COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Norenger Development (Canada) Inc. v. The Owners, Strata Plan NW 3271* 2016 BCCA 118

Date: 20160315
Docket: CA42782

Between:

Norenger Development (Canada) Inc.

Appellant
(Petitioner)

And

**The Owners, Strata Plan NW 3271,
The Residential Section of The Owners, Strata Plan NW 3271
and Winston Wing Tang Liu**

Respondents
(Respondents)

Before: The Honourable Madam Justice Kirkpatrick
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Stromberg-Stein

On appeal from: An order of the Supreme Court of British Columbia, dated April 14, 2015 (*Norenger Development (Canada) Inc. v. The Owners, Strata Plan NW 3271*, 2015 BCSC 564, Vancouver Registry Docket S112154).

Counsel for the Appellant:	P.A. Williams
Counsel for the Respondent, The Residential Section of The Owners, Strata Plan NW 3271 and Winston Wing Tang Liu:	E.T. McCormack
Counsel for the Respondent Administrator of The Owners, Strata Plan NW 3271:	G.S. Hamilton
Place and Date of Hearing:	Vancouver, British Columbia February 15, 2016
Place and Date of Judgment:	Vancouver, British Columbia March 15, 2016

Written Reasons by:
The Honourable Madam Justice Kirkpatrick

Concurred in by:
The Honourable Mr. Justice Tysoe
The Honourable Madam Justice Stromberg-Stein

Summary:

Appeal from an order, made under s. 174(7) of the Strata Property Act, S.B.C. 1998, c. 43 (the "Act"), which dispensed with the requirement that an administrator obtain the approval of voters before exercising a power or performing a duty of the strata corporation. Held: appeal allowed. Section 174(7) does not permit the court to authorize action that would otherwise require a majority, 3/4 or unanimous vote under the Act. The powers and duties of a strata corporation are independent from the powers and duties of the owners. Absent specific statutory authorization, a court may not abrogate the democratic rights of owners under the Act.

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

INTRODUCTION

[1] This appeal stems from the court appointment of an administrator for the Owners, Strata Plan NW 3271, a two-building condominium development known as Richmond Landmark in Richmond, B.C. (the "Strata Corporation").

[2] The central issue on the appeal is the proper interpretation of s. 174(7) of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*"). Section 174(7) provides:

> **174.** (7) Unless the court otherwise orders, if, under this Act, a strata corporation must, before exercising a power or performing a duty, obtain approval by a resolution passed by a majority vote, a 3/4 vote or a unanimous vote, an administrator appointed under this section must not exercise that power or perform that duty unless that approval has been obtained.

[3] This issue engages the scope of an administrator's powers and duties under the *Act*. The ultimate question to be decided on the appeal is whether s. 174(7), as it is presently worded, permits a court to abrogate a right which lies at the very core of a strata corporation's constitutional structure: the owners' democratic right to vote.

[4] For the reasons that follow, I would allow the appeal.

BACKGROUND

[5] In order to appreciate the issue on appeal, it is necessary to provide a brief review of the underlying facts and court proceedings leading up to the appeal.

A. The Strata Corporation

[6] The Strata Corporation was created on June 27, 1990, under the provisions of the former *Condominium Act*, R.S.B.C. 1979, c. 61, and consists of two sections:

(a) a residential section, comprising strata lots 1 through 44, which are located in Building B (the "Residential Section"); and

(b) a commercial section, comprising strata lots 45 and 48, which are located in Building A, and strata lots 46 and 47, which are located in Building B (the "Commercial Section").

[7] Building A is a nine-story building. Commercial strata lot 45 occupies the first two floors, and commercial strata lot 48 occupies the other seven floors.

[8] Building B is a 16-story building. Commercial strata lot 46 occupies the ground level, and commercial strata lot 47 occupies the second level. The residential units occupy floors 5 through 16. There is parking on floors 3 and 4. Building B also includes a six-level parking structure which consists of a combination of common property and limited common property for each of the sections.

[9] The original bylaws of the Strata Corporation modified the standard bylaws in the *Condominium Act*. Each strata lot was entitled to one vote. The Residential Section had 91.7% of the total votes; the Commercial Section had 8.3%.

[10] The original bylaws were ambiguous with respect to the allocation of common expenses between the Strata Corporation and the two sections. Common expenses were to be levied in part based on unit entitlement. The Residential Section made up 44.4% of the total unit entitlement; the Commercial Section made up 55.6%.

[11] From 1990 to 2010, the Strata Corporation was managed by La Salle Management Ltd. ("La Salle"), and its successor, Castle Management Ltd. ("Castle"). La Salle and Castle are related to the appellant, Norenger Development (Canada) Inc. ("Norenger"). Norenger was the developer of Richmond Landmark and remains

the sole owner of the four strata lots which comprise the Commercial Section, together with one residential strata lot.

[12] In 2010, Century 21 Prudential Estates (RMD) Ltd. took over management of the Residential Section. Castle continued to manage the Commercial Section.

