

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Strata Plan NW 499 v. Kirk*,
2015 BCSC 1487

Date: 20150825
Docket: S149448
Registry: New Westminster

Between:

The Owners, Strata Plan NW 499

Petitioner

And

**Nancy Jamieson Kirk, Executrix of the Will of Patricia Vernon Louis, Deceased
Reginald Timothy Vernon Louis, Roderick Louis and
Vancouver City Savings Credit Union**

Respondent

- and -

Docket: S154156
Registry: New Westminster

Between:

Roderick V. Louis

Petitioner

And

The Owners, BC Strata Plan NW499

Respondents

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for the Petitioner: S.M. Smith

The Respondent, Roderick Louis: In Person

Place and Date of Hearing: New Westminster, B.C.
August 6 - 8, 2014
December 19, 2014
January 12, 2015

Place and Date of Judgment: New Westminster, B.C.
August 25, 2015

Introduction

[1] These proceedings concern a condominium in White Rock, B.C. (“the condominium”) owned by Patricia Louis when she died in 1999. On her death, she named Nancy Kirk executrix of her will and bequeathed the condominium to her sons, Roderick Louis and Timothy Louis. In these reasons I will refer to the respondent Roderick Louis as Mr. Louis and to Timothy Louis and Nancy Kirk individually or as “the respondents”.

[2] Mr. Louis has occupied the condominium since 1999 and has paid all costs associated with this property. In 2012 Mr. Louis stopped paying strata fees for the condominium because he disputed the strata corporation’s right to collect strata fees for a number of reasons going back to a 2008 dispute over payments, a settlement and his right to live in the condominium.

[3] Later in 2012, the strata corporation, i.e. Strata Plan NW 499, (“the Strata”), registered a lien against title under s. 116 of the *Strata Property Act*, S.B.C. 1998 c. 43 (the “*Act*”). In February 2013, the Strata commenced this petition for judgment on the debt owing for strata fees and levies and for an order for sale and conduct of sale of the condominium (the “Strata Petition”).

[4] Mr. Louis opposes the petition and seeks seek a declaration that because his rights under the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) have been infringed and because the Strata has acted improperly and without authority, the Strata’s claims should be dismissed. Mr. Louis also brings his own petition for declarations that the results of general meetings of the Strata since April 2010 are invalid, including the adoption of the current by-laws. He also requests ancillary relief (the “Louis Petition”). He alleges that the Strata’s refusal to recognize a proxy given by Ms. Kirk, its failure to give proper notice of meetings, its failure to provide proper information, and its failure to prepare and keep proper minutes of strata meetings render all votes at special and annual general meetings of the Strata between April 1, 2010 and the present invalid and without force or effect. He further challenges the authority of the Strata to file a lien under the *Act* against title to the condominium.

[5] The Strata asks for an order that if Mr. Louis and/or the respondents have not paid the amount of the debt owing within 30 days from the date of an order in this proceeding then it shall have exclusive conduct of sale with a real estate commission allowed at 7% of the first \$100,000 and 2.5% on the balance. Any sale of the property will be subject to further order of the court and the respondents or anyone acting on their behalf will be obliged to permit entry to the condominium of persons acting on behalf of the Strata. They also seek an order that the Strata's real estate agent be provided keys to the premises. Absent Mr. Louis' success on his petition or the defences to the Strata Petition, the order should go in the terms requested.

[6] The Strata Petition was first before the court on January 16, 2014 at which time the Strata began submissions concerning its application for the order for sale.

[7] Mr. Louis informed the court at that time that he had a valid defence to the petition and he intended to bring a constitutional challenge to ss. 28(3), 53(2), 99(1), 116(1), 117 and 173.1 of the *Act*.

[8] The Strata Petition was commenced February 21, 2013 under Action No. S149448. Mr. Louis filed his petition August 21, 2013 under Action No. 154156. The substantive parts of both petitions were heard in August and December 2014. These reasons will address the outcomes in the two petitions heard at the same time.

[9] The issues in this petition are whether the Strata is entitled to enforce its lien against the condominium by obtaining an order for sale or whether Mr. Louis and the respondents are entitled to refuse payment of strata charges because the Strata breached its duties and obligations to Mr. Louis and Ms. Kirk.

Facts

[10] Mr. Louis lived in the condominium at number 206 – 1390 Martin Street in White Rock, BC since late 1999 under an agreement or understanding with Ms. Kirk and Timothy Louis since Ms. Louis' death in December 1999. The building is a 17 suite, three floor strata property built in approximately 1977.

[11] From 1999 until 2006 Mr. Louis resided at Riverview Hospital in Port Coquitlam and at the condominium; he considered the condominium his primary residence. Since January 2000, Mr. Louis has been solely responsible for the payment of all strata fees, special assessments, property taxes, mortgage interest payments, utilities and the like associated with the condominium. There is a mortgage against title that secures a loan obtained by his mother and he has paid all of the associated expenses.

[12] Until 2002 there were no age restrictions affecting the residents of the condominium. In 2002 a bylaw was passed by the Strata restricting the age of residents to those over 55 years.

[13] In 2008, the strata applied to court to prohibit Mr. Louis from living in the condominium because he was under 55 years old. In February 2009 the Court of Appeal (*The Owners NW 499 v. Louis*, 2009 BCCA 54) allowed Mr. Louis' appeal and concluded that Mr. Louis was exempt from the age restriction because he had been residing in the condominium prior to passage of the age restriction bylaw.

[14] On the appeal, there was also an issue concerning the validity of the bylaws that were approved at the 2002 meeting because the records revealed no vote was taken at the meeting to adopt the new bylaws. Low J.A. said:

[16] The chambers judge found that the respondent validly passed the proposed new bylaws. He said this:

[27] A final issue with respect to whether the bylaws were properly passed is that the minutes of the meeting refer to the votes taken with respect to five specific bylaws but do not record a vote with respect to the bylaws as a whole. I conclude, from the evidence, that the owners who were present discussed and voted on five specific bylaws that were somewhat contentious but clearly understood that the whole bylaw package was being presented for approval. In my view, the minutes of the meeting, when read as a whole together with the notice of the meeting, reflect that the required majority of 3/4 or more of the owners intended to and did adopt the new bylaws as a whole even though no formal vote was apparently taken on the package. I think it is important to recognize that the owners are not lawyers and did not have the benefit of legal advice at the meeting with respect to the formalities.

[17] I disagree with this conclusion. It seems to me that there has to be a minimum compliance with the requirements of the Act before it can be said that a bylaw of a strata corporation is valid and is binding on those affected by it. There is really no evidence here that the owners voted on the bylaw package and passed it in its entirety.

[15] Shortly after the Court of Appeal decision, the Strata served a petition on Mr. Louis seeking sale of the unit for unpaid strata fees for the period December 2006 to February 2009.

[16] On May 1, 2009 Mr. Louis and the Strata reached a settlement of the dispute concerning payment of strata fees; the settlement required Mr. Louis to pay \$5,600 in outstanding strata fees and the Strata to accept monthly strata fee payments from him. The written agreement included the following:

NW499 shall accept payments, starting May 1, 2009, from Mr. Louis for the monthly strata fees and any other sums payable in relation to unit 206. If in future NW499 should decide to not cash cheques provided by Mr. Louis they will notify him promptly and return any unused cheques to him forthwith.

NW499 shall provide Mr. Louis with the same rights as all other residents of and W-4 99 in relation to access to and W-4 99's common areas, including the recreation and hobby rooms, and shall provide him with the key(s) to the same.

[17] On January 30, 2011 Nancy Kirk gave Mr. Louis an indefinite proxy (the "proxy") prescribed under the *Act* to attend the annual and special general meetings of the Strata. The proxy contained the following:

I, Ms. Nancy J Kirk, owner of the strata lot described above, appoint Mr. Roderick Louis to act as my proxy beginning January 31, 2011 until indefinitely.

[18] Ms. Kirk did not wish to have any further involvement with the condominium and in her letter dated October 27, 2012 she informed the Strata as follows:

I am one of the two parties on title for number 206. Please be advised that my mailing address for all documentation is number 206 – 1390 Martin Street, White rock, BC, V4B 3W5. This includes all counsel minutes, financial statements and notice of upcoming meetings. Please do not send any information and/or documents to my Vancouver address. I wish to have as little to do with number 206 issues as possible.

I have provided Roderick with the general proxy for number 206. It is he who is to be consulted regarding issues relating to number 206.

[19] Mr. Louis attended the Strata annual general meeting on June 1, 2011, a special general meeting on September 14, 2011 and a November 15, 2011 special general meeting. He attempted to participate and vote using the proxy given to him by Ms. Kirk but was refused that opportunity because the Strata would not accept the proxy. The Strata formed the opinion that Mr. Louis's proxy was not valid because of advice received from its strata managers.

[20] On May 3, 2012 the owners approved amendments to the strata bylaws effectively replacing the 2002 bylaw with new provisions, some of which are summarized as follows:

- Division 1. The owners are required to pay fees on or before the first day of the month and pay interest at the rate of 10% per annum compounded annually on any outstanding balance together with a fine of \$25 per month while the strata fees remain in arrears. If an owner fails to pay a special levy, the interest rate on arrears is 10% per annum and the fine rises to \$50 per month;
- Division 3: 2. An owner will not be entitled to be elected to Council or continue to stand on Council if the Strata is entitled to register a lien against the strata lot under section 116 of the *Act*;
 10. The Council must inform owners of the minutes of all Council meetings within two weeks of the meeting whether or not minutes have been approved;
- Division 5:3. Persons who are not eligible to vote, including occupants, tenants or guests may participate in discussions at annual and special meetings if permitted to do so by the chair;
 4. An owner is not entitled to vote at an annual general meeting (except on matters requiring unanimous votes) if the Strata is entitled to register a lien against a strata lot under s. 116 of the *Act*.

[21] By notice dated April 13, 2012, the Strata informed the owners that the annual general meeting was to occur May 3, 2012. At that meeting the previous bylaws of the Strata were repealed and the new bylaws were passed.

[22] Notices of general meetings and minutes of meetings were apparently sent to Timothy Louis by email. More recently he has received Strata documents via mail at his Vancouver address. Although Ms. Kirk had directed the Strata to provide all notices and information by delivery to the condominium as per her October 27, 2012 letter, the Strata refused to accept her direction and failed to provide any notices to her or Mr. Louis. The Strata said notices were not sent to Ms. Kirk because they believed she did not want to receive notices or information and they did not send notices or information to Mr. Louis because he is not a registered owner of the condominium.

