COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *The Owners, Strata Plan LMS 2940 v. Squamish Whistler Express and Freight,* 2010 BCCA 74

Date: 20100215
Docket: CA035262; CA035265

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Between:

The Owners, Strata Plan LMS 2940

Respondent
(Plaintiff)

And:

Squamish Whistler Express and Freight a division of Quick as a Wink Courier Service Ltd. and Gary Comeau

Appellants
(Defendants)

And:

Keefer Laundry Ltd.

Respondent
(Defendant)

- and –

Docket: CA035265

Between:

The Owners, Strata Plan LMS 2940

Respondent
(Plaintiff)

And:

Keefer Laundry Ltd.

Appellant
(Defendant)

And:

Squamish Whistler Express and Freight a division of Quick as a Wink Courier Service Ltd. and Gary Comeau

Respondents
(Defendants)

Before: The Honourable Madam Justice Ryan
The Honourable Mr. Justice Frankel
The Honourable Madam Justice D. Smith

On appeal from: Supreme Court of British Columbia, June 29, 2007
(*The Owners, Strata Plan LMS 2940 v. Squamish Whistler Express and Freight*, 2007 BCSC 948, Docket No. S036494)

Counsel for Squamish Whistler Express and G. Comeau:	R.B. Lindsay, Q.C. C. Stewart
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Counsel for The Owners, Strata Plan LMS 2940:	D.A. Garner K. McLaren
Place and Date of Hearing:	Vancouver, British Columbia October 22, 2009
Place and Date of Judgment:	Vancouver, British Columbia February 15, 2010

Written Reasons by:
The Honourable Madam Justice D. Smith

Concurred in by:
The Honourable Madam Justice Ryan
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice D. Smith:

Overview

[1] The central issue in this appeal is whether the running of time for the two-year limitation period was postponed under s. 6(4)(b) of the *Limitation Act*, R.S.B.C. 1996, c. 266, or, alternatively, when the right to bring the cause of action arose under s. 3(2) of the *Limitation Act.*

[2] The plaintiff strata corporation commenced an action against the defendants two years and one day after an incident in which property it owned was damaged by the actions of the personal defendant, Gary Comeau. Section 3(2) of the *Limitation Act* requires a plaintiff to commence an action for damage to property within two years from the date on which the "right to do so arose". Section 6(4)(b) of the *Limitation Act* postpones the running of time for the limitation period if certain criteria are established.

[3] Both the plaintiff and the defendants brought summary trial applications to address the issue of the limitation period. The plaintiff sought a declaration that the action was filed within the applicable limitation period; the defendants applied for an order that the action was statute-barred.

[4] The relevant provisions of the *Limitation Act* read:

> 3(2) After the expiration of 2 years after the date on which the right to do so arose a person may not bring any of the following actions:
>
> (a) … for damages in respect of injury to person or property ...;
>
> ...
>
> 6(3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided for in subsection (4):
>
> ...
>
> (b) for damage to property;
>
> ...
>
> (4) Time does not begin to run against a plaintiff with respect to an action referred to in subsection (3) until the identity of the defendant is known to the

> plaintiff and those facts within the plaintiff's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
>
> (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
>
> (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
>
> (5) For the purpose of subsection (4),
>
> (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
>
> (b) "facts" include
>
> (i) the existence of a duty owed to the plaintiff by the defendant, and
>
> (ii) that a breach of a duty caused injury, damage or loss to the plaintiff,
>
> ...
>
> (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[5] Sections 171 and 172 of the *Strata Property Act*, S.B.C. 1998, c. 43 (the "*Act*") require strata corporations to obtain authorization by resolution passed by a 3/4 vote at an annual or special general meeting before bringing an action. Section 45 of the *Act* requires that a strata corporation give at least two weeks' written notice of a special general meeting to each of the owners. Subject to provisions for waivers of such notice or dispensing with the meeting altogether, typically it would take a strata corporation at least two weeks to meet the requirements of ss. 171 and 172 of the *Act*.

[6] The relevant provisions of the *Act* provide:

> 2(1) From the time the strata plan is deposited in a land title office,
>
> ...

> (b) the owners of the strata lots in the strata plan are members of the strata corporation under the name "The Owners, Strata Plan [*the registered number of the strata plan*]".
>
> ...
>
> 3 Except as otherwise provided in this Act, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.
>
> ...
>
> 44(1) The strata corporation does not have to hold a special general meeting to consider a resolution if all eligible voters waive, in writing, the holding of the meeting and consent, in writing, to the resolution.
>
> ...
>
> 45(1) The strata corporation must give at least 2 week's written notice of an annual or special general meeting to all of the following:
>
> (a) every owner ...;
>
> ...
>
> (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.
>
> ...
>
> 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 ....
>
> (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
>
> ...
>
> 172(1) The strata corporation may sue on behalf of one or more owners about matters affecting only their strata lots if, before beginning the suit,
>
> (a) it obtains the written consent of those owners, and
>
> (b) the suit is authorized by a resolution passed by a 3/4 vote at an annual or special general meeting,
>
> ...