B. Appointment of the Administrator

[13] In its first twenty years, the Strata Corporation did not comply with the *Act* or its original bylaws. Expenses were allocated between the two sections in an irregular manner, and the Strata Corporation did not hold annual general meetings. The Strata Corporation's first annual general meeting was held in October 2012.

[14] The dispute which led to the appointment of an administrator first arose in 2009. This dispute concerned the allocation of costs for the replacement of lights in Building B's parking and exterior common areas. Further disagreement later arose between the two sections regarding the allocation of other anticipated costs, including the cost of replacing the building envelopes on Building A and Building B.

[15] On April 1, 2011, Norenger filed a petition in the Supreme Court seeking the appointment of the respondent Garth Cambrey as the administrator of the Strata Corporation, pursuant to s. 174 of the *Act*, on the basis that the Strata Corporation was incapable of managing its affairs.

[16] The Residential Section consented to Mr. Cambrey's appointment, subject to certain qualifications. In its response to Norenger's petition, the Residential Section made submissions regarding the scope of Mr. Cambrey's mandate, including that:

> 3. It is respectfully submitted that there has not so much been a demonstrated inability to manage the Strata Corporation, but that the Strata Corporation has not been managed as a distinct legal entity, in spite of the fact that the complex has been under management related to Norenger up until April 2010.
> 4. The Residential Section supports the appointment of an Administrator if the Administrator is given specific duties which need to be accomplished under specific time frames to establish basic management of the Strata

> Corporation, so that the rights and responsibilities of the two sections and the Strata Corporation are clarified and so that a Council comprised of both Residential Section owners and Commercial Section representatives is formed.
>
> …
>
> 8. It is the submission of the Residential Section that the relief sought does not include an order about how expenses are going to be allocated between the Residential Section, the Commercial Section and the Strata Corporation and that if the Petitioner wanted an Order on this point, or alternatively direction to be given to the Administrator on this point, then the relief sought should have included this.
>
> 9. The Residential Section agrees that [the] Administrator should draft a set of bylaws for the consideration of the strata corporation owners and the owners of each section.

[17] By consent order dated November 7, 2011 (the "November 2011 Order"), Madam Justice Stromberg-Stein (as she then was) ordered:

> 3. That an Administrator be appointed to exercise the powers and perform the duties of the Strata Corporation, subject to the democratic requirements of the *Strata Property Act*… ;
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> …
>
> 7. That the Administrator prepare a first report and provide it to the parties and the Court, if the Administrator deems it appropriate, within four months of the date of this Order and that the report describe what the Administrator has found, the steps the Administrator has taken to administer the Strata Corporation and the further steps that the Administrator intends to take in administering the Strata Corporation. The report will include the recommendations of the Administrator with respect to replacement and repair needed, by whom and how it should be funded;
>
> 8. That the Administrator provide, within four months of the date of this Order, pursuant to the *Strata Property Act*, including but not limited to sections 72 and 195 and Part 11 of the Regulation thereto, a list of those present and future expenses, including operating expenses, contingency reserve expenses and expenses to be paid for by special levy that should be contributed to by all owners in the Strata Corporation, a list of those present and future expenses that should be contributed to solely by the residential section owners and a list of those present and future expenses that should be contributed to solely by the commercial section owner(s) and that if Norenger or the Residential Section dispute this list, they must file and serve a Notice of Application within two months of the date that the list is submitted by the Administrator to the parties… ;
>
> 9. That if the list mentioned above is not in dispute, that the Administrator prepare bylaws for the Strata Corporation and that these bylaws provide

> for sections and the allocation of present and future expenses as per the list prepared above between the Strata Corporation and each Section and that the bylaws be presented for the consideration of the owners at a special general meeting to be held within eight months of the date of the Order;
>
> 10. That if the bylaws are not passed at the meeting by a 3/4 vote resolution of the residential owners, a 3/4 vote of the commercial owners and a 3/4 vote resolution of owners that the Administrator and/or each of the parties can apply to the Court for further direction; …
>
> [Emphasis added.]

[18] As required under paras. 7 and 8 of the November 2011 Order, Mr. Cambrey (the "Administrator") delivered his first report on March 26, 2012 (the "First Report"). The First Report included recommendations on cost allocations. On May 25, 2012, the Residential Section filed a notice disputing these recommended cost allocations.

[19] By consent order dated May 14, 2012, the Administrator was given until August 7, 2012, to prepare draft bylaws and present these bylaws to the owners at a special general meeting, as required under para. 9 of the November 2011 Order.

[20] By order dated January 9, 2013, Mr. Justice Masuhara varied the November 2011 Order, "requiring the Administrator to prepare draft bylaws … for consideration by the owners, regardless of whether the recommended allocation of present and future expenses by the Administrator are disputed".