[23] The Council's decision was a deliberate refusal to deliver minutes and notices to the condominium as directed by Ms. Kirk. Since 2012 neither Mr. Louis nor Ms. Kirk has received notices of annual or special general meetings, council minutes, or financial statements. Most importantly, neither Ms. Kirk nor Mr. Louis received notice of the May 3, 2012 annual general meeting at which the new bylaws were approved. Mr. Louis did not attend the May 3, 2012 meeting.

[24] Meanwhile, in May 2010 the Strata hired its first property management company, Atira Property Management Inc. ("Atira"); prior to this the Strata had always been managed by the owners.

[25] Subsequent to the June 1, 2011 annual general meeting, Mr. Louis provided 12 postdated cheques for the strata fees to Atira.

[26] On December 1, 2011 Atira was replaced by a second property management company, Davin Management Ltd. ("Davin"). Mr. Louis provided Davin seven postdated cheques for strata fees for the months December 2011 to June 2012. He asked for return of the seven postdated cheques he had given to Atira and was assured they would be returned to him. Atira returned only five cheques. It appeared

that at least two of his cheques had been lost. It also appears that Davin cashed one of the cheques he had given to Atira and did not return the other cheques in a timely way. As an example, Davin used a December 2011 cheque to pay Mr. Louis' February 2012 strata fees. Davin also used his January 2012 cheque to pay the March 2012 fees.

[27] Mr. Louis became concerned that he could not rely on Davin to cash only the cheques he had given to them and not the cheques Davin assured would be returned to him.

[28] In June, Davin attempted to use one of the cheques he had given to Atira to again pay strata fees. He had not deposited sufficient funds for the cheque to clear and it "bounced". He wrote to the Strata about his concerns regarding the cheques on June 14, 2012. He repeated requests for an explanation regarding his cheques and was eventually contacted by letter on October 19, 2012 advising him that Davin could not locate at least one of the cheques.

[29] Mr. Louis told the Strata he wanted to resume paying his strata fees but demanded return of his Atira cheques. He told them that he was withholding payments of his strata fees as a protest at the non-return of those cheques. He also had a number of requests concerning other conditions he wanted satisfied by the Strata before he would resume paying his strata fees. Those conditions included: that the Strata answer questions concerning its operations; the Strata remove any lien that may have been registered against title; the Strata resume providing meetings of minutes, financial statements and the like to himself at the condominium; and that the Strata recognize his general proxy from Ms. Kirk. Although some cheques were returned to Mr. Louis he was eventually told that Davin had lost one of his cheques. None of the other conditions set out in his letter were met and Mr. Louis continues to withhold strata fees.

The Strata Claim

[30] The lien was filed on November 19, 2012. It was filed and the Strata petition commenced because Mr. Louis and the respondents have paid none of the ongoing

strata expenses since 2012. Some of the owners in the Strata have complaints about Mr. Louis. There appears to be a mutual dislike of each other.

[31] When the Strata Petition was filed, there were unpaid strata fees of \$2,756.16 and a levy of \$254.80. That amount together with all strata fees and a levy accruing since February 2013 remains unpaid by the respondents to the Strata. The calculation of the amounts claimed by the Strata is not disputed. As of January 2014 the Strata claims arrears of \$6,370.78 for strata fees, \$4,719.96 for legal fees, a bylaw charge of \$100 and a special assessment of \$2,812. The total owing was \$14,002.74. No strata fees have been paid by Mr. Louis and the unpaid balance will be much higher. This imposes a significant burden on the other owners and the only route to obtaining relief was this petition for the sale of the condominium.

Mr. Louis' Defences

[32] Mr. Louis resides in the condominium and contends he is an unregistered owner of the condominium and a legal (beneficial) owner of a one half interest although he is not an "owner" under the *Act*. see *Louis* at para 11. He has paid all of the expenses connected with the property; he does not pay rent nor does he claim status as a tenant.

[33] Mr. Louis enumerated ten defences he advances against the Strata Petition in his Amended Response #3. I will address those defences in the same order and with the same numbers used by him. One category of defence centres on alleged breaches of Mr. Louis' *Charter* rights. The second category deals with the flaws in the administration of the Strata affairs.

[34] Several of Mr. Louis' complaints of *Charter* breaches overlap his claims that the Strata has carried on its business without proper authority, registering a lien against the condominium and wrongly excluding him from the affairs of the Strata.

[35] In Defence 1, Mr. Louis contends that the lien registered against the respondents' title and his interest in the condominium is unconstitutional in that ss.

99 and 116 of the *Act* breach rights guaranteed him under sections 2(b), 2(d) and 7 of the *Charter* (the “*Charter Rights*”).

[36] In Defence 2, he contends that ss. 99, 116, 117 and 173.1 of the *Act* authorizing the strata to commence the petition are unconstitutional and infringe his *Charter Rights*.

[37] In Defence 3 he argues that the Strata did not obtain approval to commence the Strata Petition from the members as required under s. 171(2) of the *Act* and for this reason the petition should be dismissed.

[38] Under Defence 4, Mr. Louis argues that the bylaws relied upon for the authority to register a lien against the title to the condominium and to commence this petition were invalid and of no force and effect. He contends that when those bylaws were passed, the Strata had deliberately refused to give the required notice of the meeting to Ms. Kirk (and himself). Thus those by-laws could not be relied on as authority for the lien and petition ought to be dismissed.

[39] Under Defence 5, Mr. Louis contends that the Strata Council authorizing the registration of the lien was invalidly elected and as a result had no authority to proceed to file a lien against the condominium. He argues that the Strata Council elected May 3, 2012 was invalidly elected because Council deliberately failed to notify Ms. Kirk and Mr. Louis of the meeting as required under s. 45 of the *Act*.

[40] Under Defence 6, Mr. Louis argues that the Strata Council that authorized the commencement of these proceedings was invalidly elected because it deliberately failed to give notice to Ms. Kirk and Mr. Louis of the May 3, 2012 annual general meeting. As a consequence the Strata had no authority to authorize commencement of the proceedings and this flaw is not saved by the provisions of s. 173.1.

[41] Under Defence 7, Mr. Louis argues that the invalid election of the Council that approved the continuation of these proceedings had no authority. Assuming that Council had lacked the authority to commence these proceedings, then the notice

requirements under s. 45 were not adequate and the motion to approve the continuation of proceedings is invalid and of no effect.

[42] Defence 8 concerns the inadequacy of record-keeping of meetings of annual general meetings. He contends that those minutes are so deficient that it cannot be said that the meeting was validly carried out.

[43] Under Defence 9, Mr. Louis alleges that the strata breached a May 2009 settlement agreement concerning the dispute between him and the Strata that erupted after the decision in *Louis*. He contends that the settlement agreement bound the Strata to take steps to ensure his access to common property and to ensure he received documents. Also, he was to receive back a number of postdated cheques he had given for strata fees; those cheques were not returned and he believes the Strata should be reprimanded for its breach of the settlement agreement. He argues that the outstanding claim for arrears of strata fees should be extinguished because of the way the strata has treated him.

[44] Lastly, under Defence 10, Mr. Louis says that the ongoing misconduct of the Strata, including deliberate noncompliance with the *Act*, should be redressed. He contends that there is an unwritten contract between the Strata and him and that it is inappropriate for the Strata to seek payment of strata fees for the condominium when it is not discharging its duty to him.

The Louis Petition

[45] Mr. Louis's petition seeks orders that:

- (a) all votes at annual and special general meetings of the Strata between April 1, 2010 and the date of hearing were invalidly conducted and as a consequence are without force or effect;
- (b) the Strata's bylaws passed May 3, 2012 are of no force and effect;
- (c) an annual general meeting of the Strata be scheduled and conducted within 60 days;

- (d) all registered owners and their designates be provided written notice of the annual general meeting in conformance with ss. 40 to 65 of the *Act*;
- (e) notices of the annual general meeting must include information about the date, time and location, agenda, proposed budget, names of council members who will not be seeking re-election, and names of eligible persons who have put their names forward for election to counsel.

[46] The factual basis of the Louis Petition is based on the allegation that the Strata has intentionally failed to give notice to Ms. Kirk concerning annual and special general meetings since April 2010, thereby breaching s. 45 of the *Act*. He contends that the Strata has actively ignored Ms. Kirk's directions concerning delivery of documentation and notices of meetings. He contends that s. 47 of the *Act* saves the Strata from breaches under s. 45 only if reasonable attempts were made to provide notice and the strata has not made reasonable attempts. By reason of the Strata's failure to give the requisite notices of special and annual meetings, the current bylaws are invalid and the elections of council members are also invalid. The Strata lacked the authority to commence the Strata Petition.

[47] Further, the Strata have refused to honour or accept the general proxy Ms. Kirk gave Mr. Louis on January 30, 2011 thereby invalidating the proceedings and outcomes of votes at meetings between January 2011 and the present.

[48] He claims that the Strata refusal to accept the proxy issued by Ms. Kirk is compounded by its refusal to accept Ms. Kirk's direction that all notices information and documents be sent to the condominium. Thus, Mr. Louis argues that he and Ms. Kirk have been excluded from the decision-making processes of the strata and have been greatly prejudiced. Mr. Louis said that he has borne the brunt of the strata misconduct because he is the only resident of the condominium and a legal owner, albeit not a registered owner. Thus, Mr. Louis seeks declarations that will require the Strata to revisit all decisions made since April 2010.

[49] He seeks an order that the current bylaws filed with the Land Titles Office are of no force and effect and that there should be a new general meeting conducted by the Strata within 60 days.

[50] He seeks an order requiring the Strata to comply with ss. 40 to 65 of the *Act* requiring written notice be given to all owners. Lastly, he seeks an order requiring the Strata to provide specific information concerning the affairs of the Strata, including elections.

[51] Mr. Louis also argued that the Strata ought to be prevented from pressing its claims of lien and for the sale of the condominium because it failed to obtain the requisite three-quarter majority vote authorizing the petition and that failure was not saved by s. 173.1.

[52] Finally, Mr. Louis alleges that the Strata breached a settlement agreement concerning the 2009 dispute and that breach of the agreement should operate to discharge any obligations the owners have to pay strata fees in the interim.

