringing an action: See Owners, Strata Plan No. NW 651 v. Beck's Mechanical Ltd., (1980), 20 B.C.L.R. 12 (S.C.); Strata Plan No. LMS44 v. RBY Holdings Ltd. [1993] B.C.J. No. 2251 (S.C.); Strata Corp VR 2673 v. Comissiona (2000), 80 B.C.L.R. (3d) 350 (S.C.).

¶ 22 Counsel argued that, significantly, the courts also interpreted these conditions precedent as procedural in nature, and any failure to obtain the approval of the owners prior to commencing an action was a mere irregularity which could be rectified. In other words, although interpreted in an imperative manner, the requirement for owner approval was directory in nature: See Beck's Mechanical, supra, at 20; Strata Plan LMS 1328 v. Marco Polo Properties, [2000] B.C.J. No. 977, 2000 BCSC 776 at para. 47.

¶ 23 Counsel submitted that the finding that the requirement for owner approval under the Condominium Act was procedural, is based on the reasoning in Beck's Mechanical, supra, where Esson J. (as he then was) said at p. 20:

> ...The condition precedent of a special resolution and consent is entirely procedural. Failure to comply with it affects the right to proceed in the name of the strata corporation for damages suffered by individual owners; but failure to meet the condition precedent does not affect the cause of action. It is a defect which can be cured by amendment as in Hanson v. Sponchia (1980), 15 B.C.L.R. 157 , 102 D.L.R. (3d) 508 (C.A.).

¶ 24 Counsel submitted that this reasoning remains equally applicable to ss. 171 and 172. He said that the fundamental nature of and rationale behind the requirement for owner approval did not change with the repeal of the Condominium Act, and the enactment of the SPA. The special resolution and consent requirements are conditions precedent to the commencement of an action by a strata corporation as a representative of, or on behalf of, the owners. However, the cause of action remains the owners'.

¶ 25 Counsel also said that the predecessor sections to ss. 171 and 172 of the SPA created a procedural mechanism whereby a strata corporation could stand before a court in place of, or on behalf of, the owners. The requirement for owner approval was simply to ensure that the owners consented to the action and to protect them from any unauthorized expenses in this regard.

¶ 26 Counsel argued that a failure by a strata corporation to obtain the approval of the owners before commencing an action does not and cannot affect the cause of action held by each owner. As a result, such a failure should not render the preceding a nullity. Any such defects are irregularities that may be rectified by the court, or by subsequent steps taken by the owners.

IV SUMMARY OF THE POLYGON DEFENDANTS' POSITION

¶ 27 The Polygon Defendants asserted that the requirements for a special resolution under s. 171 of the SPA, and for a special resolution and written consents under s. 172 of the SPA are mandatory. As a result, the failure of the plaintiff to satisfy these requirements before commencing its action renders the action a nullity.

¶ 28 Counsel for the Polygon Defendants submitted that the plaintiff's position on the object of the SPA is seriously flawed and cannot lend any support to the plaintiff's contention that a strata corporation is entitled to commence legal proceedings in certain situations without first obtaining the approval of the owners by 3/4 vote. Counsel said that it is not appropriate to consider the effect or result of interpreting a statutory provision in a case such as this; if the language is clear and a plain reading of that language meets the objects and purposes of the statute when read as a whole, then the consequences to a party, whether prejudicial or not, are of no import.

V DECISION

¶ 29 I disagree with the plaintiff's position that the court should override the plain meaning of the words in ss. 171 and 172 by deleting from those sections an express and mandatory prerequisite to commencement of an action. The wording in ss. 171 and 172 does not state that a strata corporation may sue on behalf of the owners and on its own behalf; the wording is clearly restrictive, providing that a strata corporation may sue as representative of all owners (s. 171) or that a strata corporation may sue on behalf of one or more owners (s. 172). In the instant case, the plaintiff's claims against the Polygon Defendants sound mainly in negligence, claims that could not be made by the plaintiff independent of ss. 171 and 172. The plaintiff is simply the vehicle by which the Legislature has intended that a representative action of this kind may be brought where the owners by 3/4 vote have approved that course of action and have, in effect, agreed that all owners will be bound by or share in any judgment and contribute pro rata to the costs of the action.

¶ 30 The plaintiff is not a separate entity that will share in the award or contribute independently to the costs of the action as a true representative plaintiff would in a representative action brought pursuant to the common law or under Supreme Court Rule 5(11) which governs representative proceedings. In my opinion, this action is, therefore, purely a statutory representative action that gives the plaintiff the capacity to sue or a right of action, which it would not otherwise have. It is in this respect, in my opinion, that ss. 171 and 172 are substantive, rather than purely procedural.