[21] By consent order dated November 29, 2013 (the "November 2013 Order"), the Administrator's term was extended to November 7, 2014. The November 2013 Order also provided that:

> (vi) If the bylaws are not approved, Mr. Cambrey will apply to the Court within 60 days to seek the Court's direction and/or court orders. …

[22] On March 31, 2014, a special general meeting was held to consider the draft bylaws and two unanimous resolutions presented by the Administrator. The first resolution concerned a new formula for allocating expenses pursuant to s. 100 of the *Act.* Section 100(1) provides:

> **100.** (1) At an annual or special general meeting held after the first annual general meeting, the strata corporation may, by a resolution passed by a unanimous vote, agree to use one or more different formulas, other than the formulas set out in section 99 and the regulations, for the calculation of a strata lot's share of the contribution to the operating fund and contingency reserve fund.

[23] The second concerned the removal of a limited common property designation (a loading bay) pursuant to s. 257 of the *Act*. Section 257(a) provides:

> **257.** To amend a strata plan to designate limited common property, or to amend a strata plan to remove a designation of limited common property made by the owner developer at the time the strata plan was deposited or by amendment of the strata plan, the strata plan must be amended as follows:
>
> > (a) a resolution approving the amendment must be passed by a unanimous vote at an annual or special general meeting; …

[24] The procedure for amending bylaws is set out in s. 128 of the *Act*:

> **128.** (1) Subject to section 197, amendments to bylaws must be approved at an annual or special general meeting,
>
> > (a) in the case of a strata plan composed entirely of residential strata lots, by a resolution passed by a 3/4 vote,
> >
> > (b) in the case of a strata plan composed entirely of nonresidential strata lots, by a resolution passed by a 3/4 vote or as otherwise provided in the bylaws, or
> >
> > (c) in the case of a strata plan composed of both residential and nonresidential strata lots, by both a resolution passed by a 3/4 vote of the residential strata lots and a resolution passed by a 3/4 vote of the nonresidential strata lots, or as otherwise provided in the bylaw

[25] The draft bylaws and unanimous resolutions were defeated at the March 2014 special general meeting.

[26] On May 21, 2015, the Administrator delivered a third report. This report was later revised on August 26, 2014 (the "Revised Third Report"). In the Revised Third Report, the Administrator included the following recommendation:

> xiii) *New Bylaws and Unanimous Resolutions* - I believe that the new bylaws and unanimous resolutions considered by the Strata Corporation at the March 31, 2014 SGM are required to assist the Strata Corporation to become operationally functional by settling many of the unresolved issues, subject to proposed modifications.

> It is my recommendation that the new bylaws and resolutions respecting cost allocations and LCP removal should be adopted by the Strata Corporation in the form attached as Appendix "V".

C. Relief sought by the Administrator and the Residential Owners

[27] On May 28, 2014, the Administrator applied for directions from the court, as required by the November 2013 Order. The Administrator then filed an amended notice of application on August 26, 2014, seeking the following orders:

> 2. An order repealing the Strata Corporation's bylaws and replacing them with the bylaws attached as Schedule A to this Amended Notice of Application (the "New Bylaws").
> 3. An order that the Administrator approve, without the requirement of a unanimous vote, a resolution pursuant to s. 100 of the *Strata Property Act* requiring the Strata Corporation to use the formulas for calculating a strata lot's share of the contribution to the operating fund, contingency reserve fund and a special levy set out in the unanimous resolution attached as Schedule B to this Amended Notice of Application (the "Unanimous Resolution").
> 4. An order that the Administrator approve, without the requirement of a unanimous vote, a resolution pursuant to s. 257 of the *Strata Property Act* amending the strata plan to remove the designation of limited common property in respect of the area shown on the plan attached as Schedule C to this Amended Notice of Application (the "LCP Resolution")[.]

[28] On October 2, 2014, the Residential Section and Mr. Winston Liu, one of the residential owners (collectively, the "Residential Owners") filed a notice of application seeking substantially the same relief as the Administrator. The Residential Owners also sought various declarations regarding the unfairness of certain conduct.

[29] The two applications came on for hearing in February 2015. The chambers judge delivered his reasons on April 14, 2015, indexed at 2015 BCSC 564.

D. Reasons for judgment of the chambers judge

[30] The chambers judge was satisfied that the Administrator's recommendations in the Revised Third Report were "a practical and sensible way out of the impasse, and one that is, overall, fair to all parties" (at para. 52). He found that the proposed

bylaws would resolve ambiguities and inconsistencies that made the current bylaws unworkable, that the proposed formula for cost allocation would recognize the reality that Building A only contains Commercial Section strata lots, and that the proposal to remove the designation of limited common property near a loading bay was a "sensible and practical way" of resolving issues surrounding recycling, garbage and used oil collection, and moving vehicles (at paras. 46-48).