The Legislation

[53] Both petitions refer to many sections of the *Act* and Mr. Louis relies on ss. 7, 2(b) and 2(d) of the *Charter*. I will set out each provision at this juncture:

Strata Property Act, S.B.C. 1998 c. 43

Definitions and interpretation

1(1) In this Act:

"owner" means a person, including an owner developer, who is

- (a) a person shown in the register of a land title office as the owner of a freehold estate in a strata lot, whether entitled to it in the person's own right or in a representative capacity, or
- (b) if the strata lot is in a leasehold strata plan, as defined in section 199, a leasehold tenant as defined in that section, unless there is
- (c) a registered agreement for sale, in which case it means the registered holder of the last registered agreement for sale, or
- (d) a registered life estate, in which case it means the tenant for life;

Part 4 — Strata Corporation Governance**Division 1 — The Council****Election of council**

- 25** At each annual general meeting the eligible voters who are present in person or by proxy at the meeting must elect a council.

Council exercises powers and performs duties of strata corporation

- 26** Subject to this Act, the regulations and the bylaws, the council must exercise the powers and perform the duties of the strata corporation, including the enforcement of bylaws and rules.

Control of council

- 27(1)** The strata corporation may direct or restrict the council in its exercise of powers and performance of duties by a resolution passed by a majority vote at an annual or special general meeting.
- (2) The strata corporation may not direct or restrict the council under subsection (1) if the direction or restriction
- (a) is contrary to this Act, the regulations or the bylaws, or
 - (b) interferes with the council's discretion to determine, based on the facts of a particular case,
 - (i) whether a person has contravened a bylaw or rule,
 - (ii) whether a person should be fined, and the amount of the fine,
 - (iii) whether a person should be denied access to a recreational facility,
 - (iv) whether a person should be required under section 133 (2) to pay the reasonable costs of remedying a contravention of the bylaws or rules, or
 - (v) whether an owner should be exempted under section 144 from a bylaw that prohibits or limits rentals.

Eligibility for council

- 28(1)** The only persons who may be council members are the following:
- (a) owners;
 - (b) individuals representing corporate owners;
 - (c) tenants who, under section 147 or 148, have been assigned a landlord's right to stand for council.
- (2) Despite subsection (1), the strata corporation may, by a bylaw passed at an annual or special general meeting held after the first annual general meeting, allow classes of persons, other than those referred to in subsection (1), to be council members.
- (3) Despite this section, a strata corporation may, by bylaw, provide that no person may stand for council or continue to be on council with

respect to a strata lot if the strata corporation is entitled to register a lien against that strata lot under section 116 (1).

Notice requirements for annual or special general meeting

- 45(1)** The strata corporation must give at least 2 weeks' written notice of an annual or special general meeting to all of the following:
- (a) every owner, whether or not a notice must also be sent to the owner's mortgagee or tenant;
 - (b) every mortgagee who has given the strata corporation a Mortgagee's Request for Notification under section 60;
 - (c) every tenant who has been assigned a landlord's right to vote under section 147 or 148, if the strata corporation has received notice of the assignment.
- (2) A person who has a right to be notified under this section may, in writing, waive the right and may, in writing, revoke a waiver.
- (3) The notice of the annual or special general meeting must include a description of the matters that will be voted on at the meeting, including the proposed wording of any resolution requiring a 3/4 vote or unanimous vote.
- (4) If the meeting is an annual general meeting, the notice must include the budget and financial statement referred to in section 103.
- (5) A vote at an annual or special general meeting may proceed despite the lack of notice as required by this section, if all persons entitled to receive notice waive, in writing, their right to notice.
- (6) If 2 or more persons share one vote with respect to a strata lot, all of them must consent to the waiver of notice under subsection (5).

Failure to give proper notice of meeting

- 47** Failure to give proper notice of an annual or special general meeting to a person entitled to receive notice under section 45 does not invalidate a vote taken at the meeting as long as the strata corporation made a reasonable attempt to give the notice in accordance with that section.

Number of votes per strata lot

- 53(1)** At an annual or special general meeting each strata lot has one vote unless different voting rights are set out in a Schedule of Voting Rights in the prescribed form in accordance with section 247, 248 or 264.
- (2) Despite subsection (1), a strata corporation may, by bylaw, provide that the vote for a strata lot may not be exercised, except on matters requiring a unanimous vote, if the strata corporation is entitled to register a lien against that strata lot under section 116 (1).
- (3) If, in accordance with a bylaw passed under subsection (2), a vote for a strata lot may not be exercised, the strata lot's vote must not be considered for the purposes of determining a quorum in accordance

with section 48 or for the purposes of sections 43 (1), 46 (2) and 51 (3).

- (4) Despite subsection (1), if there is a tie vote at an annual or special general meeting, the president, or, if the president is absent or unable or unwilling to vote, the vice president, may, if the bylaws so provide, break the tie by casting a second, deciding vote.

Voters

54 The following persons may vote at an annual or special general meeting:

- (a) an owner, unless a tenant or mortgagee has the right to vote under paragraph (b) or (c);
- (b) a tenant who has been assigned a landlord's right to vote under section 147 or 148, unless a mortgagee has the right to vote under paragraph (c);

56(1) A person who may vote under section 54 or 55 may vote in person or by proxy.

(2) A document appointing a proxy

- (a) must be in writing and be signed by the person appointing the proxy,
- (b) may be either general or for a specific meeting or a specific resolution, and
- (c) may be revoked at any time.

(3) The following persons may be proxies:

- (a) only if permitted by regulation and subject to prescribed restrictions, an employee of the strata corporation;
- (b) only if permitted by regulation and subject to prescribed restrictions, a person who provides strata management services to the strata corporation;
- (c) subject to the regulations, any other person.

(4) A proxy stands in the place of the person appointing the proxy, and can do anything that person can do, including vote, propose and second motions and participate in the discussion, unless limited in the appointment document.

Notice given by strata corporation

61(1) A notice or other record or document that the strata corporation is required or permitted to give to a person under this Act, the bylaws or the rules must be given to the person,

- (a) if the person has provided the strata corporation with an address outside the strata plan for receiving notices and other records or documents,
 - (i) by leaving it with the person, or

- (ii) by mailing it to the address provided, or
- (b) if the person has not provided the strata corporation with an address outside the strata plan for receiving notices and other records or documents,
 - (i) by leaving it with the person,
 - (ii) by leaving it with an adult occupant of the person's strata lot,
 - (iii) by putting it under the door of the person's strata lot,
 - (iv) by mailing it to the person at the address of the strata lot,
 - (v) by putting it through a mail slot or in a mail box used by the person for receiving mail,
 - (vi) by faxing it to a fax number provided by the person, or
 - (vii) by emailing it to an email address provided by the person for the purpose of receiving the notice, record or document.
- (2) The notice, record or document may be addressed to the person by name, or to the person as owner or tenant.
- (3) A notice or other record or document that is given to a person under subsection (1) (a) (ii) or (b) (ii) to (vii) is conclusively deemed to have been given 4 days after it is left with an adult occupant, put under the door, mailed, put through the mail slot or in the mail box, faxed or emailed.

Strata corporation responsible for common expenses

- 91** The strata corporation is responsible for the common expenses of the strata corporation.

Calculating strata fees

- 99(1)** Subject to section 100, owners must contribute to the strata corporation their strata lots' shares of the total contributions budgeted for the operating fund and contingency reserve fund by means of strata fees calculated in accordance with this section and the regulations.
- (2) Subject to the regulations, the strata fees for a strata lot's share of the contribution to the operating fund and contingency reserve fund are calculated as follows:

Notice to owner or tenant of money owing to strata corporation

- 112(1)** Before suing or beginning arbitration to collect money from an owner or tenant, the strata corporation must give the owner or tenant at least 2 weeks' written notice demanding payment and indicating that action may be taken if payment is not made within that 2 week period.
- (2) Before the strata corporation registers a lien against an owner's strata lot under section 116, the strata corporation must give the owner at

least 2 weeks' written notice demanding payment and indicating that a lien may be registered if payment is not made within that 2 week period.

Disputed debt

- 114(1)** If there is a dispute over whether an owner or tenant owes money to the strata corporation, the owner or tenant may pay the disputed amount
- (a) into court if court proceedings have been started and the Supreme Court Civil Rules allow payment into court, or
 - (b) to the strata corporation to hold in trust if the matter has been referred to arbitration or if court proceedings have been started.
- (2) On receipt of an amount under subsection (1) (b), the strata corporation holds the money and any interest on the money in trust for the parties to the dispute until the dispute is resolved.
- (3) After the dispute is resolved, the strata corporation must pay the amount to the party entitled to it as set out in the decision of the court or arbitrator.

Certificate of Lien

- 116(1)** The strata corporation may register a lien against an owner's strata lot by registering in the land title office a Certificate of Lien in the prescribed form if the owner fails to pay the strata corporation any of the following with respect to that strata lot:
- (a) strata fees;
 - (b) a special levy;
 - (c) a reimbursement of the cost of work referred to in section 85;
 - (d) the strata lot's share of a judgment against the strata corporation;
 - (e) [Repealed 1999-21-25.]
- (2) The strata corporation may register a lien against any strata lot, but only one strata lot, owned by an owner as owner developer, by registering in the land title office a Certificate of Lien in the prescribed form if the owner developer fails to pay an amount payable to the strata corporation under section 14 (4) or (5), 17 (b) or 20 (3).
- (3) Subsections (1) and (2) do not apply if
- (a) the amount owing has, under section 114, been paid into court or to the strata corporation in trust,
 - (b) arrangements satisfactory to the strata corporation have been made to pay the money owing, or
 - (c) the amount owing is in respect of a fine or the costs of remedying a contravention.

- (4) On registration the certificate creates a lien against the owner's strata lot in favour of the strata corporation for the amount owing.
- (5) The strata corporation's lien ranks in priority to every other lien or registered charge except
 - (a) to the extent that the strata corporation's lien is for a strata lot's share of a judgment against the strata corporation,
 - (b) if the other lien or charge is in favour of the Crown and is not a mortgage of land, or
 - (c) if the other lien or charge is made under the *Builders Lien Act*.
- (6) On receiving the amount owing, the strata corporation must within one week remove the lien by registering in the land title office an Acknowledgment of Payment in the prescribed form.