[7] On December 2, 2003, the *Act* was amended. Section 173.1 provides that failure to obtain the requisite authorizations under ss. 171 and 172 will not affect the capacity of a strata corporation to commence a representative action, and does not constitute a defence to the action. The amendment was made retroactive. Section 173.1(3) reads:

> This section is retroactive to the extent necessary to give full force and effect to its provisions and must not be construed as lacking retroactive effect in relation to any matter merely because it makes no specific reference to that matter.

[8] Section 173.1 was enacted to address the issue that arose as a result of the decision in *Strata Plan LMS 888 v. Coquitlam (City)*, 2003 BCSC 941, 15 B.C.L.R. (4th) 154. In that case, Cohen J. held that non-compliance with ss. 171 or 172 of the *Act* nullified a representative action commenced by a strata corporation.

[9] In this case, the plaintiff strata corporation claimed in the court below that ss. 171(2) and 172(1) of the *Act* created a statutory impediment, which postponed the running of time under s. 6(4)(b) of the *Limitation Act* until the statutory impediment could reasonably be removed. Alternatively, it contended that the statutory impediment postponed its right to bring an action under s. 3(2) of the *Limitation Act* by a reasonable period. It also asserted that the retroactive effect of s. 173.1, properly construed, did not negate its right to bring an action by granting the defendants a limitation defence where it would otherwise not have existed.

[10] The issue for the trial judge was whether the plaintiff strata corporation was statute-barred from bringing its action. In his view it was not, because ss. 171 and 172 of the *Act* created a statutory impediment that postponed the running of time under s. 6(4)(b) of the *Limitation Act* by at least a day. He also was of the view that s. 173.1 did not defeat the claim. His reasons for judgment are indexed at 2007 BCSC 948.

[11] In my view, the trial judge's conclusion was substantially correct. I agree with the appellants that the right to bring the action under s. 3(2) arose on December 1, 2001, the day of the incident. I am also of the view that the alternative reasoning in *Kitto (Guardian Ad Litem) v. Hanson* (1991), 58 B.C.L.R. (2d) 265 (C.A.), has been overtaken by the s. 6(4)(b) analysis in *Novak v. Bond*, [1999] 1 S.C.R. 808. However, in my opinion a postponement of the limitation period, in circumstances of this case, is nevertheless consistent with the analysis in *Novak.*

Background facts

[12] The plaintiff (respondent), The Owners, Strata Plan LMS 2940, (the "Strata Corporation"), is the owner of the Delta Whistler Village Suites Hotel at Whistler, B.C. (the "Hotel"). On December 3, 2003, the Strata Corporation commenced an action against the defendants (appellants), Squamish Whistler Express and Freight, a division of Quick As A Wink Courier Service Ltd. ("Squamish Whistler Express"), Gary Comeau, an employee of Squamish Whistler Express, and Keefer Laundry Ltd. ("Keefer"). Keefer had a contract with the Hotel for the cleaning of its laundry.

[13] The action for damages arose out of an incident that occurred on December 1, 2001, at the Hotel. Mr. Comeau was either picking up or delivering laundry at the Hotel when his truck struck a water pipe in the Hotel's parking garage. The water pipe broke and consequential flooding damaged the Hotel's building and its contents.

[14] Mr. Comeau left his name, his employer's name (Squamish Whistler Express) and his licence plate number with the Hotel's manager. Later that afternoon, the manager contacted the Strata Corporation's insurance broker and filed a claim with its insurance adjuster. December 1, 2001, was a Saturday. The adjuster was unable to travel to the Hotel on that day because of a snow storm but arrived on Sunday, December 2, 2001, when he began his investigation of the claim.

[15] On December 3, 2001, the adjuster met with the building inspector for the Resort Municipality of Whistler. The building inspector advised him that the heights and locations of the water pipes in the parking garage of the Hotel complied with Whistler's building code. Based on this information, the adjuster was satisfied that a subrogated claim against Mr. Comeau and other parties was a "definite possibility".

[16] The adjuster understood that the limitation period for a property damage claim was two years from the date on which the investigation and evidence supported a cause of action. Based on that understanding, he did not instruct counsel to file a Writ of Summons to protect the insurer's subrogated claim until December 2, 2003

(two years and one day after the accident). On the same date, counsel for the insurer commenced the within action for damages on behalf of the Strata Corporation.

[17] The Strata Corporation brought a summary trial application for a declaration that its action was filed within the applicable limitation period under the *Limitation Act*. The defendants, Squamish Whistler Express and Mr. Comeau, along with Keefer, brought separate summary trial applications to have the action dismissed as being statute-barred.