[31] The judge then turned his mind to the court's ability to make the orders sought. The Administrator argued that s. 174(7) of the *Act* empowered the court to make the orders authorizing conduct that would otherwise require a 3/4 or unanimous vote, pointing to the opening clause of subsection (7), "[u]nless the court otherwise orders". The Residential Owners relied on ss. 164 and 165 of the *Act*, and the inherent jurisdiction of the court. Sections 164 and 165 read as follows:

> **164.** (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> > (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
> >
> > (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
>
> (2) For the purposes of subsection (1), the court may
>
> > (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 40% or more of the votes,
> >
> > (b) vary a transaction or resolution, and
> >
> > (c) regulate the conduct of the strata corporation's future affairs.
>
> **165.** On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:
>
> > (a) order the strata corporation to perform a duty it is required to perform under this Act, the bylaws or the rules;
> >
> > (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
> >
> > (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[32] In response, Norenger argued that neither s. 174(7), nor s. 165, nor the court's inherent jurisdiction, empowered the court to override the democratic provisions of the *Act.* In its submission, ss. 100, 128, and 257 were intended to protect the democratic rights of owners. It argued that the general language of s. 174(7) did not empower the court to abrogate these specific democratic rights.

[33] The judge concluded that s. 174(7) "clearly gives the Court the power to permit an administrator appointed under s. 174 to exercise a power or a duty of a strata corporation despite the fact that the administrator has been unable to obtain approval of a resolution by a majority or a 3/4 vote or a unanimous vote" (at para. 62). He continued at paras. 65-67:

> [65] In the present case there was a clear inability to manage, and the appointment of the Administrator was necessary to bring order to the affairs of the strata corporation. The Administrator has made carefully considered recommendations which would, in my view, help to resolve that inability to manage. He put those recommendations before the owners in the form of resolutions, but those resolutions did not pass. As I interpret s. 174(7), this is the very sort of situation in which the Legislature intended the Court to be able to act, in order that the Administrator may complete the task of putting the affairs of the strata corporation in order, so that the appointment of the Administrator can ultimately come to an end.
>
> [66] I agree with the reasoning of Macaulay J. in *Clarke v. The Owners, Strata Plan VIS 770,* 2009 BCSC 1415, that where an administrator has been appointed and has tried to bring order to the affairs of the strata corporation by bringing a special resolution, the administrator must be able to turn to the Court if a required 3/4 or unanimous vote fails.
>
> > [21] The conclusions in the cases discussed above are sensible. There would be little point in appointing an administrator to deal with a dysfunctional building only to have the administrator paralyzed by the owners' inability to agree on important issues. The Act provides for a democratic process, but, when it fails, protection for the owners lies in the two-step process that is envisaged. First, the administrator must seek a 3/4 majority whenever a special resolution is required. *If, however, the special resolution fails, the second step is for the administrator to apply to the court under s. 165, or otherwise, for orders or directions to ensure that the strata corporation addresses all issues in respect of which it has a duty*.
> >
> > [22] *Without the availability of the second step, there would be no effective means to address the continuing dysfunction. The protection for the owners, at the second step, regardless whether they are part*

> *of the majority, is to appear on the application to support or oppose the application*.
>
> [Emphasis in original.]
>
> [67] Although Macaulay J. was considering the matter from the perspective of s. 165, and although he spoke of issues in respect of which there is a duty, I am satisfied that the same reasoning should apply to s. 174(7) where an appointed administrator is acting to bring order to the affairs of a dysfunctional strata corporation, regardless of whether the dysfunction is in relation to a duty. Section 174(7) uses more general language; it speaks of "exercising a power or performing a duty". It is clear from Part 7 of the *Act*, and in particular, the language used in s. 123(1.1), that the power to pass bylaws is a power of the strata corporation.

[34] I note that s. 123(1.1) of the *Act* concerns pet and age bylaws, and provides:

> **123.** (1.1) Without limiting a strata corporation's power to pass any other bylaws, a strata corporation may pass a bylaw that restricts the age of persons who may reside in a strata lot.

[35] Norenger also made submissions regarding s. 72 of the *Act*. Section 72 concerns responsibility for the repair and maintenance of limited common property and common property. Norenger argued that s. 72 rendered the proposed bylaws unenforceable insofar as they made Norenger responsible for the cost of repairing the envelope of Building A. The judge did not accept this argument:

> [69] As well, I do not accept Norenger's argument that pursuant to s. 72 of the *Act*, the proposed bylaws would be unenforceable insofar as they make Norenger responsible for the envelope of Building A. I do not consider s. 72 to have that effect. As well, I find Norenger's submission to be somewhat disingenuous, given that it has said that it supports the recommendations set out in the Administrator's First Report to the effect that "all expenses of Building A, including building envelope expenses, should be the responsibility of the Commercial Section".

[36] Having found that s. 174(7) empowered him to grant the orders sought by the Administrator, the judge did not consider the other arguments advanced by the Residential Owners. In the result, he made several orders, including:

> 2. The Strata Corporation's bylaws be repealed and replaced with the bylaws attached as Schedule A to this Order.
> 3. The Administrator approve, without the requirement of a unanimous vote, a resolution pursuant to s. 100 of the *Strata Property Act* requiring the

Strata Corporation to use the formulas for calculating a strata lot's share of the contribution to the operating fund, contingency reserve fund and a special levy as set out in the unanimous resolution attached as Schedule B to the Administrator's Amended Notice of Application, which is attached as Schedule B to this Order.