Forced sale of owner's strata lot to collect money owing

- 117(1)** After the strata corporation has registered a Certificate of Lien against a strata lot, the strata corporation may apply to the Supreme Court for an order for the sale of the strata lot.
- (2) If the strata corporation has obtained a judgment for the amount owing, the court may, after considering all the circumstances, make an order for the sale of the strata lot.
 - (3) If the strata corporation has not obtained a judgment for the amount owing, the court may try the issue and may
 - (a) order that judgment be entered against the owner in favour of the strata corporation for the amount of the lien or for an amount that the court, as a result of the trial, finds owing, and
 - (b) if judgment is entered against the owner, make an order for the sale of the strata lot after considering all the circumstances.
 - (4) An order for the sale of a strata lot must provide that, if the amount owing is not paid within the time period required by the order, the strata corporation may sell the strata lot at a price and on terms to be approved by the court.

Costs added to amount owing

- 118** The following costs of registering a lien against an owner's strata lot under section 116 or enforcing a lien under section 117 may be added to the amount owing to the strata corporation under a Certificate of Lien:
- (a) reasonable legal costs;
 - (b) land title and court registry fees;
 - (c) other reasonable disbursements.

Preventing or remedying unfair acts

- 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 50% or more of the votes,
 - (b) vary a transaction or resolution, and
 - (c) regulate the conduct of the strata corporation's future affairs.

Other court remedies

- 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;

Strata corporation may sue as representative of all owners

- 171(1)** The strata corporation may sue as representative of all owners, except any who are being sued, 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;
 - (c) the use or enjoyment of a strata lot;
 - (d) money owing, including money owing as a fine, under this Act, the bylaws or the rules.
- (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.
- (3) For the purposes of the 3/4 vote referred to in subsection (2), a person being sued is not an eligible voter.
- (4) The authorization referred to in subsection (2) is not required for a proceeding under the *Small Claims Act* against an owner or other person to collect money owing to the strata corporation, including

money owing as a fine, if the strata corporation has passed a bylaw dispensing with the need for authorization, and the terms and conditions of that bylaw are met.

- (5) All owners, except any being sued, 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) except that
 - (a) an owner who is being sued is not required to contribute, and
 - (b) the unit entitlement of a strata lot owned by an owner who is being sued is not used in the calculations.

Other court remedies

173(1) On application by the strata corporation, the Supreme Court may do one or more of the following:

- (a) order an owner, tenant or other person to perform a duty he or she is required to perform under this Act, the bylaws or the rules;
- (b) order an owner, tenant or other person 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).

Validity of suits and arbitrations undertaken by strata corporation

173.1(1) The failure of a strata corporation to obtain an authorization required under section 171 (2) or 172 (1) (b) or the written consent of an owner under section 172 (1) (a) in relation to a suit or an arbitration

- (a) does not affect the strata corporation's capacity to commence a suit or arbitration that is otherwise undertaken in accordance with this Act,
- (b) does not invalidate a suit or arbitration that is otherwise undertaken in accordance with this Act, and
- (c) does not, in respect of a suit or arbitration commenced or continued by the strata corporation that is otherwise undertaken in accordance with this Act, constitute
 - (i) a defence to that suit or arbitration, or
 - (ii) an objection to the capacity of the strata corporation to commence or continue that suit or arbitration.

Canadian Charter of Rights and Freedoms

- 2. Everyone has the following fundamental freedoms:
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; and

- (d) everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Discussion

[54] I intend to address the issues raised in the Louis Petition and the defence of the Strata Petition separately from the constitutional questions Mr. Louis has raised.

Standing

[55] One ground on which the Strata opposed the Louis Petition was that one of two joint owners of a strata property cannot sue on behalf of a strata lot. In *Extra Gift Exchange Inc. v. Ernest & Twins Ventures (PP) Ltd.*, 2007 BCSC 426, Sinclair-Prowse J. stated:

[80] Mr. Lam brings these claims as the owner of a 1/100th interest in one of the strata units. In my view, as the owner of a 1/100th interest, Mr. Lam does not have the capacity to sue as an owner. Rather, in keeping with the fact that the rights and obligations of owners under the Act are all determined in terms of strata units (for example, there is one vote per strata unit, and contributions of strata fees are calculated on a strata unit basis), I am satisfied that the capacity to sue as an owner is defined in the same manner. That is, it is the owner or owners of a strata unit that have the capacity to sue.

[81] Applying this conclusion to the present case, Mr. Lam does not have standing to bring claims as an owner by himself. Rather, because he and Sze Hang Holdings together own the strata unit in which Mr. Lam has an interest, a claim as an owner requires that they both participate in it. To hold otherwise would not only be inconsistent with the other provisions of the Act, but it would also permit an owner to limit his/her/its liability by limiting his/her/its ownership interest in a strata unit as Mr. Lam has done in this case.

[56] There are important differences in the facts in *Extra Gift Exchange* and this case. In *Extra Gift Exchange*, Mr. Lam owned only a 1% interest in the strata lot and brought personal actions in damages against the strata corporation and others as owner of a 1/100th interest in a strata lot. The plaintiff's claims in negligence, breach of contract, breach of statutory duty, breach of fiduciary duty and fraudulent misrepresentation were dismissed because those actions could only be brought by both owners totalling a 100% interest in the strata lot. In my view, *Extra Gift*

Exchange is focused on third-party claims made by one owner of a strata lot without participation of the other owners. The object of the litigation was to obtain damages as a result of misconduct.

[57] In this case, Mr. Louis's claim derives from Ms. Kirk's personal right as an owner to receive notices and information, to grant a proxy, and to have the owner's voice heard at strata meetings; she holds Mr. Louis's interest in the condominium in trust for him. These claims do not involve the interests of the other owner because, in part, Timothy Louis had received notices of meetings and was obviously entitled to attend but did not.

[58] I do not accept that Mr. Louis's claim in the Louis Petition is barred due to a lack of standing. He is an interested person under s. 165 of the *Act*.

Failure to Give Notice of Meetings

[59] Section 45 of the *Act* requires the Strata to give two weeks written notice to every owner of annual or special general meetings. Owner is defined:

"owner" means a person, including an owner developer, who is

- (a) a person shown in the register of a land title office as the owner of a freehold estate in a strata lot, whether entitled to it in the person's own right or in a representative capacity, or
- (b) if the strata lot is in a leasehold strata plan, as defined in section 199, a leasehold tenant as defined in that section,

[60] In this case, s. 61 requires that notice be given by leaving it with "the person", leaving it with an adult person occupying the person's strata lot, or by putting it under the door of the person's strata lot.

[61] Section 45 requires that every owner must receive the statutory two weeks' notice of a meeting unless an owner has given the strata a written waiver of the right to receive notice. Clearly, in the absence of a waiver of notice, "every owner" is entitled to notice.

[62] On October 27, 2012 Ms. Kirk gave directions that all notices, council minutes, financial statements, information and documents were to be delivered to

the condominium. Ms. Kirk has not waived her entitlement to notice of meetings nor has she provided an address outside the strata plan for receiving notices and other records or documents. To the contrary, Ms. Kirk had directed that notices, records and other documents be delivered to the condominium. This direction accords with s. 61 of the *Act*.

[63] I have read carefully the affidavits of Leah Booth and Karen York made August 1, 2013. The Strata contends that it sent notices by email and hand-delivered to owners who did not choose to use email in accordance with s. 61. Before March 2011 notices were delivered by hand to each unit.

[64] Ms. York said that notices were not sent out for the September 14, 2011 meeting, but notices were posted on a bill board or sent by email. No formal notice was provided.

[65] The Strata submits that, while not strictly complying with the *Act*, its effort to give notice was sufficient. It relies on *Azura Management (Kelowna) Corp. v. Strata Plan KAS 2428*, 2009 BCSC 506 at para. 37. They contend that the attendance at the September 2011 meeting of many members demonstrates that owners were clearly aware of that meeting and that emails sent out provided sufficient information to comply with the *Act*.

[66] Nonetheless, the Strata acknowledges it has not provided notice of general meetings to Ms. Kirk since March 2011. They claim they were under a belief that she did not want to receive notices; this is an irrational position insofar as Mr. Louis had received Ms. Kirk's proxy to attend meetings and in October 2012 Ms. Kirk informed the Strata she wanted documents sent to the condominium. Presumably they believed this belief excused them from compliance with s. 61 notwithstanding her specific instruction.

[67] After October 27th, the Strata was obliged to serve Ms. Kirk in accordance with her directions and s. 61 of the *Act*. The Strata was entitled to ignore its duty to serve documents on Ms. Kirk only if she had signed a waiver of her right to notice.

[68] The Strata did not comply with s. 61 or ss. 45 and 47 when Strata meetings were upcoming. Even faced with Ms. Kirk's October 2012 direction, the Strata unreasonably refused to honour her directions based on what it "believed her true instructions were". Absent the requisite notices Ms. Kirk was rightly entitled to complain that her rights as an owner had been ignored.

[69] In my view, the Strata did not give Ms. Kirk or Mr. Louis meeting notices because they did not want Mr. Louis involved in the affairs of the Strata. It is more than obvious that Ms. Kirk recognized Mr. Louis as the legal/beneficial owner of a one half interest in the condominium and wanted him to assume use and management of the unit. It is also clear that during the 2009 dispute, the Strata dealt with Mr. Louis as if he was an owner of an interest in the condominium. In particular, they negotiated a settlement of his ongoing strata fee obligations and assured him access to strata facilities. He could be forgiven for interpreting this treatment as a recognition of his ownership interest in the condominium.

[70] This is particularly important in light of s. 61(1)(b)(ii), which allows notice to be made by leaving it with an adult occupant of a strata lot. There is no reasonable explanation from the Strata why they did not deliver notices to Mr. Louis who was known to them to be living in the condominium.

[71] The Strata concedes that Mr. Louis is an "interested person who may apply for relief" under s. 165 and thus he has a right to seek an order that the Strata comply with the *Act* and in particular s. 45.

[72] The Strata contends that its failure to give notice to Ms. Kirk should be saved by s. 47 which provides that where proper notice is not given to a person entitled to receive notice, votes taken at meetings are not invalid as long as the Strata made reasonable attempts to give notice in accordance with this section. The inference that can be drawn from this section is that, if reasonable attempts to give notice have not been made, then votes taken at meetings are not valid.