[18] The trial judge held there was a postponement of the running of time for the two-year limitation period because the procedural requirements of ss. 171 and 172 of the *Act* could not be met when the cause of action arose on December 1, 2001. He held that the length of that postponement was for a reasonable period of time, which he found unnecessary to define, but that included, at the very least, the additional day beyond the expiration of the two-year limitation period. It was apparent to the trial judge that it would take more than one day for the Strata Corporation to have the owners pass a resolution authorizing it to commence the action. He concluded, therefore, that the action was properly filed within the limitation period and dismissed the defendants' applications.

Issues on appeal

[19] The appellants submit the trial judge erred in law in the following respects:

1. In interpreting s. 171(2) of the *Act* to mean that the Strata Corporation was not "able", for the purposes of s. 6(4)(b) of the *Limitation Act,* to bring an action until a reasonable time was allowed for it to obtain a 3/4 vote from the owners authorizing it to commence the action; and

2. In finding that the commencement of the limitation period was postponed pursuant to s. 6 of the *Limitation Act.*

[20] The respondent maintains that the trial judge did not err in finding that the limitation period was postponed pursuant to s. 6 of the *Limitation Act*. In the alternative, the respondent submits that the right to bring the action under s. 3(2) of

the *Limitation Act* did not arise until December 2, 2001, at the earliest, and, therefore, the action commenced on December 2, 2003 was brought within the limitation period.

The trial judge's analysis

[21] Before the trial judge, the Strata Corporation argued that ss. 171 and 172 of the *Act* created a statutory impediment to its right to bring an action on a substantially, fully accrued, statutory cause of action, because the right to bring the action did not arise until there had been a 3/4 vote by the owners. This submission was based on the primary reasoning in *Kitto (Guardian Ad Litem) v. Hanson*.

[22] The circumstances of *Kitto* involved a claim under the *Family Compensation Act,* R.S.B.C. 1979 c. 120, by the beneficiaries (the mother and son) of the woman who had died in a motor vehicle accident. The *Family Compensation Act* creates a statutory right of action where the death of a person is caused by a wrongful act, neglect, or default. This action must be brought for the benefit of the deceased's beneficiaries and by the deceased's personal representative. However, if there is no personal representative or if the personal representative does not bring the action within six months after the person's death, then the beneficiaries may bring the action themselves in their own names. In *Kitto,* the personal representative did not commence an action within the six-month period; two years and three-and-a-half months after the accident, the beneficiaries commenced an action in their own names. The chambers judge dismissed the action brought by the beneficiaries as being statute-barred.

[23] This Court allowed the appeal. It held that the six-month limitation period for the personal representative of the deceased to bring an action under the *Family Compensation Act* created a statutory impediment to the beneficiaries' right to bring an action in their own names, as it was not until the six months had expired that the beneficiaries' right to bring the cause of action arose. The Court concluded that, if after a substantive cause of action arises (the death of the deceased), a procedural step is required before an action may be commenced (i.e., the expiry of the six-

month limitation period in which the personal representative of the deceased must bring an action for the benefit of the deceased's beneficiaries), then the right to bring the action (i.e., by the beneficiaries directly) does not arise until the procedural step has been completed.

[24] In this case, the trial judge declined to follow the primary reasoning in *Kitto* based on s. 3(2) of the *Limitation Act* because of the difference in the nature of the statutory impediment between *Kitto* and the statutory impediment he found was created by ss. 171 and 172 of the *Act*. In *Kitto,* he reasoned, the statutory impediment involved the mere passage of time; in this case, the statutory impediment required the Strata Corporation to pass a resolution before it could commence an action. That requirement, in his view, had the potential to create an indefinite limitation period if, for whatever reason, the Strata Corporation failed to take the necessary steps to obtain that special resolution, which in turn could indefinitely delay the triggering of the plaintiff's right to bring the action. In such circumstances, he concluded, there might be no end for the defendants' potential liability.

[25] The trial judge instead chose to rely on the alternative reasoning in *Kitto* based on the postponement provisions of s. 6(4)(b) of the *Limitations Act*. In that aspect of the *Kitto* analysis, the Court said that if the beneficiaries' right to commence the action arose on the date of death (not after the expiry of the six-month limitation period for the personal representative), the running of time for the limitation period was postponed under s. 6(4)(b) because the beneficiaries would not be "able" to bring an action until the expiry of the six-month period. The ability to bring an action is one of the four components of s. 6(4)(b) that must occur before a limitation period will begin to run. In *Ounjan v. St. Paul's Hospital,* 2002 BCSC 104, Tysoe J. (as he then was) summarized the four components at para. 21:

> (a) The identity of the defendant is known to the plaintiff;
>
> (b) The plaintiff has certain facts (including the facts set out in s. 6(5)(b));

(c) A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success; and

(d) A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in his/her own interest and taking his/her circumstances into account, to be able to bring an action.

