

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Imbeau v. Owners Strata Plan NW971*,
2011 BCSC 801

Date: 20110621
Docket: S130331
Registry: New Westminster

Between:

Douglas Imbeau, Marilyn Clarke, Gillian Rutherford

Petitioners

And

The Owners, Strata Plan NW971 (Highland Park)

Respondent

Before: The Honourable Mr. Justice Truscott

Reasons for Judgment

Counsel for the Petitioners:

J.W. Bilawich

Counsel for the Respondent:

G.S. Hamilton

Place and Date of Hearing:

New Westminster, B.C.
June 6, 2011

Place and Date of Judgment:

New Westminster, B.C.
June 21, 2011

[1] The petitioners are owners of units in the strata property known as Highland Park and members of the respondent The Owners, Strata Plan NW971.

[2] On March 29, 2010 a special general meeting of the respondent took place at which a special resolution, known as Resolution “A”, was put forward proposing a special levy of \$3,000,000, an average of roughly \$20,000 per unit, for the funding of an extensive program of repairs and renovations to the property.

[3] The strata property is a complex in Port Moody, British Columbia consisting of 150 townhouse units and 25 buildings with related common property.

[4] The special levy was to be paid in five instalments commencing on October 1, 2010 and continuing on October 1st of each year thereafter through to and including 2014.

[5] It is the common affidavit evidence that Resolution “A” was highly contentious with the petitioners as members of a group of owners opposed to addressing maintenance or remediation issues in what they considered to be an unduly large scale and expensive program.

[6] The petitioners filed their petition on September 24, 2010 and amended it on February 7, 2011. In the petition they seek:

(1) an order or declaration that the vote at the meeting on Resolution “A” and its subsequent passing are null and void for:

(a) failure to conduct the meeting in accordance with the Highland Park bylaws, and in particular purporting to appoint as Chair of the meeting a person, Tony Gioventu, who was not authorized to act as chair and permitting him to run the meeting and unreasonably restrict discussion and debate among Highland Park owners who were entitled to speak and vote at the meeting;

- (b) failure to make any or proper arrangements for a secret ballot vote concerning the special levy, including private locations to mark ballots and submit ballots;
- (c) failure to properly administer the distribution of ballots during the sign-in process including without limitation failure to distribute a ballot properly due to the petitioner Marilyn Clarke and distributing an excessive number of ballots to Juanita Strasser, Bradley Weisner (SL006) and David McGaughey (SL039);
- (d) failure to have attained the requisite 75% majority;

and that consequently the Owners are not required to pay that special levy.

- (2) an order or direction that in the event that the respondent holds a further meeting for a vote for a resolution similar to Special Resolution "A", then the resources for delivery and exchange of information and the date of such a meeting shall be provided to the proponents and to the opponents of such proposed resolution and that the costs of such process for conduct of the meeting be paid by the respondent;
- (3) an order that the costs of this application be paid by the respondent as special costs, or alternatively, as increased costs.

[7] I will deal with only one of the petitioners' complaints about the voting process because in my view the determination of that complaint is sufficient to issue a declaration that the vote at the meeting on Resolution A and its subsequent passing are null and void for failure to make any or proper arrangements for a secret ballot vote concerning the special levy, including private locations to mark ballots and submit ballots.

Requirement for a Secret Ballot

[8] Section 32.4 of the Strata Plan bylaws provides that if a precise count is requested the chair must decide whether it will be by a show of voting cards or by roll-call, secret ballot or some other method.

[9] Mr. Gioventu says the voting was conducted by secret ballot at the request of the owners in accordance with the respondent's bylaws and he and Mr. Hamilton, the lawyer for the council, collected the ballots.

[10] Ms. Strasser also says the voting proceeded by secret ballot and the cards were collected by Mr. Gioventu and Mr. Hamilton.

[11] The petitioner Rutherford says that there was no private booth provided for votes to be marked and deposited in private and when the voting cards were collected the collectors could see the voting cards as could persons seated nearby.

[12] She believes that the lack of privacy may have intimidated some owners not to have participated in the vote at all.

[13] The petitioner Clarke says several people were collecting ballots and could readily see how each person voted.

[14] Petitioners' counsel submits that given the fact that apparently 112 owners and proxies were present but only 102 actually voted and given the highly charged atmosphere in the meeting it is not unreasonable to infer that some owners abstained from voting in part because of the lack of a private area to mark and tender their ballots.

[15] Respondent's counsel submits that the bylaws do not require a voting booth during a secret ballot. The method of voting was determined by the Chair in accordance with bylaw 32.4 and there was no evidence of any owner requesting a voting booth at the time.

[16] Further he says the ballot did not identify the person signing the ballot so that an owner or proxy's name was never known when the ballots are collected and counted.

[17] Petitioners' counsel relies upon a decision of McLachlin J. (as she then was) in *Leroux v. Molgat*, [1985] B.C.J. 45; 67 B.C.L.R. 29. That decision concerned a union election for which a declaration that it was null and void was sought from the court.

[18] The union's business manager said that people were voting in circumstances where their votes could be seen by their neighbour and that no divisions to ensure privacy were provided at the advance polls notwithstanding the complaints.

[19] The plaintiff there testified that at a number of advance polls no partitions were provided and members voted by placing their ballots on open tables or against the wall where their marks could be observed.

[20] Madam Justice McLachlin concluded that the vote was not conducted by secret ballot and secrecy of ballot is one of the most fundamental principles in elections. Breach of this principle is regarded as more than a mere irregularity; it is always viewed as serious and substantial.

[21] She said it follows from the fact that it was quite possible for members to observe how other members were voting at a number of the advance polls that members could be identified with their votes contrary to the constitution of the local union.

[22] I see no material difference between the importance of a secret ballot at a union election and the importance of a secret ballot for a special resolution at a strata corporation meeting, where that method of voting was required by the Chair of the meeting.

[23] Mr. Gioventu, the Chair of the meeting, decided that the voting would be by secret ballot. That complied with s. 32.4 of the Strata Plan bylaws.

[24] The petitioner Rutherford says that no private booth was provided for people to mark and deposit their ballots and that persons sitting nearby those persons marking their ballots could see their voting cards.

[25] Ms. Strasser says some members folded their ballots before handing them in to be counted so that it would not be possible for other owners to see how they voted.

[26] This statement is clear evidence that without folding over a ballot it was distinctly possible for others to see how a member or proxy voted.

[27] These allegations are not answered by the respondent in its affidavits.

[28] It is my conclusion that the vote was not conducted by secret ballot and the petitioners are entitled to a declaration that the vote and subsequent passing of Resolution "A" on March 29, 2010 is null and void and the Owners do not have to pay the special levy authorized by that Resolution.

[29] I decline to issue any order or direction as to the notice requirements or other procedure to be followed in the event of a subsequent special resolution being proposed similar to Special Resolution "A". The requirements for advance notice and delivery of information and the costs for that are all internal matters to be determined by the Strata Plan bylaws and the *Strata Property Act* provisions where applicable.

[30] The petitioners will have their costs.

"The Honourable Mr. Justice Truscott"