4. The Administrator approve, without the requirement of a unanimous vote, a resolution pursuant to s. 257 of the *Strata Property Act* amending the strata plan to remove the designation of limited common property in respect of the area shown on the plan attached as Schedule C to the Administrator's Amended Notice of Application, which is attached as Schedule C to this Order.
5. The Administrator file at the Land Title Office the New Bylaws, Unanimous Resolution and LCP Resolution, and execute such further and other documents as may be necessary or desirable to complete the filing, including, without limitation, a Form B Certificate of Strata Corporation and Form I Amendment to Bylaws.
6. The New Bylaws, Unanimous Resolution and LCP Resolution will be effective and binding against owners and the Strata Corporation upon filing at the Land Title Office.

[37] These orders are the subject of this appeal.

ON APPEAL

[38] Norenger argues that the judge erred in his interpretation of s. 174(7) of the *Act*. Norenger submits that s. 174(7) should only apply where a strata corporation is exercising a power or performing a duty. It argues that passing bylaw amendments under s. 128, removing limited common property designations under s. 257, or changing the formula for allocating expenses under s. 100 are *not powers or duties* of the Strata Corporation. Norenger submits that more explicit language than s. 174(7) is required to interfere with the democratic rights of owners under ss. 100, 128 and 257. In the alternative, if the judge did not err in his interpretation of s. 174(7), Norenger urges this Court to find that some of the new bylaws are unenforceable by virtue of s. 72.

[39] The Administrator submits that the opening clause of s. 174(7), "[u]nless the court otherwise orders", empowered the judge to make the orders under appeal. He argues that the judge was correct in finding that the power to amend bylaws is a

power of the Strata Corporation, citing s. 123(1.1). He says that changing the formula for expenses under s. 100, and removing limited common property designations under s. 257, are also powers of the Strata Corporation. In the alternative, he says that the bylaws which require the Residential and Commercial Sections to repair and maintain common property do not offend s. 72 because "section" can be read in place of "strata corporation" for the purpose of that section.

[40] The Residential Owners effectively submit that the judge did not err in dispensing with the owners' approval under s. 174(7). They submit that the very act of appointing an administrator suspends the democratic rights of owners. They also ask this Court to consider the alternative relief available under ss. 164 and 165.

[41] Finally, at the commencement of the hearing, Norenger brought a preliminary motion for orders that: (i) Norenger be permitted to argue that s. 164 does not apply to the orders appealed from; (ii) the Administrator has no standing to oppose the appeal; and, (iii) alternatively, Norenger is "not liable for any contribution to the financial expense" of preparing the Administrator's factum or his attendance at the hearing. We concluded that s. 164 is not properly before this Court because the judge did not address this section in his reasons. We found that it would be of assistance to hear from the Administrator. Further, the Administrator advised us that he would not seek costs on the appeal.

[42] None of the parties challenge the Administrator's appointment.

DISCUSSION

[43] Under s. 174(2) of the *Act*, an administrator may be appointed if, in the court's opinion, "the appointment of an administrator is in the best interests of the strata corporation". In *Lum et al. v. The Owners, Strata Plan VR519*, 2001 BCSC 493 [*Lum*], Mr. Justice Harvey identified the following factors as relevant to the court's exercise of discretion to appoint an administrator under s. 174:

> (a) whether there has been established a demonstrated inability to manage the strata corporation,

(b) whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation,

(c) whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation,

(d) where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation,

(e) where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

[44] These factors illustrate that the overarching purpose of s. 174 is to address dysfunction within a strata corporation. The full text of s. 174 reads as follows:

> **174.** (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation.
>
> (2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation.
>
> (3) The court may
>
> (a) appoint the administrator for an indefinite or set period,
>
> (b) set the administrator's remuneration,
>
> (c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and
>
> (d) relieve the strata corporation of some or all of its powers and duties.
>
> (4) The remuneration and expenses of the administrator must be paid by the strata corporation.
>
> (5) The administrator may delegate a power.
>
> (6) On application of the administrator or a person referred to in subsection (1), the court may remove or replace the administrator or vary an order under this section.
>
> (7) Unless the court otherwise orders, if, under this Act, a strata corporation must, before exercising a power or performing a duty, obtain approval by a resolution passed by a majority vote, a 3/4 vote or a unanimous vote, an administrator appointed under this section must not exercise that power or perform that duty unless that approval has been obtained.

[45] Subsection (7) was added to s. 174 on December 11, 2009. This appeal is the first opportunity which this Court has had to consider the effect of s. 174(7).