[73] The Strata relies on Joyce J.'s reasons in *The Owners, Strata Plan NW 499 v. Kirk*, 2008 BCSC 759:

[24] It is conceded by NW 499 that s. 45(1), when read with the provisions of the Interpretation Act, R.S.B.C. 1996, c. 238, effectively required giving notice 20 days before the date of the meeting, whereas only 17 days' notice was given. The petitioner submits, however, and I agree, that the curative provision of s. 47 applies in this case and does not invalidate the meeting. Section 47 reads:

Failure to give proper notice of an annual or special general meeting to a person entitled to receive notice under section 45 does not invalidate a vote taken at the meeting as long as the strata corporation made a reasonable attempt to give the notice in accordance with that section.

[74] Although Joyce J. was overturned by the Court of Appeal, the Strata says this finding was not challenged.

[75] In my view, the 2008 chambers decision in *Kirk* is distinguishable from Mr. Louis' argument in this case. Here, he contends that the Strata made a deliberate and conscious decision not to serve Ms. Kirk with any documents or meeting notices because she had expressed a desire not to be involved.

[76] Section 47 exempts the Strata from giving notice under s. 45 only if an owner has given a written waiver of a right to notice. Section 47 preserves the validity of votes taken at meetings where proper notice has not been given on condition that the strata has "made a reasonable attempt to give the notice in accordance with that section". In this case no effort was made to give notice; thus no exemption is allowed under s. 45.

[77] In my view, this stricter view is reflected in the Court of Appeal conclusions in the *Louis* case where Low J.A. said:

[17] I disagree with this conclusion. It seems to me that there has to be a minimum compliance with the requirements of the Act before it can be said that a bylaw of a strata corporation is valid and is binding on those affected by it. There is really no evidence here that the owners voted on the bylaw package and passed it in its entirety.

[Emphasis added.]

[78] The Strata would have been aware of the requirements of s. 45(6), that where two persons share one vote with respect to a strata, all of them must consent to waiver of notice.

[79] Thus, I find that the Strata was in breach of the *Act* in failing to give notice of the May 2012 annual general meeting. It is worth noting that in September 2011 Mr. Louis corresponded with the Strata telling them of his concerns that notice of meetings had not been properly given. He also complained that they had improperly rejected his proxy. The Strata did not respond to Mr. Louis's concerns and proceeded with meetings, votes, elections, and other management decisions without Ms. Kirk's or Mr. Louis's presence or involvement.

Ms. Kirk's Proxy

[80] Mr. Louis received a valid proxy from Ms. Kirk on January 30, 2011 and thereafter was entitled to attend all Strata meetings in Ms. Kirk's stead.

[81] The Strata refused to recognize Mr. Louis's proxy from Ms. Kirk as valid. The Strata claims to have adopted this position regarding the proxy on the basis of advice received from their strata management company. In the alternative, the Strata contends that where there is more than one owner, a proxy must be signed by both the owners before it can be valid. The Strata cites s. 57 of the *Act*, which addresses the procedure to be followed if there is a conflict between the votes of two owners of the same unit. If the chair is advised that the owners disagree, their vote is not counted in the vote.

[82] Section 56 directs that "a person" "may vote... by proxy".

[83] Section 57 directs that where two owners share one vote, only one may vote and unless they agree on the vote, the chair cannot count their vote.

[84] Section 56 grants the right to appoint a proxy to a person who may vote, propose and second motions, and participate in discussion unless subject to some limitations. The proxy operates as a transfer of personal participatory rights from one

person to another. Thus, a proxy is entitled to do those things authorized under s. 56 except if a second owner of the same unit does not agree with the co-owners' decision on a vote, in which case no vote is recorded for the two owners.

[85] A single proxy does not require the signature of both owners and it is my view a proxy can only be given by one person to another person. Two owners may each give proxies to other persons but the appointment of two proxies does not affect the validity of either document.

[86] The Strata argued that Mr. Louis does not have a right to challenge the Strata's decisions because he was not an owner; only the grantor of the proxy would have standing to challenge the Strata. They contend that the right to have a vote cast on Ms. Kirk's behalf belonged to her alone and neither Mr. Louis's response to the Strata Petition or his own petition can cloak him with an interest in challenging the actions of the Strata.

[87] I reject the Strata argument; the Strata was in breach of its obligations to permit Ms. Kirk to be present at meetings and vote through her proxy. She was denied this fundamental right of ownership and suffered prejudice as a result. Mr. Louis as the beneficial owner had an important interest in exercising the right to attend and participate in meetings and was similarly prejudiced.

Compliance with s. 172 and 173.1

[88] Prior to filing the Strata Petition, the Strata did not obtain a three-quarter vote at an annual or special general meeting authorizing the proceeding, as required by s. 172 of the *Act*. Mr. Louis contends that this flaw in the proceeding against him is not saved by the provisions of s. 173.1 that shield a strata from a challenge to its capacity to commence proceedings where a proceeding is commenced without the requisite vote of members.

[89] He argued that s. 173.1 was adopted in response to the result in *Owners, Strata Plan LMS 888 v. Coquitlam (City)*, 2003 BCSC 941 where the strata corporation commenced an action without the proper authority and by the time the

issue was raised, the limitation period had passed. The amendment was intended to obviate the expiry of limitation periods because the right to commence a representative action did not exist outside ss. 171 or 172 of the *Act*.

[90] Mr. Louis believes that s. 173.1 was a response to the serious situation of “leaky condominium” litigation that was introduced because of the strata corporation’s failure to obtain the requisite three-quarter vote. He said there is no limitation period issue in this case and the Strata Petition should not be allowed to proceed with a claim against him absent a three-quarter vote. The failure to comply with ss. 171 and 172 is compounded by the fact that he would not likely have been given notice of a meeting to approve legal commencement of proceedings.

[91] The Strata failure to obtain a three-quarter majority vote in favour of the Strata Petition does not operate to defeat the petition due to lack of authority. However, in all the circumstances concerning Mr. Louis and Ms. Kirk’s issues with the Strata I have concluded that the Strata Petition should be stayed until the Strata addresses its failure to comply with s. 171(2).

Deficiencies in Meeting Minutes

[92] Mr. Louis also complained that the minutes prepared of strata meetings failed to record sufficient detail to report accurately or fully the affairs of the strata corporation. He focuses on the minutiae of the conduct of meetings and the failure to address his specific complaints. He submits that minutes should identify the owners of a strata lot’s present, identify the person exercising each strata lot’s vote, and the names of persons attending the meetings.

[93] The Strata contends that there is no statutory description of what information must be recorded in minutes. The Standard Bylaw requires strata councils to distribute minutes within two weeks of a Council meeting. Votes taken at annual general meetings must be recorded in minutes the *Canadian Oxford Dictionary* describes an” minute” as...”; A brief summary of the proceedings of a meeting”.

[94] The Strata argues that the statute is purposely silent on the contents of minutes because the Legislature wanted to leave the detail of the management of strata corporations to the will of the owners. The owners may, by bylaw, limit or expand the content of meeting minutes as they see fit. A complaint about the state of the minutes is properly taken at an annual general meeting.

[95] On this point, I accept the submissions of the Strata I am satisfied that there is no merit to this ground of attack by Mr. Louis. The minutes of the meetings typically record the outcome of votes and not the details of debate or the identification of the attendees. Mr. Louis's challenge to the practices of the Strata concerning minutes of meetings is dismissed.

Breach of Contract

[96] Mr. Louis argued that the settlement of his 2009 dispute with the Strata contained clauses binding the Strata to conduct in exchange for him resuming payment of strata fees for the condominium. He described events in 2011 and 2012 concerning the change of property managers employed by the Strata. He exchanged previously issued postdated cheques for replacement cheques; there was confusion concerning the exchange of cheques and the strata management company's use of his cheques. He questioned their actions and his concerns were, in part, the reason why he stopped paying strata fees.

[97] He also claimed that the Strata had agreed to provide him access to the strata amenities but subsequently changed the locks without providing him a new key.

[98] The settlement agreement had assured Mr. Louis that he would have the same rights as all other residents to use common areas. For a time, locks to the common property had been changed; eventually the owners and residents obtained keys to those places.

[99] On the evidence presented by Mr. Louis, I am not satisfied that he suffered any loss or damage as a result of the actions of the Strata in regard to the 2009

settlement. Mr. Louis may have been disappointed and aggrieved at how events unfolded. Davin was clearly wrong in the manner in which they dealt with his postdated cheques. Similarly, when the Strata changed the locks to the common areas without notice to Mr. Louis, they acted improperly. However, on the evidence he did not suffer any loss or damage and thus is not entitled to withhold his strata fees until the conditions he demanded of the Strata were met.

Remedies

[100] The Strata contends that there is overwhelming prejudice to the Strata and its other owners if its previous decisions, elections and assessments are declared invalid; they argue this must be balanced against the consequences of declining relief. It argues that the result of the impugned votes was fair to the Strata but, if invalid, would otherwise result in votes, elections and levies for several years before being invalidated. There would be enormous prejudice to the strata corporation and its operations because it would be required to retroactively reconsider all budgeting resolutions, council elections, and other decisions that would be impugned due to flaws in the conduct of the Strata's affairs. The Strata argues the court should exercise its inherent jurisdiction to act to obviate the prejudice to all owners resulting from an adverse ruling invalidating any Strata votes, budgets, levies or elections. Thus, notwithstanding past errors these proceedings should stand: *The Owners, Strata Plan NW971 v. Daniels*, 2009 BCSC 1235 (aff'd 2010 BCCA 584).

[101] In *The Owners, Strata Plan NW971 v. Daniels*, Hyslop J. said:

[50] Nonetheless, I find the Impugned Motion overall was fair in that the petitioner has and will suffer greater prejudice than the respondent if the levy is found invalid. The money collected under the 2007 special levy has been collected and spent. If the levy is found invalid, the Strata would have to determine how to raise the money to refund the monies collected under the levy, determine who should receive the refund, and then eventually have another vote for a new special levy. In the end, Ms. Daniels would be required to pay the 2007 special levy, but designated as a different special levy. The Strata would suffer significant prejudice if the 2007 special levy were invalidated.

[55] The court has inherent discretion to consider the prejudice to each party as part of the test of whether the procedure was fair, reasonable and appropriate in all the circumstances. The special 2007 levy stands.

