

# LEAKY CONDO LAWSUITS UPDATE



BY ADNAN HABIB

*commercial and construction litigation*

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The legal capacity of a Strata Corporation to advance a leaky condo lawsuit against developers, contractors, subtrades, consultants and municipalities was recently challenged in the decision of *The Owners, Strata Plan LMS888 v. The City of Coquitlam, Polygon et al.*

This case involved a condominium and townhouse development in Coquitlam that was built between July 1992 and August 1993. Repairs to that development were being made on an ongoing basis since February 2001. The Strata Corporation began a lawsuit in October 2000 alleging negligence against the various defendants.

After the lawsuit had been started the Strata Corporation passed a special resolution, in January 2003 pursuant to s.171 and/or 172 of the *Strata Property Act*. These sections indicate that the Strata Corporation may sue as a representative for all owners about matters affecting the Strata Corporation provided that the Strata Corporation has obtained a resolution passed by a three-quarter vote at an annual or special general meeting and where appropriate, has obtained consents from the individual owners.

One of the defendants brought an application to dismiss the Strata Corporation's lawsuit on the basis that the Strata Corporation did not have the legal capacity to bring the lawsuit. In effect, the defendant argued that because the resolution was passed after and not before the lawsuit had been commenced, this technical failure on the part of the Strata Corporation meant it did not have the legal capacity to start the lawsuit.

The issue for the Court to decide was whether the failure of the Strata Corporation to obtain a special resolution under s. 171 and 172 of the *Strata Property Act* and appropriate consents, was a procedural defect capable of being cured or a substantive flaw entitling the defendants to a dismissal of the lawsuit against them.

The Strata Corporation argued that s. 171 and 172 were procedural in nature and that any failure to satisfy the requirements before the starting of the lawsuit was a technical defect that may be and has been rectified as it was abundantly clear that the majority of the owners had approved the starting of the lawsuit by the Strata Corporation as their representative. This was supported by the predecessor provisions in the *Condominium Act* R.S.B.C. 1996, c. 64. The provisions under the *Condominium Act* required a Strata Corporation to obtain owner approval by special resolution and written consent where appropriate and the Courts have uniformly interpreted this requirement as a pre-condition to starting a lawsuit, however, that pre-condition was procedural in nature that could be rectified without declaring the entirety of the lawsuit invalid.

Mr. Justice Cohen disagreed with the Strata Corporation's position primarily because the wording of s. 171 and 172 used stronger language and as a result His Lordship interpreted the provisions of s. 171 and 172 of the *Strata Property Act* to read that:

- (a) The Strata Corporation's right to commence a representative action does not exist outside of s. 171 and 172 of the *Strata Property Act*;
- (b) The Strata Corporation must obtain a three-quarter 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 individual owners before doing so. If the Strata Corporation fails to do so, its right to commence legal proceedings does not arise; and
- (c) If the Special Resolution is passed after the lawsuit has been commenced, the Court cannot make a corrective order. Non-compliance by the Strata Corporation of s. 171 and 172 of the *Strata Property Act* is fatal and will result in the action being declared a nullity.

Accordingly, given the harsh interpretation by His Lordship, Strata Corporations should ensure that a proper special resolution is passed and written consents are obtained from each of the individual owners where applicable.

It should be noted that if a Strata Corporation starts a lawsuit without the appropriate special resolution or consents in place, that lawsuit is invalid and would not stop the running of the applicable limitation period. In such a circumstance, it may be that by the time the Strata Corporation discovers its mistake that the limitation period will have expired before it obtains the special resolutions, consents and starts a second lawsuit.

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