[26] Applying the alternate reasoning from *Kitto*, the trial judge held that the Strata Corporation's action was not statute-barred because, in the circumstances, s. 6(4)(b) had not been met (the plaintiff ought to be able to bring an action) and therefore a postponement of the running of time should be allowed for a reasonable period of time. He declined to define what that reasonable period would be as he was satisfied that it would, at the very least, include one day for the Strata Corporation to obtain the required vote to commence the action. In the result, he held that the Strata Corporation's action was not statute-barred.

[27] The trial judge also declined to give s. 173.1 of the *Act* full retroactive effect, which would have removed the statutory impediment he found had been created by operation of ss. 171 and 172 of the *Act.* He based this determination on two grounds. First, he found that the Attorney General's comments in introducing the amendment, as they were reported in the *Debates of the Legislative Assembly (Hansard),* No. 3 (27 November 2003) at 1615, disclosed an intention to preserve a representative action commenced before the enactment, without an authorizing resolution, from being declared a nullity. In other words, the purpose in making s. 173.1 retroactive was to save such actions and not to render them statute-barred to the detriment of the strata corporation. Second, he found that s. 173.1 did nothing to change the requirements in ss. 171 or 172 for a 3/4 vote before a strata corporation could commence a representative action.

Discussion

[28] The issues raised by the grounds of appeal include the following:

1. Do ss. 171 and 172 of the *Act* create a statutory impediment?

2. If they do, then does s. 173.1 remove the statutory impediment?

3. If it does not, then when did the right to bring the cause of action arise under s. 3(2) of the *Limitation Act*?

4. If the right to bring the cause of action arose on December 1, 2001, then was the running of time postponed by operation of s. 6(4)(b) of the *Limitation Act*?

(i) *Do ss. 171 and 172 of the Act create a statutory impediment?*

[29] There is a threshold issue of whether ss. 171 and 172 of the *Act* create a statutory impediment, as found by the trial judge, to a strata corporation commencing an action.

[30] Sections 171 and 172 require a strata corporation to pass a resolution by a 3/4 vote before it may commence a representative action. The provisions are mandatory and amount to a condition precedent to the filing of an action. This was the ratio of *Strata Plan LMS 888 v. Coquitlam (City)*, which nullified a representative action commenced by the strata corporation because of its non-compliance with ss. 171 and 172 of the *Act.* It was this decision that triggered the s. 173.1 amendment to the *Act.*

[31] In my opinion, the trial judge was correct in finding that the inability of the Strata Corporation to meet the procedural requirements for at least a reasonable period of time amounted to a statutory impediment to its ability to bring the action.

(ii) *Does s. 173.1 remove the statutory impediment?*

[32] The appellants submit that s. 173.1 should be interpreted in a manner that would provide them with a limitation defence. I do not agree. In my view, s. 173.1 seeks to preserve a representative action that would otherwise be a nullity because the strata corporation failed to comply with ss. 171 and 172 of the *Act.*

[33] I agree with Edwards J. who described the effect of s. 173.1 in *Dockside Brewing Co. v. Strata Plan LMS 3837,* 2005 BCSC 1209, 46 B.C.L.R. (4th) 153, as follows:

> [15] Section 173.1 of the *SPA* addresses the failure of a strata corporation to obtain the 3/4 authorization required under s. 171(2). It provides that such failure does not constitute "a defence" to any suit or arbitration which requires 3/4 authorization, nor "an objection" by a defendant to "the capacity of a strata corporation to commence or continue any suit or arbitration" not undertaken in accordance with the *SPA*.
>
> [16] Section 173.1 is retroactive and ensures that any unauthorized suit or arbitration is not defeated by a defendant to such a suit or arbitration for failure of a strata corporation to obtain the required 3/4 authorization. ...

[34] The appellants' submission on this issue runs contrary to the way in which the rules of statutory interpretation for retroactive legislation have been traditionally applied. As Ruth Sullivan articulated it in *Sullivan and Driedger on the Construction of Statutes,* 4th ed. (Markham, Ont.: Butterworths, 2002), at 553-554:

> It is obvious that reaching into the past and declaring the law to be different from what it was is a serious violation of the rule of law. As Raz points out, the fundamental principle on which rule of law is built is advance knowledge of the law. No matter how reasonable or benevolent retroactive legislation may be, it is inherently arbitrary for those who could not know its content when acting or making their plans. And when retroactive legislation results in a loss or disadvantage for those who relied on the previous law, it is unfair as well as arbitrary. Even for persons who are not directly affected, the stability and security of law are diminished by the frequent or unwarranted enactment of retrospective legislations.