[102] The Court of Appeal upheld the Chambers decision but seems to question whether the inherent discretion of the court could be used to correct a flawed management decision. Smith J.A. said:

[41] The appellant raised this ground of appeal in the event this Court found that the chambers judge erred in dismissing the appellant's contention that the 2007 Special Assessment passed on April 23, 2007 was null and void. The effect of such a declaration would have left the Strata Corporation with having expended \$390,000 on repairs in the absence of any authority to do so. The chambers judge found that in such circumstances the prejudice to the respondent would have outweighed any prejudice to the appellant, and therefore a declaration that the 2007 Special Assessment was null and void should be granted in those circumstances.

[42] I find it unnecessary to address this ground of appeal in view of my finding that the chambers judge was correct in upholding the validity of the April 23, 2007 vote on the special resolution. However, with respect, I would also note that counsel has not referred to any authority that would give a court the "inherent jurisdiction" to make orders with respect to the internal management of a private organization in the circumstances of this case.

[103] Overall, the Strata argues that Mr. Louis failed to take steps to challenge the Strata Council on votes and administrative decisions made since 2011. Although Mr. Louis was in regular correspondence with the Strata complaining of the things which are raised in this proceeding, he waited until the Strata commenced its petition in February 2013 to raise these issues.

[104] The Strata argued that *Blue-Red Holdings v. Strata Plan VR 857* (1994), 42 R.P.R. (3d) 421 (B.C.S.C.) is an example of similar circumstances where the court declared past decisions of an improperly constituted council valid and binding while directing that a new election be held to address flaws in the previous election.

[105] The Strata also submits that a remedy under s. 164 of the *Act* is not available to Mr. Louis. The Strata points out that Mr. Louis is not an owner of the condominium as defined by the *Act*. Because Mr. Louis is neither an owner nor a tenant under s. 164 he is not entitled to obtain relief available under that section. The Strata contends that Mr. Louis' standing to seek relief is limited to claims falling under s. 165 which permits "interested persons" to apply for relief; the phrase "interested person" is not defined but presumably includes a beneficial owner such as Mr. Louis. The Strata accepts that Mr. Louis is likely an interested person under s. 165.

[106] The Strata cited *Christensen v. The Owners, Strata Plan KAS468*, 2013 BCSC 1714 for the principle that relief under s. 165 can be granted only in relation to current contraventions but not previous contraventions. In *Christensen*, the owner was not permitted to challenge the method by which a special levy was allocated amongst the owners five years before.

[107] Thus the Strata says Mr. Louis's challenges for past wrongs of the Strata should not succeed because he did not take exception to the results of the meetings and allowed them to go unchallenged until the respondents were named in the Strata Petition. Mr. Louis was aware of the Strata's accumulating breaches of the *Act* for three to four years passed before he took steps in this petition to remedy the past mismanagement of the Strata.

[108] During this time, however, the Strata has completed several annual general meetings and other meetings without notice to Ms. Kirk or Mr. Louis. When he was able to attend meetings, after 2011 the Strata rejected the proxy given to him by Ms. Kirk. Thus, in no sense has the Strata paid any regard to Ms. Kirk's or Mr. Louis's interest in the affairs of the Strata.

[109] I am satisfied that the Strata has acted improperly in refusing to recognize Ms. Kirk's proxy in favour of Mr. Louis, in failing to give the statutory notice of meetings to Ms. Kirk and Mr. Louis, and in commencing the Strata Petition against the respondents without the required vote of the owners.

[110] Mr. Louis incorrectly believed that he was entitled to withhold strata fees because of his dispute concerning the settlement of the 2009 dispute. There was nothing in the evidence to convince me that Mr. Louis had a legal basis to withhold those fees pending resolution of his dispute or at all. He was not able to point to any fact or law that would relieve the owners from paying strata fees and levies. Although he alleged that there was a contract between him and the Strata concerning the 2009 dispute that was breached by the Strata, nothing in the evidence suggested that he had any contractual or statutory right to withhold his fees. With the possible exception of a brief interruption of his access and use of the

common facilities in the strata, he not had suffered damages or any financial loss due to actions by the Strata. At best, Mr. Louis was distressed by mismanagement of his personal cheques and various other complaints. None of these supported the proposition that he was entitled to withhold the monthly fees pending the resolution of his dispute.

[111] Further, Mr. Louis eschewed the option of placing the disputed monies into trust and pursuing arbitration of the dispute. Since 2012, the Strata has been forced to meet its financial obligations, largely for services to the strata corporation, without the condominium owner's contribution.

[112] I accept the fact that it would be exceedingly prejudicial to set aside all votes and elections conducted by the Strata since 2011 because notices were not given and Ms. Kirk's proxy was ignored.

[113] In my view however, the Strata has acted badly and they were most likely motivated by an animus toward Mr. Louis; the history of discord between them was palpable.

[114] Similar to the strata in *Daniels* there was no attempt made by the Strata to give notice of meetings and Mr. Louis did not impugn the results of the meetings until the Strata Petition was started. The court in *Daniels* accepted that the owner and the strata had suffered prejudice but nevertheless determined the prejudice to the strata outweighed the prejudice to the owner and upheld the impugned bylaw.

[115] I accept that Mr. Louis is not an owner of the condominium as defined by the *Act* and is not entitled to relief reserved for owners and tenants. He approached his argument as if he was the owner under the *Act* and did not appreciate that owners claiming relief under s. 164 must be registered owners. In his submissions Mr. Louis alluded to a disagreement between him and Timothy Louis that has been an impediment to Ms. Kirk transferring title to Mr. Louis. I have no details concerning that dispute. It may be that either of the Louis brothers has a challenge or issue with the entitlement of the other to a one-half interest in the condominium; the only

uncontroverted fact is that Mr. Louis is not a registered owner. Thus, he is not an owner for the purposes of considering relief under s. 164.

[116] While I am satisfied that the conduct of the Strata was significantly unfair and defeated Mr. Louis's reasonable expectations, I am unable to consider a remedy in his favour under s. 164. Although he is the beneficial owner of an interest in the condominium, I have concluded that the reference to "owner" in that section and "interested person" in s. 165 was meant to discriminate between registered owners and others who may have interests in strata properties aside from an interest as an owner.

[117] The question is what remedy, if any, can be given to Mr. Louis under s. 165 at this time. Section 165 is permissive and if the Strata has erred in failing to give notice or in failing to honour Ms. Kirk's proxy in the past, nothing can be done to redress those errors. The only person prejudiced by Strata errors are Ms. Kirk or Timothy Louis; Mr. Louis is not entitled to any remedy under s 164. However he is an interested person under s. 165 which allows the court to:

- (a) order a strata to perform a duty it is required to perform under the bylaws, the *Act* or the rules;
- (b) order the strata to stop contravening the *Act*, the bylaws or the rules; and
- (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[118] In *Jivan Dhillon & Co. Inc. v. Gosal*, 2010 BCCA 324 the Court of Appeal described the application of s. 165 to this type of dispute:

[17] Strata property ownership presents a distinct mix of legal principles derived from property law and law relating to collective governance. The framework is provided by a statute designed to facilitate management of common issues, providing an appropriate degree of individual autonomy through the device of democratic principles, and borrowing to some degree from concepts found in statutes regulating municipal and corporate governance.

[18] To that end, the Strata Property Act and bylaws passed under it, provide a code for governance of strata properties setting out mandatory requirements permitting participation of owners in the governance through election of the strata council, control over the strata corporation's bylaws, and control over certain management decisions that are considered so important to the enterprise as to require approval by the owners though the mechanism of a vote. Daily management is effected through the elected strata council, and the council has both powers and responsibilities.

[19] Recognizing that disputes sometimes arise, and that elected bodies sometimes perform inadequately, provision is made in the Strata Property Act, by Part 10, for resolution of issues. I have already referred to the main provisions. Sections 164 and 165 give authority to the Supreme Court of British Columbia, upon application including by an owner, to make certain orders against a strata corporation. It is not necessary for the purposes of this case to expound on s. 164, but it is apparent it is directed to remedies for significantly unfair acts or threatened acts by a strata corporation or persons, or a significantly unfair exercise of voting rights by persons with more than 50% of the votes. Section 165, on the other hand, is more tightly focused, and empowers the court to make what may be described as a mandatory injunction compelling the strata corporation to perform duties required of it by the *Act*, bylaws or rules (s-s. (a)), or a simple injunction enjoining the strata corporation from contravening the *Act*, bylaws or rules (s-s. (b)).

[20] Subsection (c) is the provision in issue. I repeat its language: the court may "make any other orders it considers necessary to give effect to an order under paragraph (a) or (b)". Looking at the grammatical and ordinary meaning of those words, two conclusions may be drawn. First, an order under s-s. (c) may not be freestanding, but rather must be tied to an order directed to the strata corporation's actions or inactions, that is, an order under s-s. (c) may only be made when its purpose is to give effect to either a mandatory injunction under s-s. (a) or an simple injunction under s-s. (b) made against the strata corporation. Second, the court must consider that the order is necessary to give effect to the order under s-s. (a) or (b), that is, the court must consider that without the order under s-s. (c), the orders against the strata corporation under s-s. (a) or (b) will not be effective.

[119] After considering the conduct of the Strata toward Ms. Kirk and Mr. Louis, I am satisfied that there needs to be an order requiring the Strata to perform its duties and comply with the *Act* and the bylaws.

[120] Thus, I order that the Strata begin forthwith to provide notice of all meetings of the Strata to Ms. Kirk by delivering a copy of such notice and other documents made generally available by the Strata to the owners to Unit 206, i.e. the condominium. I also order the Strata to deliver copies of all minutes of meetings prepared since January 2011 to the condominium in the manner prescribed under s. 61 of the *Act*.

[121] I also order the Strata to forthwith recognize Mr. Louis as the lawful proxy of Ms. Kirk at any meeting of the owners of the Strata unless and until it is retracted.

[122] I order that the Strata Petition be stayed until there has been a three-quarter vote at a meeting in favour of continuing the Strata Petition against the owners. This will be a meeting at which Mr. Louis will be entitled to advance his views to the owners and attempt to persuade them not to continue the petition although he will not be entitled to vote due to the operation of s. 171(3) nor is he obliged to contribute to the expense of the litigation as provided for in ss. (5).