[46] Prior to the enactment of s. 174(7), this Court considered the scope of an administrator's powers and duties in *Aviawest Resort Club v. Chevalier Tower Property Inc.*, 2005 BCCA 267 [*Aviawest*]. In *Aviawest*, the administrator appointed under s. 174 was given the power, by way of court order, "to impose a special levy, to approve a special budget and to pass any other resolution normally requiring a majority or 75%, if such resolution is in the best interest of the [strata corporation]".

[47] The appellants in *Aviawest* argued that the court did not have the authority to make these orders under s. 174. In their submission, s. 174 did not empower the court to authorize an administrator to act without a resolution of the owners in circumstances where the strata corporation could not act without such a resolution. In response, the respondents argued that the powers of the owners and the powers of the strata corporation were unified under the *Act*: the conferral of the powers of the strata corporation on an administrator carried with it the power to act without resort to a formal vote of the owners.

[48] Mr. Justice K. Smith did not accept the respondents' submissions. He held that the passage of a resolution by the members of a strata corporation at a general or special meeting was not a "power or duty" of the strata corporation: "… the right to vote is an individual right possessed by the owners and nothing in s. 174(3)(d) would support an order abrogating that right" (at para. 33). At para. 34, he continued:

> [34] Section 174 of the *Act* authorizes the court to appoint an administrator to exercise the powers and perform the duties of the strata corporation. He can do no more than the strata corporation could do. In particular, if the strata corporation could not act without the authority of a resolution, the administrator is equally restrained. The owners are members of the strata corporation. It is the members who vote on and pass resolutions at meetings of the strata corporation. Allowing the administrator to act without resort to the owners at all, as the impugned orders do, abrogates the rights of the owners to vote on actions requiring their authorization by resolution. The *Act* does not authorize such a result. …
>
> [Emphasis added.]

[49] In support of this conclusion, Smith J.A. cited the decision of Madam Justice Huddart (as she then was) in *Cook v. Strata Plan N-50* (1995), 131 D.L.R. (4th) 393, 16 B.C.L.R. (3d) 131 (S.C.). *Cook* was decided under s. 71 of the *Condominium Act*, which preceded the *Act* but contained substantially the same provisions as ss. 174(1), (3)-(6). Huddart J. found that the words "the powers and duties of the strata corporation" in s. 71(4) of the *Condominium Act* did not include the power of an administrator to act without a special resolution when such a resolution was required under the statute. She held that while owners may together constitute a corporate body, they continue to have individual rights, including the right to vote on resolutions. At 135, she said:

> This reasoning leads me to conclude that this court can confer all of the powers and duties of the strata corporation on an administrator, but that an administrator appointed under section 71 will require the approval of a majority of the votes at a general meeting for the approval of a budget and 3/4 of the votes to amend the bylaws, or to do any other act where a special resolution is required by the *Act*. The administrator will require that approval because the strata corporation would require it. …

[50] In support of his conclusion in *Aviawest*, Smith J.A. also cited the decision of Mr. Justice Pitfield in *Toth v. The Owners, Strata Plan LMS1564* (19 August 2003), Vancouver L022502 (B.C.S.C.). In *Toth*, Pitfield J. applied the principles from *Cook* to s. 174 of the *Act*. He found that s. 174 did not empower the court to authorize an administrator to impose a special levy without satisfying the requirement for a 3/4 vote under s. 108 of the *Act.* At paras. 14 and 16, he held:

> [14] The result is that I construe s. 174 to provide no means whatsoever by which the court is empowered to permit the administrator, appointed for whatever purpose, to act in contravention of the wishes of the owners where a 3/4 majority is required.
>
> …
>
> [16] In my opinion, the duties and powers of the strata corporation are independent of the rights and powers of the owners. The court has the capacity to excuse an administrator, if appointed, from the performance of some or all of the duties and powers under the *Strata Property Act*. The wording is not directed to, nor does it permit, the abrogation of the owners' rights conferred by s. 108 of the *Strata Property Act.*
>
> [Emphasis added.]

[51] Pitfield J. went on to discuss the democratic principles that underlie the *Act*:

> [18] The reasons why the *Strata Property Act* contains some provisions that require a 3/4 majority are fairly straightforward. The *Strata Property Act* is the legislative embodiment of the so-called democratic principles that are supposed to surround community living. The interests of those who live in a community are different from those who live alone. The financial circumstances of the owners vary. Their living and life circumstances vary. Their personal views of life are different. Obviously, in a community or democratic environment, a wide range of interests must be accommodated.
>
> [19] The legislature has decided that some decisions made by owners are more important than others. Some can be made by simple majority. Others require a substantial majority, thought by the legislature to be appropriately set at 3/4. The reason is understandable.
>
> …
>
> [21] To permit an administrator to make a decision on the nature and extent of repairs without the administrator being in any way accountable to the owners or to the court, would be to deny the owners the rights that have been conferred upon them by statute.