[35] Similarly, Pierre-André Côté, in *The Interpretation of Legislation in Canada,* 2nd ed. (Cowansville, Qc.: Les Editions Yvon Blais Inc., 1992), states at 114:

> The courts are often influenced by the consequences of different interpretations. They can determine whether the retroactive or prospective application of a statute will cause undue prejudice to individuals. There is a presumption that the legislator does not intend to be unjust. As a result, judges may refuse to apply statutes so as to produce "unjust", "unreasonable", "prejudicial", "severe", or simply "inconvenient" consequences. [Footnotes omitted.]

[36] In my view, the trial judge was correct in finding that s. 173.1 should not be interpreted so as to provide the defendants with a limitation defence, contrary to the

intention of the Legislature and to the detriment of the Strata Corporation. The trial judge was also correct in finding that, regardless of its retroactive effect in this case, s. 173.1 does not remove the statutory impediment presented by ss. 171 and 172. Although an unauthorized action commenced by a strata corporation action is no longer void by operation of s. 173.1, it must still obtain a special resolution from the requisite number of owners before it is authorized to bring an action on their behalf. If the intention of the Legislature was to make a special resolution in these circumstances optional, or to remove the consequences of a strata corporation bringing an unauthorized action, then it would have been sufficient to simply repeal ss. 171 and 172 instead of adding s. 173.1

[37] It is clear from the comments of the Attorney General that were made when introducing the s. 173.1 amendment that ss. 171 and 172 have a corporate governance purpose:

> The new section will clarify that the requirement for strata corporations to obtain owner approval before commencing a lawsuit is an internal procedural rule for the benefit of the owners ....

[38] With the implementation of 173.1, a previously unauthorized and void action by a strata corporation is converted to a voidable action. This view is supported by s. 165 of the *Act*, by which an owner or “interested person” may take steps to ensure that a strata council and its members comply with the mandatory procedures under the *Act.* Section 165(b) of the *Act* allows an interested person to seek an order from the Supreme Court directing a strata council to stop contravening the *Act* and s. 165(c) authorizes the court to make any other order necessary to give effect to an order made under s. 165(b).

[39] The contravention of ss. 171 and 172 could also have consequences for strata council members, notwithstanding the effect of s. 173.1. For example, s. 31 of the *Act* requires council members, when exercising the powers and performing the duties of the strata corporation, to act honestly and in good faith with a view to the best interests of the strata corporation, and with the care, diligence, and skill of a reasonably prudent person in comparable circumstances. It is not likely that a

reasonably prudent person (or strata corporation) would bring an action in contravention of the *Act*.

[40] Based upon what I see as the remedial effect of these provisions, which is limited to the technical validity of unauthorized actions, I am of the view that s. 173.1 does not remove the statutory impediment imposed by ss. 171 and 172 of the *Act*.

(iii) When did the right to bring the cause of action arise under s. 3(2) of the Limitation Act?

[41] Pursuant to s. 3(2) of the *Act*, the limitation period for bringing an action in respect to damage to property is two years "after the date on which the right to do so arose". It is settled law that the right to bring an action arises when the substantive elements of the cause of action occur: *Bera v. Marr* (1986), 1 B.C.L.R. (2d) 1 at 14 (C.A.); *Levitt v. Carr* (1992), 66 B.C.L.R. (2d) 58 at para. 71 (C.A.). The substantive elements of the plaintiff's claim—the defendants' duty of care, the breach of the standard of care, and the damage caused to the Hotel's property—were all established on December 1, 2001.

[42] In *Kitto,* the Court held that there may be an exception to this general rule where a procedural step arises after the substantive elements of the cause of action have been fulfilled, which prevents a plaintiff from bringing the cause of action. Lambert J.A. summarized this exception at para. 9:

> In most cases the right to bring the action arises when the cause of action accrues. But there may be exceptions to that general rule. The two phrases are not necessarily synonymous: see *Berra v. Marr,* 1 B.C.L.R. (2d) 1, [1986] 3 W.W.R. 442, 37 C.C.L.T. 21, 27 D.L.R. (4th) 161 (C.A.), and *Bank of Montreal v. Kim* (1990), 68 D.L.R. (4th) 738, 40 C.P.C. (2d) 11 (B.C.C.A.). If, after the substantive cause of action accrues, some procedural step is required by law to be taken before an action can be brought, then in my opinion the right to bring the action does not arise until after the procedural step is taken. [Emphasis added.]

[43] While there may be exceptions to the general rule, I am not persuaded that the underlined sentence in para. 9 of *Kitto* represents a general statement of the law for all purposes. The *Family Compensation Act* creates a unique statutory cause of

action for a deceased's personal representative to commence an action for the beneficiaries of the deceased within a period of six months. After that time, if no action has been brought or if no personal representative has come forward, the *Family Compensation Act* provides that the cause of action is extended to the beneficiaries. By the wording of the statute, the beneficiaries have no cause of action before the expiry of the six-month period. This is not a mere "procedural step" as the limitation period begins to run, without action by the beneficiaries, as soon as the right to bring the action is conferred by the statute.