Constitutional Challenge to Parts of the Strata Property Act

[123] Mr. Louis challenges the constitutionality of provisions of the *Act* that permit a strata to: (a) disenfranchise owners from voting at meetings (b) prohibit owners from seeking office on the strata council and (c) selling or threatening to force sale of strata properties due to unpaid strata fees. This challenge is directed at ss. 28(3), 53(3), 99(1), 116 (1), 116 (4), 117, and 173.1 of the *Act*.

[124] Mr. Louis gave notice under s. 8(2) of the *Constitutional Question Act*, R.S.B.C. 1996, c. 68 that he challenges the strata fee charges, lien and sale provisions of the *Act* on the basis that together with the bylaws of the Strata, they have infringed his rights under ss. 2(b), 2(d) and 7 of the *Charter*.

[125] Mr. Louis's written argument and oral submissions are prolix. He represented himself and has attempted to address a wide range of complaints concerning the Strata activity he sees as threatening his *Charter* rights.

[126] As I understand Mr. Louis' constitutional argument, he contends that the *Act* imposes a scheme on property owners that forces them to pay strata fees which may be unjustified. He contends that the legislation permitting strata corporations to file liens against strata titles based on mere allegations of an owner's failure to pay monthly strata fees or assessments without any impartial assessment or inquiry into the allegation of arrears is contrary to the principles of fundamental justice.

[127] Mr. Louis asserts that because the Strata can arbitrarily and unilaterally determine the state of accounts between an owner and the Strata without impartial oversight, the Strata can act in bad faith, and without proper justification, this interferes with his peaceful enjoyment of his residence. In the absence of a process requiring any impartial assessment of the owners' obligation to pay strata fees, he has been denied the right to fundamental justice. He claims the filing of the lien (and/or the sale) is a threat to his continued occupancy of his personal residence and thus threatens the security of his person.

[128] Mr. Louis questions the constitutionality of s. 99 of the *Act* because it requires owners to contribute to the budgeted operating requirements and contingency reserve funds necessary to maintain the Strata. He contends that owner must be able to suspend payments in circumstances where the owner claims that the Strata is in breach of its contractual relationship. He believes principles of fundamental justice require that owners be able to suspend payment in response to misconduct, maladministration or breach of contract by the Strata.

[129] He cites as principles of fundamental justice, the right to:

- (a) have an impartial decision maker and determine the amount, if any, of strata fees owing;
- (b) be able to make submissions and present evidence to the impartial adjudicator concerning the claim for strata fees.

[130] He claims that the absence of impartial oversight of decisions by strata councils to file liens is a breach of fundamental justice and constitutes an attack on his physical and psychological well-being. He argues that the effect of a s. 116 lien exposed him to damage to his reputation and financial security. He claims that current or potential creditors concerned about the alleged failure to pay his fees might take steps adversely affecting him, and s. 117 of the *Act* threatens his right to housing which in turn threatens his right to life and security of the person under s. 7 of the *Charter*. He asserts that his s. 7 *Charter* rights are thus violated by the *Act*

incorporating the opportunity for strata corporations to arbitrarily deny housing rights in a manner not in accordance with principles of fundamental justice. Thus, if ss. 116 and 117 of the *Act* violate his s. 7 rights, those sections should be declared of no force and effect pursuant to s. 52 of the Constitution Act, 1982.

[131] He also contends that the legislation allowing the Strata to deprive him of his democratic rights to participate in the management of the Strata by voting at meetings and standing for election violates his *Charter* rights under ss. 2(b) and 2(d) and that that section of the *Act* should be struck down.

[132] He argues that the absence of mandatory standards and criteria for strata corporation meetings, mandatory standards for recording the meetings, standards and procedures for the conduct of strata corporation elections, and a requirement that judgments affecting strata properties be registered in the Land Title Office is unconstitutional and infringes his ss. 2(b), 2(d) and 7 *Charter* rights.

[133] He contends that section 173.1 of the *Act* is unconstitutional because it allows strata corporations to commence legal proceedings without the consent of the owners. In this case neither he nor Ms. Kirk were notified of the meeting convened to approve the Strata Petition; thus the vote was taken without giving him an opportunity to speak at the meeting, argue against the petition, and vote against the petition. He claims that the petition was not properly commenced and this omission deprives him of the fundamental protection not to be forced out of his home for nonpayment when proceedings are without due process.

[134] One remedy Mr. Louis seeks is an order requiring the legislature to amend the legislation to correct this problem and to alter other provisions which he believes are a breach of his fundamental rights.

[135] Mr. Louis relies on *Harvey v. Law Society of Newfoundland* (1992), 88 D.L.R. (4th) 487 (N.L.S.C.T.D.) for the proposition that a self-governing body constituted by provincial legislation cannot displace the protection of the *Charter* on an issue of procedural fairness in penalizing him for non-payment of strata fees. He argued that

his circumstances were parallel to those of the Newfoundland solicitor in *Harvey* who was penalized for improper professional conduct after an extraordinary delay in the disciplinary process leading to the finding of misconduct.

[136] He also relies on *Mia v. British Columbia (Medical Services Commission)* (1985), 61 B.C.L.R. 273 (B.C.S.C.) in which the court struck down the scheme restricting physicians to practice in specific geographical locations. The court said these restrictions offended against fundamental rights in a free country and constituted an attack on the doctor's s. 7 liberty rights.

[137] Finally, Mr. Louis cited *R. v. Robson* (1984), 56 B.C.L.R. 194 (B.C.S.C.) wherein the court concluded that a section of the *Motor Vehicle Act*, R.S.B.C. 1996, c. 318 requiring a motorist to provide a breath sample to demonstrate that the subject's alcohol level was below the legal limit was invalid because of its arbitrariness which was contrary to fundamental justice and in breach of the accused's *Charter* rights.

Discussion

[138] By way of background, the Attorney General pointed to s. 32(1) of the *Charter* that reads:

This Charter applies

- (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
- (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

[139] Generally, courts give standing to those whose private rights are at stake or who are specifically affected by the issue: *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, 2012 SCC 45 at para. 1 ("*DESWUAVS*"). These limitations serve to ensure, among other things, that scarce judicial resources are not spent on marginal or redundant cases, that courts have the benefit of contending points of view from those most directly affected by the issues, and that courts maintain their proper role within our democratic system of

government. As Cromwell J. commented in *DESWUAVS* at para. 1, “it would be intolerable if everyone had standing to sue for everything, no matter how limited a personal stake they had in the matter.”

[140] The general rule has been relaxed to allow courts to grant some litigants public interest standing in public law cases. This is largely a recognition that in the face of increased governmental regulation and after the coming into force of the *Charter*, some public interest litigants are well placed to challenge legislation and government action: *DESWUAVS* at para. 22. The Attorney General notes it is a fundamental *Charter* principle that *Charter* arguments should only be considered where necessary. There is a need for judicial restraint in making unnecessary findings in constitutional matters. The rationale for that restraint was stated by Justice Sopinka in *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97:

9 The policy which dictates restraint in constitutional cases is sound. It is based on the realization that unnecessary constitutional pronouncements may prejudice future cases, the implications of which have not been foreseen. Early in this century, Viscount Haldane in *John Deere Plow Co. v. Wharton*, [1915] A.C. 330, at p. 339, stated that the abstract logical definition of the scope of constitutional provisions is not only "impracticable, but is certain, if attempted, to cause embarrassment and possible injustice in future cases".

[141] In *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, Estey J. stated at p. 383:

The development of the *Charter*, as it takes its place in our constitutional law, must necessarily be a careful process. Where issues do not compel commentary on these new *Charter* provisions, none should be undertaken.

[142] It is important to be constrained in the examination of unnecessary constitutional pronouncements. Issues that do not compel application of the *Charter* should not be undertaken.

Does the *Charter* Apply to Governance of Residential Strata Properties

[143] The Strata and the Attorney General argue the *Charter* does not apply to the Act or bylaws of the Strata. If I am satisfied that this submission prevails, it is

unnecessary to decide any of the following issues including standing and breaches of Mr. Louis's ss. 2(a), 2(d) and 7 *Charter* rights.

[144] The threshold question posed in Mr. Louis's challenge is whether the *Charter* applies to the *Act* insofar as it might affect his private dispute concerning owners' obligations under the Strata bylaws and rights under the *Charter* he claims have been infringed by actions of the Strata.

[145] The analysis begins with s. 32 of the *Charter* which limits the application of the *Charter* to Parliament, the Government of Canada, legislatures and governments of each province, the Yukon and the Northwest Territories.

[146] The first step is to decide if the Strata is "government" or the activities of the strata are "government-like" activities. In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 (S.C.C.) LaForest J. for the Court set out framework for this analysis:

[16] Thus, there are two ways to determine whether the *Charter* applies to an entity's activities: by enquiring into the nature of the entity or by enquiring into the nature of its activities. If the entity is found to be "government", either because of its very nature or because the government exercises substantial control over it, all its activities will be subject to the *Charter*. If an entity is not itself a government entity but nevertheless performs governmental activities, only those activities which can be said to be governmental in nature will be subject to the *Charter*.

[147] LaForest J. summarized the approach to the question of whether the *Charter* applies to an entity:

[44] ... the *Charter* may be found to apply to an entity on one of two bases. First, it may be determined that the entity is itself "government" for the purposes of s. 32. This involves an inquiry into whether the entity whose actions have given rise to the alleged *Charter* breach can, either by its very nature or in virtue of the degree of governmental control exercised over it, properly be characterized as "government" within the meaning of s. 32(1). In such cases, all of the activities of the entity will be subject to the *Charter*, regardless of whether the activity in which it is engaged could, if performed by a non-governmental actor, correctly be described as "private". Second, an entity may be found to attract *Charter* scrutiny with respect to a particular activity that can be ascribed to government. This demands an investigation not into the nature of the entity whose activity is impugned but rather into the nature of the activity itself. In such cases, in other words, one must scrutinize

the quality of the act at issue, rather than the quality of the actor. If the act is truly “governmental” in nature – for example, the implementation of a specific statutory scheme or a government program – the entity performing it will be subject to review under the *Charter* only in respect of that act, and not its other, private activities.

[Emphasis added.]

[148] The threshold question is whether the Strata is by nature a government entity or is controlled by government. The next question is whether the quality of the acts at issue establish that the Strata is implementing a statutory scheme or government program: *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2009 SCC 31.

[149] In answering the first question, I conclude that strata corporations created under the *Act* are not by their nature government nor are their activities controlled by government to the extent that they attract *Charter* scrutiny.