[52] Although Pitfield J. left open the possibility that the difficulties facing the parties might be resolved under ss. 164 or 165 of the *Act*, he concluded that s. 174, as it was then worded, did not create a clear mechanism for resolving a stalemate:

> [23] Regrettably, the *Strata Property Act* is silent as I read it, on the question of what should be done in circumstances of this kind… .
>
> [24] The *Strata Property Act* might have settled upon some mechanism for the resolution of stalemates among owners. It does not appear to have done that, at least in any direct sense. …

[53] Some years later, but prior to the enactment of s. 174(7), Mr. Justice Macaulay considered a similar issue in *Clarke v. The Owners, Strata Plan VIS770*, 2009 BCSC 1415. In *Clarke*, the administrator applied for an order that a special levy be imposed to cover the administrator's expenses. Macaulay J. found that the strata corporation had a duty to fund these expenses under s. 174(4), which in turn triggered potential relief under s. 165 of the *Act*. At paras. 21-22, he commented:

> [21] … There would be little point in appointing an administrator to deal with a dysfunctional building only to have the administrator paralyzed by the owners' inability to agree on important issues. The Act provides for a democratic process, but, when it fails, protection for the owners lies in the two-step process that is envisaged. First, the administrator must seek a 3/4

> majority whenever a special resolution is required. If, however, the special resolution fails, the second step is for the administrator to apply to the court under s. 165, or otherwise, for orders or directions to ensure that the strata corporation addresses all issues in respect of which it has a duty.
>
> [22] Without the availability of the second step, there would be no effective means to address the continuing dysfunction. The protection for the owners, at the second step, regardless whether they are part of the majority, is to appear on the application to support or oppose the application.

[54] In the case at bar, the judge extended Macaulay J.'s reasoning from *Clarke*, in the context of s. 165, to the powers and duties of an administrator under s. 174(7). In my respectful view, the judge erred in so doing.

[55] The wording and effect of s. 165 is substantially different from the wording and effect of s. 174(7). Section 165 empowers the court to make certain orders which concern the duties and conduct of a strata corporation: "[o]n application of an owner, tenant, mortgagee of a strata lot or interested person, *the Supreme Court may do one or more of the following*…". In contrast, s. 174(7) provides that, "[u]nless the court otherwise orders", an administrator must not exercise a power or perform a duty of the strata corporation if he or she has not obtained the requisite approval.

[56] It is instructive to note that s. 4 of the *Act* provides that a strata corporation functions through a strata council: "The powers and duties of the strata corporation must be exercised and performed by a council, unless this Act, the regulations or the bylaws provide otherwise." Similarly, it is the strata council which exercises the powers and duties of the strata corporation: s. 26. Eligible voters, defined in s. 1(1) as "persons who may vote under sections 53 to 58", elect a council at each annual general meeting: s. 25.

[57] However, the *Act* is clear that a strata council, *acting alone*, does not have the power to pass bylaw amendments, remove limited common property designations, or change the formula for allocating expenses − only owners, or other eligible voters, have the power to approve these changes pursuant to their legislated mandate:

(a) s. 100 calls for a resolution passed by a unanimous vote to amend the formula for allocating expenses;

(b) s. 128 calls for a resolution passed by a 3/4 vote to amend the bylaws of the strata corporation; and

(c) s. 257 calls for a resolution by a unanimous vote to amend the strata plan to remove a limited common property designation.

[58] Other sections which require the approval of voters before action can be taken by a strata corporation include: s. 21 (majority vote required to approve the first annual budget), s. 27 (majority vote required to direct or restrict the actions of the strata council), s. 80 (3/4 vote required to dispose of common property), s. 108 (3/4 vote required to approve a special levy), and s. 261 (unanimous vote required to amend the Schedule of Unit Entitlement). For a comprehensive list of sections which require the approval of voters before action can be taken, see: *British Columbia Strata Property Practice Manual*, loose-leaf (Vancouver: The Continuing Legal Education Society of British Columbia, 2008) at §6.101, 6-61 to 6-65.

[59] In my opinion, s. 174(7) falls short of empowering the court to dispense with the need for voter approval under the *Act*. Clearer wording is needed to override such a fundamental right.

[60] Support for this approach is grounded in the presumption that the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham, Ont.: LexisNexis Canada, 2014) at 497. It is a general rule of statutory interpretation that legislation which curtails rights must be strictly construed.

[61] For example, in *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123, Justice Abella found that s. 47(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, empowers a bankruptcy judge to direct an interim receiver's conduct but "does not, explicitly or implicitly,

confer authority on the court to make unilateral declarations about the rights of third parties affected by other statutory schemes" (at para. 45). At para. 51, she held:

> [51] If the s. 47 net were interpreted widely enough to permit interference with all rights which, though protected by law, represent an inconvenience to the bankruptcy process, it could be used to extinguish all employment rights if the bankruptcy court thinks it "advisable" under s. 47(2)(*c*). Explicit language would be required before such a sweeping power could be attached to s. 47 in the face of the preservation of provincially created civil rights in s. 72. As Major J. stated in *Crystalline Investments Ltd. v. Domgroup Ltd.*, [2004] 1 S.C.R. 60, 2004 SCC 3:
>
> > . . . explicit statutory language is required to divest persons of rights they otherwise enjoy at law. . . . [S]o long as the doctrine of paramountcy is not triggered, federally regulated bankruptcy and insolvency proceedings cannot be used to subvert provincially regulated property and civil rights. [para. 43]
>
> The language of s. 47(2) falls well short of this standard. The bankruptcy court can undoubtedly mandate employment-related conduct by the receiver, but as s. 47(2) of the Bankruptcy and Insolvency Act is presently worded, the court cannot, on its own, abrogate the right to seek relief at the labour board.