[44] The reference to *Bank of Montreal v. Kim* does not support the claim that the circumstances in *Kitto* involved a "procedural step". The issue in *Kim* was when the limitation period began to run on an action to enforce a foreign judgment. The Court held that the right to bring an action on the judgment did not arise until the defendant became resident in B.C. This reasoning was simply a logical extension of the jurisdictional problem in that case: no cause of action could exist on a foreign judgment that has no connection to the province. The defendant's place of residence was not within the plaintiff's control and therefore could not be affected by the plaintiff's actions.

[45] It would appear that the judicial application of *Kitto* has been limited to actions under the *Family Compensation Act*. See *MacDuff v. St. Paul's Hospital* (6 March 1995), Vancouver, C930873 (S.C.); *McIndoe v. Henry*, 2006 BCSC 1983; *Wiseman v. British Columbia (Transportation & Highways)*, 2007 BCSC 1447. This Court has relied on *Kitto*, but also in the context of the *Family Compensation Act*, and then only to restate its discrete finding that the beneficiaries' right to bring an action does not arise until six months after the date of death: *Lougheed v. Co-operators General Insurance*, 2007 BCCA 503, 72 B.C.L.R. (4th) 283. I am not aware of any other decisions, and we were not provided with any, in which *Kitto* has been followed for the general proposition that the right to bring an action does not arise until a mandatory procedural requirement has been met.

[46] In my opinion, a finding that the right to bring an action does not arise until a strata corporation obtains the requisite authorization under the *Act* would be inconsistent with the Court's rationalization of the provisions of the *Limitation Act* in *Novak v. Bond*. In that case, Madam Justice McLachlin (as she then was), for the majority, began her analysis by reviewing the purpose of limitation acts and the modern approach to limitation periods. She conceived the modern approach to this issue as requiring a balance between the traditional rationales, which protect the defendant, and the more contemporary concern for fairness to the plaintiff. This balance is reflected in four characteristics possessed by most limitation acts that she described at para. 67 as follows:

> [Limitation statutes] are intended to: (1) define a time at which potential defendants may be free of ancient obligations, (2) prevent the bringing of claims where the evidence may have been lost to the passage of time, (3) provide an incentive for plaintiffs to bring suits in a timely fashion, and (4) account for the plaintiff's own circumstances, as assessed through a subjective/objective lens, when assessing whether a claim should be barred by the passage of time.

[47] The postponement provisions of the *Limitation Act* are intended to ensure fairness to the plaintiff. However, as McLachlin J. noted, certainty and diligence require that the limitation period cannot be postponed indefinitely. The ultimate limitation periods established in s. 8 of the *Limitation Act* perform this function: they represent a final cap on the length of a limitation period. Madam Justice McLachlin concluded her analysis by describing limitation periods as being fixed at the beginning and end of the period with s. 6 (4)(b) providing some flexibility within these bounds:

> 71 Viewed in this context, s. 6(4)(b) may be seen as operating to adjust the position of the limited window of time within which a plaintiff may bring an action. This section is <u>constrained at one end by the specific date on which the cause of action actually arose in fact</u> and, at the other end, by the ultimate limitation period of six or thirty years. [Emphasis added.]

[48] The logic of this scheme is compromised if the start date of the limitation period is not fixed. Madam Justice McLachlin clearly defined that date—"the date on which the right to [bring an action] arose", the phrase used in s. 3(2)—when she

characterized the front end of the limitation period as a "specific date on which the cause of action actually arose in fact" (emphasis added). She used a similar definition at para. 68 when she characterized "the date on which the right to bring [an action] arose" as "the date on which all the elements of the cause of action came into existence".

[49] I would note that this is essentially the reasoning that led the trial judge to reject the primary reasoning in *Kitto*. He shared the same concern that the commencement of the limitation period could be put off indefinitely if the plaintiff failed to take the step required to remove the statutory impediment.

[50] In this case, the date on which all of the elements of the cause of action came into existence was December 1, 2001. On that date, the Strata Corporation had the right to bring an action against the defendants but could not do so until it had complied with the provisions in the *Act*, which governed its ability to do so.

(iv) If the right to bring the cause of action arose on December 1, 2001, was the running of time postponed under s. 6(4)(b) of the Limitation Act?

[51] The appellants submit that the trial judge erred in relying on s. 6(4)(b) of the *Limitation Act*, as it was applied in the alternative reasoning of *Kitto*, because it was no more than *obiter dicta*. The trial judge found, however, that ss. 171 and 172 of the *Act* were a relevant consideration in determining when the running of time commenced. In that regard, he stated at para. 24 of his reasons:

> A strata corporation ought not "be able" to bring an action until it has a reasonable time to obtain the requisite 3/4 vote authorizing the action. What is a reasonable period of time will depend on all of the circumstances, including the number of owners, their proximity and their past practice of waiving notice to meetings. In the present case, I need not determine what would constitute a reasonable period of time because there is no doubt that it would be at least one day.