[150] This question was addressed in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229, where the Court dealt with mandatory staff retirement from universities. In that case the Court held that government had no legal power to control universities and it would significantly undermine the purpose of s. 32 of the *Charter* if universities were subject to the *Charter* in addressing the issue of mandatory retirement. The Court said it would be wrong to extend *Charter* rights to private contracts and concluded that although universities were subject to government regulation and dependent on government funds, they managed their own affairs and made decisions on the allocation of funds without the influence of government: *McKinney* at paras. 30, 40 and 41. LaForest J. concluded:

I, therefore, conclude that the respondent universities do not form part of the government apparatus, so their actions, as such, do not fall within the ambit of the *Charter*. Nor in establishing mandatory retirement for faculty and staff were they implementing a governmental policy.

[151] Similarly, though a strata corporation is created by statute and all powers and duties derive from the statute, it is not subject to the control of government in carrying out its duties and powers. The interplay between the owners, strata bylaws and the *Act* is in the nature of a private agreement to use the same real property in a

common purpose, which is the creation of an individual living space. Strata's manage and maintain the common property and common assets through an executive council elected by the members to exercise the powers and perform the duties necessary to facilitate each owner's use of space. The Strata does not act in furtherance of any government program or policy.

[152] In *Eldridge*, the Court underscored the distinction between private entities furthering specific government programs at para. 43:

Two important points must be made with respect to this principle. First, the mere fact that an entity performs what may loosely be termed a "public function", or the fact that a particular activity may be described as "public" in nature, will not be sufficient to bring it within the purview of "government" for the purposes of s. 32 of the Charter. Thus, with specific reference to the distinction between the applicability of the Charter, on the one hand, and the susceptibility of public bodies to judicial review, on the other, I stated as follows, at p. 268 of *McKinney*:

It was not disputed that the universities are statutory bodies performing a public service. As such, they may be subjected to the judicial review of certain decisions, but this does not in itself make them part of government within the meaning of s. 32 of the Charter. . . . In a word, the basis of the exercise of supervisory jurisdiction by the courts is not that the universities are government, but that they are public decision-makers. [Emphasis added.]

[153] Strata council powers and functions are not powers and functions that government would otherwise perform. Strata councils are elected by the members and council members are bound by an obligation to act honestly and in good faith with a view to the best interests of the strata. Strata corporations are not subject to the control of government in carrying out its powers and duties set out in the statute. The governance structure created by the *Act*, including the methods of enforcing owners' obligations to contribute to the expenses of the corporation, is approved by the owners at properly constituted meetings.

[154] Much like the circumstances inherent in university management described in *McKinney*, the roles and responsibilities of a strata corporation and council are not controlled or directed by government. The legislation requires strata corporations to maintain certain minimum requirements for the administration of the strata affairs. It is authorized to pass bylaws necessary to the performance of its duties. The

overarching duty of a strata corporation is to facilitate the shared ownership of land and space to accommodate the private interests of owners. The *Act* prescribes the requirements to elect a council and decision-makers in a process similar to the requirements for managing limited liability corporations.

[155] The *Act* is intended to facilitate private individuals living in a community like scheme and regulating behaviours to facilitate management of the strata property. This is a private relationship that is not government or government-controlled activity.

[156] The decisions in *Harvey* and *Mia* are distinguishable from the circumstances in this case. Both of those decisions dealt with members of self-governing professions. In *Harvey*, the issue focused on the Law Society member's misconduct and his entitlement to fairness in the disciplinary process. In *Mia*, the issue was whether the legislature had the power unfettered by the *Charter* to prevent physicians practising medicine where they chose to work.

[157] As for whether the actions of the Strata were governmental activities, the case of *Reid v. Strata Plan LMS 2503*, 2007 BCSC 1396 is helpful. In *Reid*, the Court found the actions of the strata were not governmental functions. The strata corporation in that case had granted some strata owners temporary permission to place items on the common property. Mr. Reid sought a declaration to force the strata council to resile from its decisions regarding the use of the common property. The applicant argued that the strata corporation was a hybrid public authority and subject to the *Charter* insofar as its decisions affected his strata lot. Although dismissing the claim on other grounds, Gropper J. addressed the question of the applicability of the *Charter* to strata corporations. She said at para 38:

[38] I agree with the strata corporation that none of the provisions in these acts, nor the provision in the *Universal Declaration of Human Rights*, discloses a reasonable cause of action. Clearly, the *Canadian Bill of Rights* does not apply, as its application is limited to matters within the federal jurisdiction. The *Universal Declaration of Human Rights* does not create a cause of action for the plaintiffs and no authority was provided for such an assertion. Finally, the *Charter* does not apply to the resolution and by-laws of

the strata corporation: *Condominium Plan No. 9310520 v. Smith*, 1999 ABQB 119 (CanLII) at 5:

Even though the by-laws [of the condominium corporation] do make a distinction against people under the age of forty-five years (and do therefore 'discriminate')...the Charter is not applicable. It was not 'intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing without engaging governmental', [1990] 3 S.C.R. 229 at 266.

[39] The House of Lords decisions are unhelpful, as they do not address the application of the Charter, for obvious reasons. The *Godbout* decision refers to the applicability of the Charter to the actions of municipalities in that they are entities that perform "governmental functions" (at 50). The plaintiffs have not explained why, in their view, the strata corporation is performing "governmental functions". Their argument appears to be that the strata corporation receives its authority from the Strata Property Act. That is an insufficient basis to support the assertion that the strata corporation is performing governmental functions.

[158] It is helpful to contrast the functions of municipal governments and strata corporations in the analysis of whether the strata activities may be described as public and sufficient to bring it within the purview of "government" for the purposes of the *Charter*. In *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, the Court discussed the *Charter* in the context a municipality's right to dictate, as a condition of employment, where its employees could reside and concluded that a rule requiring an employee to live within the municipal boundaries breached the employee's s. 7 *Charter* rights: paras. 48-51, 55.

[159] The Court described the features of municipal governments including elected councils, right to tax, power to make laws, to administer and enforce laws within their territorial jurisdiction which led to the conclusion that the bylaw infringed the employee's *Charter* rights. The important distinction was set out in this passage at para. 51:

Finally, and most significantly, municipalities derive their existence and law-making authority from the provinces; that is, they exercise powers conferred on them by provincial legislatures, powers and functions which they would otherwise have to perform themselves. Since the Canadian Charter clearly applies to the provincial legislatures and governments, it must, in my view, also apply to entities upon which they confer governmental powers within their authority. Otherwise, provinces could (in the manner outlined earlier)

simply avoid the application of the *Charter* by devolving powers on municipal bodies.

[160] People acquiring strata title property in BC do so with the assurance that bylaws and regulations are mandated to provide for the orderly administration of the affairs of the strata corporation, including the building, facilities and grounds. Although some of the indicia of municipalities parallel the functions of strata corporations (such as the right to set fees for the proper management and administration of the strata corporation), none of the powers and functions of a strata corporation are those which the province would otherwise have to perform itself. The fees collected by the strata are used for the direct personal benefit of the owners. The *Act* does not download government functions to the strata that would have been performed by the provincial government in the absence of the strata corporation. The province created the strata corporation to provide a means of property ownership that facilitated private community management of land or space for the benefit of all units in the plan.

[161] If the province had not created this model of property ownership then land that is now strata property would otherwise remain owned, used and governed in the same way as all other land in a municipality. The owners of the land would have the typical relationship with the municipality and be entitled to *Charter* protection where appropriate. The provisions of the *Act* that Mr. Louis complains of relate to the rights and responsibilities of owners and strata corporations but do not concern powers and functions the province would otherwise undertake. In my view, the *Charter* was not intended to address the type of nongovernmental activity performed by strata corporations as provided for in the *Act* and those activities challenged by Mr. Louis do not come within the ambit of the *Charter*.

[162] It is another important feature of the *Charter* that it was not intended to protect economic interests: *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927 at para. 95.

[163] At its heart, Mr. Louis's complaint is that his interest in the condominium may be sold because the owners have failed to pay strata fees without getting due

process to vote at meetings or participate as an elected member of Council or address his other complaints about management of the Strata.

[164] Mr. Louis's complaint is in the nature of an economic dispute; if the Strata waives its debt claim, provides certain information and promises to comply with the *Act*, then he will continue to pay.

[165] The real threat to Mr. Louis is the loss of his home due to unpaid strata fees. Although he has been denied participation in the management of the strata, this is, in essence, a dispute that deals with his financial responsibility and not *Charter* protected rights.

[166] Overall, it is my view Mr. Louis is seeking to protect his property interests by invoking the *Charter* and relying on his perception that various *Charter* rights have been infringed to justify his failure to make strata fee payments for more than three years. I have concluded that the *Charter* does not assist in protecting Mr. Louis's right to resist paying strata fees and levies incidental to the infringement of his self-perceived *Charter* rights.

Conclusion

[167] Mr. Louis's claim that his *Charter* rights have been infringed and that the Strata should be prohibited from pursuing enforcement of its claim for payment of the strata arrears is dismissed.

[168] Mr. Louis's claim in his petition and response to the Strata Petition is allowed in part. The Strata is ordered to:

- (a) forthwith to provide and continue to provide notice of all meetings of the Strata to Ms. Kirk by delivering a copy of such notice and other documents made generally available by the Strata to the owners to unit 206;
- (b) deliver copies of all minutes of meetings prepared since January 2011 to the condominium in the manner prescribed under s. 61 of the *Act*;

- (d) forthwith recognize Mr. Louis as the lawful proxy of Ms. Kirk at any meeting of the owners of the Strata.

[169] Finally, I order that the Strata Petition be stayed until there has been a three-quarter vote at a meeting in favour of continuing the Strata Petition against the owners. This will be a meeting at which Mr. Louis will be entitled to advance his views to the owners and attempt to persuade them not to continue the petition.

[170] I will adjourn the Strata application for judgment, an order for sale and conduct of sale until the owners have approved continuing the Strata Petition.

[171] One final note needs to be recorded. Mr. Louis appears to have commenced another petition against the Strata under No. 168585 New Westminster Registry. This petition was forwarded to the court but I have not taken into account anything contained in it in reaching the conclusions in these reasons. It is not clear that whether the Strata received notice that Mr. Louis was sending these documents to the court and I have not considered them in this decision.

[172] I will not address costs of either proceeding at this stage.

“The Honourable Mr. Justice Armstrong”