[62] Similar reasoning is applicable here. In my respectful view, the language in s. 174(7) falls short of statutory language that is required to divest owners and other voters within a strata corporation of their democratic rights under the *Act.*

[63] I would also find that the principles enunciated in *Aviawest*, *Toth* and *Cook* remain relevant despite the subsequent enactment of s. 174(7) in 2009. These principles are applicable to the case at bar and can be distilled as follows:

- Democratic governance lies at the core of the *Act* and is fundamental to the function of a strata corporation established under the *Act*.

- Under s. 174 of the *Act*, the court may appoint an administrator to exercise the powers and perform the duties of a strata corporation.

- The powers and duties of a strata corporation are independent from the powers and duties of the owners who are members of that strata corporation. The right to vote on and pass a resolution at an annual or special general

meeting is an individual right possessed by the owner of a strata lot (or an assignee or mortgagee under s. 54 of the *Act*).

- The *Act* provides that a strata corporation, *qua* strata council, must obtain the approval of voters before taking certain action.

- Absent specific statutory authorization, the court cannot empower an administrator to act without the approval of voters as required under the *Act.*

[64] Under s. 1(1), a "majority vote" means a vote in favour of a resolution by more than half of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and have not abstained from voting. A "3/4 vote" means a vote in favour of a resolution by at least three quarters of the votes cast by eligible voters who are present in person or by proxy at the time the vote is taken and have not abstained from voting. A "unanimous vote" means a vote in favour of a resolution by all the votes of all the eligible voters. This latter threshold – the requirement for a resolution passed by *all eligible voters* – only serves to underscore the importance of an owner's stake in the democratic governance of a strata corporation.

[65] I note that s. 52 empowers the court to waive the democratic rights of voters in two very limited circumstances. Where a strata corporation comprises ten or more strata lots, the court may dispense with the requirement for a unanimous vote if a resolution has been approved by all voters except for one, or where the dissenting votes total less than five percent of the strata corporation's total votes. On an application under s. 52, the court must also be satisfied that the passage of the resolution is in the best interests of the strata corporation and would not unfairly prejudice the dissenting voter(s). As with s. 165, the operative words in s. 52 – "the court may… make an order providing that the vote proceed as if the dissenting voter or voters had no vote" – are different from those in s. 174(7).

[66] Finally, notwithstanding the judge's reliance on s. 123(1.1) as confirmation that "the power to pass bylaws is a power of the strata corporation", that subsection

should not, in my opinion, be read as giving a strata corporation the power to pass a bylaw absent the requirement for 3/4 vote under s. 128. When read in the context of the *Act* as a whole, s. 123(1.1) is an insufficient anchor for construing s. 174(7).

[67] In summary, I find that s. 174(7), as it is presently worded, does not support the interpretation which the respondents encourage us to adopt. To abrogate the democratic rights of owners requires express statutory authorization. Section 174(7) does not authorize the court to dispense with an administrator's obligation to obtain the approval of owners under ss. 100, 128 and 257 of the *Act*. The judge erred in making the orders sought by the Administrator and the Residential Owners.

[68] I appreciate that the dispute underlying this appeal has been protracted and that the solution proposed by the Administrator was a well-meant attempt to put an end to the perceived dysfunction of the Strata Corporation. However, in my opinion, the foundational democratic principles that pervade the *Act* cannot be sacrificed to expediency absent clear statutory direction.

[69] This said, as in *Aviawest* and *Toth*, I do not preclude the possibility that the existing dysfunction might be resolved on an application by the Administrator under s. 165, or an application by an owner under ss. 164 or 165.

[70] In any event, the problems posed by this appeal are not unique, and a legislated solution should, in my respectful opinion, be implemented.

[71] Given the manner in which I would dispose of the appeal, it is not necessary to address the parties' alternative submissions regarding s. 72.

CONCLUSION

[72] In the result, I would allow the appeal and set aside paras. 2 through 6 of the judge's order. I would also set aside the judge's order regarding costs of the application heard on February 16-19, 2015.

[73] Norenger is entitled to its costs in this Court against the Residential Owners only. Norenger is also entitled to its costs of the application heard on February 16-19, 2015, in the court below, against the Residential Owners only.

The Honourable Madam Justice Kirkpatrick

I AGREE:

The Honourable Mr. Justice Tysoe

I AGREE:

The Honourable Madam Justice Stromberg-Stein