[52] The appellants submit that the trial judge erred in following the alternative reasoning in *Kitto*, by finding that the Strata Corporation was not "able" to bring an action because of ss. 171 and 172 of the *Act* on the date the cause of action arose.

They rely on *Novak* to support this argument. They say that postponement of the running of time will only be granted where there exist "serious, significant and compelling" reasons to do so and that the obligation imposed on the Strata Corporation to obtain a 3/4 vote of the owners before commencing an action does not amount to a "serious, significant or compelling" reason for the postponement of time. In their view, the requirement of the Strata Corporation to obtain a 3/4 vote from the owners does not mean that it was not "able" to obtain that authorization, only that it would take a reasonable period of time to do so. They further submit that the Strata Corporation provided no evidence for why it could not comply with the procedural requirements of the *Act* within the limitation period.

[53] I cannot agree with these submissions. First, the appellants have focused on a single line from *Novak*, to the exclusion of the rest of McLachlin J.'s detailed analysis in that case. Second, the appellants make no allowance for the fact that a strata corporation is a very different plaintiff than a person who has cancer, as was the case in *Novak*.

[54] *Novak* established a new approach to the application of s. 6(4)(b) of the *Limitation Act.* In that case, a patient sued her doctor in negligence for allegedly misdiagnosing what was later diagnosed by a specialist as breast cancer. By then, the cancer had spread. The plaintiff commenced her action against the initial doctor, six years after she received the diagnosis from the specialist. Under the *Limitation Act,* there is a two-year limitation period for personal injury actions. On the issue of whether s. 6(4)(b) would apply to postpone the running of time in these circumstances, McLachlin J. had to interpret the meaning of "ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action", the key phrase in s. 6(4)(b).

[55] After reviewing a number of interpretations of this phrase, McLachlin J. adopted a subjective/objective test:

> [Section] 6(4)(b) may be read as denoting a time at which a reasonable person would consider that someone in the plaintiff's position, acting

> reasonably in light of his or her own circumstances and interests, could—not necessarily should—bring an action (at para. 81).

She added that "[t]he reasonable person would only consider that the plaintiff could not have brought an action at the time the right to do so first arose if the plaintiff's own interests and circumstances were serious, significant, and compelling. Tactical considerations are excluded from consideration. She then rephrased the test in two slightly different ways:

> 84 ... The running of the limitation period is therefore postponed when the plaintiff shows that practical considerations arising from his or her "circumstances" and "own interests" render him or her unable, as a reasonable person, to bring an action at the earlier prescribed date. "[O]ught ... to be able to bring an action", interpreted thus, is very different from the normative "should bring an action". "Should" connotes subjective choice; "could" connotes practical ability. ... Section 6(4)(b) therefore refers to a time at which, in light of the plaintiff's particular situation, the bringing of a suit is reasonably possible, not when it would be ideal from the plaintiff's perspective to do so. [Emphasis added.]

[56] In describing what interests and circumstances should be considered, and what would amount to "serious, substantial, and compelling", McLachlin J. identified some interests and circumstances that are more applicable to natural persons considering litigation, such as the cost and strain of litigation and other personal circumstances that make it unfeasible (at para. 85). However, at para. 86 she made the following statement, which in my view is highly relevant to the application of the test to this case:

> Whether a particular circumstance or interest has the practical effect of preventing the plaintiff from being able to commence the action must be assessed in each individual case.

She later cited with approval a statement of Hope J.A. of the New South Wales Court of Appeal in *Royal North Shore Hospital v. Henderson* (1986), 7 N.S.W.L.R. 283 at 287, by stating:

> Recognizing that each case must be assessed on its own facts, he further observed at p. 287 that he saw "no reason to ... confine the circumstances which would justify the not bringing of an action to any particular class or category" (at para. 88).

[57] A plaintiff's "interests and circumstances" represent the subjective element of the s. 6(4)(b) test. Because a strata corporation is a legal entity—rather than a natural being with personal concerns, emotions, and actual subjective thought—the subjective considerations in this context will differ from the subjective considerations of an individual. The interests and circumstances that will be serious, substantial, and compelling to a strata corporation will naturally differ from those that will affect an individual and will obviously differ from those that affected the plaintiff in *Novak*. That said, at the very least the reasonable person animating this test must still be placed in the "plaintiff's particular situation".

[58] The plaintiff in this case is a strata corporation that is created by, and bound to follow, the *Act*. The Strata Corporation has suffered a significant financial loss due to the actions of the defendants. In these circumstances, it is in the best interests of the Strata Corporation to attempt to recover that loss. It would not, however, be in the best interests of the Strata Corporation to ignore the mandatory provisions of the *Act* by commencing an action that had not been authorized. The council and its members cannot be expected to risk the consequences of ignoring the procedural requirements of the *Act* in order to file their action when the right first arises. These interests and circumstances are, in this context, serious, substantial, and compelling. In this situation, it would not be "reasonably possible" for the Strata Corporation to bring their action on the day the right to do so arose as the Strata Corporation lacks the "practical ability" to do so.