¶ 31 In Bell ExpressVu, supra, the Supreme Court of Canada considered the proper interpretation to be given s. 9 (1)(c) of the Radiocommunication Act, R.S.C. 1985, c. R-2. Iacobucci J.'s approach to the interpretation of this section is set out at paras. 26-27 and 37, as follows:

> (1) Principles of Statutory Interpretation
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> 26. In Elmer Driedger's definitive formulation, found at p. 87 of his Construction of Statutes (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: see, for example, Stubart Investments Ltd. v. R., [1984] 1 S.C.R. 536 (S.C.C.), at p. 578, per Estey J.; Quebec (Communaute urbaine) c. Notre-Dame de Bonsecours (Corp.), [1994] 3 S.C.R. 3 (S.C.C.), at p. 17; Rizzo & Rizzo Shoes Ltd., Re, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21; R. v. Gladue, [1999] 1 S.C.R. 688 (S.C.C.), at para. 25; R. v. Sharpe, [2001] 1 S.C.R. 45 , 2001 S.C.C. 2 (S.C.C.), at para. 33, per McLachlin C.J.; Chieu v. Canada (Minister of Citizenship & Immigration), [2002] S.C.J. No. 1 , 2002 S.C.C. 3 (S.C.C.), at para. 27. I note as well that, in the federal legislative context, this Court's preferred approach is buttressed by s. 12 of the Interpretation Act, R.S.C. 1985, c. I-21, which provides that every enactment "is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
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> 27. The preferred approach recognizes the important role that context must inevitably play

> when a court construes the written words of a statute: as Professor John Willis incisively noted in his seminal article "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar Rev. 1, at p. 6, "words, like people, take their colour from their surroundings". This being the case, where the provision under consideration is found in an Act that is itself a component of a larger statutory scheme, the surroundings that colour the words and the scheme of the Act are more expansive. In such an instance, the application of Driedger's principle gives rise to what was described in R. v. Ulybel Enterprises Ltd., [2001] 2 S.C.R. 867 , 2001 S.C.C. 56 (S.C.C.), at para. 52, as "the principle of interpretation that presumes a harmony, coherence, and consistency between statutes dealing with the same subject matter". (See also Murphy v. Welsh, [1993] 2 S.C.R. 1069 (S.C.C.) [a.k.a. Stoddard v. Watson], at p. 1079; Pointe-Claire (Ville) c. S.E.P.B., Local 57, [1997] 1 S.C.R. 1015 (S.C.C.), at para. 61, per Lamer C.J.).
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> 37. Furthermore, it was not necessary for Parliament to include the phrase "or elsewhere" in the s. 2 definition if it merely intended "subscription programming signal" to be interpreted as radiocommunication intended for direct or indirect reception by the public on board any of the s. 3(3) vessels, spacecrafts or rigs. In my view, the words "or elsewhere" were not meant to be tautological. It is sometimes stated, when a court considers the grammatical and ordinary sense of a provision, that "[t]he legislator does not speak in vain". (Quebec (Procureur General) v. Carrieres Ste-Therese Ltee, [1985] 1 S.C.R. 831 (S.C.C.), at p. 838.) Parliament has provided express direction to this effect through its enactment of s. 10 of the Interpretation Act, which states in part that "[t]he law shall be considered as always speaking". In any event, "or elsewhere" (<ou ailleurs>, in French) suggests a much broader ambit than the particular and limited examples in s. 3(3), and I would be reticent to equate the two.

¶ 32 I think that the approach articulated in Bell ExpressVu, supra, ought to be applied to the facts in the case at bar. The word "before" in ss. 171 and 172, therefore, cannot be viewed as superfluous and must have the meaning ordinarily given to it. For the court to conclude that the requirement that a 3/4 vote be obtained "before" a suit is brought is merely directory, would not only render the word meaningless but would also suggest that the Legislature had no real purpose or reason to include it in the provisions.

¶ 33 In my opinion, in the context of ss. 171 and 172 of the SPA, the court can assume that the Legislature chose to limit the right of a strata corporation to bring a representative action by including the words "before the strata corporation sues" and "before beginning the suit". If the Legislature had not intended that a strata corporation first obtain the 3/4 vote, or the 3/4 vote and written consent of specific owners before it would be able to commence an action as the representative, then one would assume it would not have included those phrases in ss. 171 and 172, respectively. There would have been no need to do so.

¶ 34 Further, if those phrases had not been added these sections would have been no different from s. 15 of the Condominium Act. Section 15(1)(a) of the Condominium Act, permitted a strata corporation to bring representative proceedings without the necessity of obtaining a 3/4 vote. Section 15(7)(b) permitted a strata corporation to sue if it was authorized by a special resolution and had the written consent of the owners concerned, but did not specify that this was to be done "before" commencing the suit, leaving it open to a court to interpret that requirement as being met even if it were done after the action was begun. I agree with defence counsel that the requirement upon a strata corporation for authorization by resolution has been changed substantially in the SPA, and that such a change must

be given effect to. The mandatory provisions contained in ss. 171 and 172 are clear on their face; there is no ambiguity.