[59] It is important to recall that one of the rationales for the postponement of limitation periods is fairness to the plaintiff. In this case, the Strata Corporation was not able to bring its action because of the effect of a statute unrelated to the *Limitation Act*. Sections 171 and 172 of the *Act* were not enacted to shorten the limitation period applicable to strata corporations by at least two weeks; as noted above, ss. 171 and 172 serve a corporate governance purpose. However, the practical effect of these sections is that strata corporations have a shorter limitation period than most other plaintiffs. In my opinion, it is in the interest of fairness to

postpone the running of the limitation period for a reasonable period to permit the Strata Corporation to comply with this mandatory procedural requirement.

[60] The appellants further submit that the individual owners are the true plaintiffs in this case and that the Strata Corporation is merely a representative vehicle for the owners. They claim that the question of whether the plaintiff "ought to be able" to bring the action is directed at owners and not the Strata Corporation. They contend that ss. 171 and 172 do not prevent the owners from bringing actions in their individual capacity and therefore they should not benefit from a postponement of the limitation period by the fact that their representative action is being brought by the Strata Corporation.

[61] I am unable to agree. A strata corporation is not a mere representative vehicle through which the owners may bring an action. The *Act* gives a strata corporation the power and capacity of a natural person and the duty to manage and maintain common property and common assets as if it were a natural person:

> 2(1) From the time the strata plan is deposited in a land title office,
>
> (a) a strata corporation is established, and
>
> (b) the owners of the strata lots in the strata plan are members of the strata corporation under the name "The Owners, Strata Plan *[the registration number of the strata plan]*."
>
> (2) Subject to any limitation under this Act, a strata corporation has the power and capacity of a natural person of full capacity.
>
> 3 Except as otherwise provided in this Act, the strata corporation is responsible for managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners.

[62] Section 6(4)(b) deals with the running of a limitation period against *a plaintiff* and whether *a plaintiff* ought to be able to bring the action. In this case, the plaintiff is the Strata Corporation acting in its own legal capacity, albeit as representative of the owners. The individual owners may well have been able to bring their own actions, but that has no bearing on whether the Strata Corporation is "practically able" to bring its own action.

[63] The appellants have referred to *Strata Plan VR 368 v. Marathon Realty* (1982), 41 B.C.L.R. 155 (C.A.), and *Strata Plan VR 2000 v. Shaw* (1998), 55 B.C.L.R. (3d) 103 (S.C.), in support of this submission. I would point out that both of these decisions dealt with issues arising under two successive versions of the now repealed *Condominium Act*, R.S.B.C. 1979, c. 61; R.S.B.C. 1996, c. 64. Moreover, even if each strata owner could bring their own action to recover their portion of the total loss, the plaintiff *in this case* is not practically able to bring its action.

[64] In *Strata Plan VR 368 v. Marathon Realty*, the Court held that, for the purpose of discovery under the *Rules of Court*, the strata corporation's action was for the benefit of the owners. The action in this case is for the benefit of all the individual owners. That does not mean, however, that the individual owners are the real plaintiffs in this case. In *Strata Plan VR 2000 v. Shaw*, the trial judge held that for the purpose of s. 6 of the *Limitation Act*, the knowledge of the individual owners determines when the limitation period begins to run, not the knowledge of the strata corporation. That case does not assist the issue in this case, which does not turn on the knowledge of the Strata Corporation but on the issue of the Strata Corporation's practical ability (s. 6(4)(b) of the *Limitation Act*) to bring its action in the face of a statutory impediment.

[65] I agree with the trial judge that it is not necessary to decide what constitutes a reasonable period to comply with the *Act* because it would, in any event, be at least one day. In the typical situation, it will take at least two weeks for a strata corporation to obtain the resolution required for the commencement of the action. That said, it is not necessary to decide generally what might be a reasonable period of time because the length of the postponement under s. 6(4)(b) will be decided on the facts of each case. I would, however, make two comments in this regard. First, the burden of proving that the running of time has been postponed lies on the party claiming the benefit of the postponement pursuant to s. 6(6) of the *Limitation Act*. Second, reflecting the rationale of encouraging diligence on the part of plaintiffs, strata corporations must exercise diligence in discharging the procedures required by the *Act* before they can bring an action.

[66] In the result, I would dismiss the appeal. The limitation period in this case was postponed for at least one day pursuant to s. 6(4)(b).

"The Honourable Madam Justice D. Smith"

I AGREE:

"The Honourable Madam Justice Ryan"

I AGREE:

"The Honourable Mr. Justice Frankel"