¶ 35 Moreover, I agree with the Polygon Defendants' argument that the earlier judicial construction of the relevant provisions that appeared in the previous legislation cannot be adopted in the instant case. The Condominium Act was repealed on July 1, 2000, when the SPA came into force. The wording of section 15 of the Condominium Act was significantly changed in ss. 171 and 172 of the SPA, and the object, purpose, and requirements for a strata corporation to be able to commence a representative action were clarified.

¶ 36 As defence counsel noted, even if it could be said that the SPA in ss. 171 and 172 simply amended or revised s. 15, and that similar wording remains, the Interpretation Act, R.S.B.C. 1996, c. 238, s. 37(3) must be applied. That section is very clear that when an enactment has been amended or revised, the new version, "must not be construed to be or to involve an adoption of" any construction placed on that or similar language by previous judicial decision.

¶ 37 Therefore, on a plain reading of s. 37(3), the court cannot presume that the Legislature has adopted any previous construction for purposes of interpreting the new version. Applying that reading to the case at bar, if ss. 171 and 172 of the SPA can be considered to be amendments or revisions of s. 15 of the Condominium Act, and if the decision in Beck's Mechanical, supra, can be said to support an interpretation of s. 15 as involving procedural requirements, a defect in compliance with which may be corrected ex post facto by the court, I agree that that decision is not determinative for the purposes of interpreting ss. 171 and 172 of the SPA.

¶ 38 Furthermore, I disagree with the plaintiff's contention that the court should read down ss. 171 and 172 because s. 15 of the Condominium Act, which does not contain the same wording, was held to be procedural. In repealing the Condominium Act, and replacing it with the SPA, the Legislature has changed the law; the plaintiff can no longer rely on judicial decisions based on the Condominium Act for a definition of its rights and obligations under the SPA. The action was not commenced until after the SPA came into force and, as such, the plaintiff had no vested, accrued or even accruing right under the Condominium Act that it could carry over after the repeal of that Act. As stated by Dickson J. in Gustavson Drilling (1964) Ltd. v. Minister of National Revenue, [1977] 1 S.C.R. 271 at pp. 282-283, "No one has a vested right to continuance of the law as it stood in the past", and "The mere right existing in the members of the community or any class of them at the date of the repeal of a statute to take advantage of the repealed statute is not a right accrued...".

¶ 39 Finally, I agree with defence counsel that to give effect to the plaintiff's interpretation of ss. 171 and 172 as containing merely procedural requirements, non-compliance with which may be cured by the court, would confuse otherwise clearly worded provisions and create unnecessary confusion for owners, strata councils and strata corporations expected to read and understand the plain language of the SPA and govern their actions accordingly without the necessity of legal advice. As defence counsel noted, it cannot be disputed that the legislators intended the SPA to be read and understood within the plain meaning of the words used: as stated by defence counsel, if "before" does not really mean "before", then one must ask how individual owners can be expected to read and understand their governing legislation without reference to judicial precedent and costly legal advice?

¶ 40 I also agree with defence counsel that merely because there may be no prejudice to a defendant in allowing a strata corporation to commence an action and obtain the requisite approval afterward, that does not satisfactorily answer the question of where a strata corporation obtained the power to commence the action in the first place. As defence counsel correctly argued, in my view, the plaintiff does not have capacity or status to act as the representative of the owners until the 3/4 vote has been obtained. While this result may appear harsh in the circumstances of the instant case, it is not, in my view, the function of the court to fashion a remedy which will cure a strata corporation's failure to acquire the capacity to sue by complying with the clear and unambiguous requirements of the SPA.

¶ 41 In the result, I find that:

(a) the plaintiff's right to commence a representative action does not exist outside of ss. 171 and 172 of the SPA;

(b) The plaintiff must obtain a 3/4 vote before it commences an action pursuant to s. 171, and, in the case of s. 172, it must also obtain the written consent of the individual owners before doing so. Having failed to do so, its right to commence a representative action does not arise;

(c) This is not a case where the court can reasonably find non-compliance with a purely procedural provision, or make a corrective order. Non-compliance by the plaintiff with ss. 171 and 172 of the SPA must result in the action being declared a nullity.

VI CONCLUSION

¶ 42 Plaintiff's counsel advised the court that if the court construed ss. 171 and 172 in favour of the Polygon Defendants, then the plaintiff will seek leave pursuant to Rule 15(5) to apply to substitute an owner (or owners) as a plaintiff in this action.

¶ 43 While I am satisfied that the Polygon Defendants are entitled to an order to strike the plaintiff's action, granting of the order is postponed pending receipt of further submissions on this point.

COHEN J.

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