COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Findlay v. The Owners, Strata EPS401,* 2024 BCCA 305

Date: 20240821
Docket: CA48990

Between:

Bruce Findlay

Appellant
(Defendant)

And

The Owners, Strata EPS401

Respondents
(Plaintiffs)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer
The Honourable Mr. Justice Voith

On appeal from: An order of the Supreme Court of British Columbia, dated March 30, 2023 (*The Owners, Strata EPS401 v. Findlay*, 2023 BCSC 500, Victoria Docket 162338).

Counsel for the Appellant:	G.H. Dabbs L.J. Marriner
Counsel for the Respondents:	J.M. Aiyadurai
Place and Date of Hearing:	Victoria, British Columbia April 19, 2024
Place and Date of Judgment:	Vancouver, British Columbia August 21, 2024

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Mr. Justice Voith

Summary:

This appeal raises a question of statutory interpretation involving the Strata Property Act and the Real Estate Development Marketing Act. The appellant appeals the order of the trial judge granting the respondent strata corporation standing to bring a representative statutory cause of action on behalf of the owners. Specifically, the judge allowed the strata corporation to advance a claim under s. 22(3) of the Real Estate Development Marketing Act for misrepresentations in a disclosure statement given to purchasers of a development unit.

Held: Appeal allowed and the action is dismissed. Section 171 of the Strata Property Act only authorizes a strata corporation to sue as a representative of all owners with respect to any matter affecting the strata corporation. It does not authorize the strata corporation to act on behalf of initial purchasers. The trial judge erred in finding that the strata corporation could rely on s. 22(3) of the Real Estate Development Marketing Act to bring a representative action. Section 22(3) expressly limits causes of action for liability for misrepresentation to the purchaser of a development unit in the development property.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

[1] This appeal involves an issue of statutory interpretation, specifically the legislative provisions under s. 171 of the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*] and s. 22 of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*].

[2] The principal issue in this case is whether s. 171 of the *SPA* permits a strata corporation to pursue a statutory cause of action under s. 22(3) of the *REDMA* for damages arising out of a disclosure statement that allegedly contained misrepresentations to the purchasers of a development unit.

[3] This Court has previously described the issue of whether a strata corporation has the standing to bring representative *REDMA* claims on behalf of owners as “arguable” and an “interesting question”, but it has not had to decide the issue. This is the first occasion where a trial judge considered and decided this issue and the question was then argued on appeal in this Court.

[4] The trial judge concluded the respondent strata (the "Strata Corporation") could prosecute a representative action on behalf of all the owners, including the initial purchasers who had purchased a development unit in the development property (the "initial purchasers"). He awarded $170,960 in damages and found the appellant Mr. Bruce Findlay personally liable for those damages, pursuant to s. 22(3) of the *REDMA*.

[5] For the reasons that follow, I would allow the appeal and dismiss the action. Respectfully, in my view, the judge erred in law in his interpretation of the relevant provisions of the *SPA* and *REDMA*. When the principles of statutory interpretation are applied correctly, only the initial purchaser of a development unit in the development property can advance a *REDMA* claim for liability for misrepresentation in a disclosure statement. A strata corporation does not have the standing to bring that claim.

Standing

[6] I first wish to address the use of the term "standing". The parties, the trial judge, and this Court in *Strata Plan LMS 1564 v. Odyssey Tower Properties Ltd.*, 2008 BCCA 509 [*Odyssey CA*] and *Bosworth v. Jurock*, 2013 BCCA 4 [*Bosworth*] have framed this issue as one of "standing".

[7] The difference between standing and legal capacity to commence a legal proceeding is subtle, but meaningful. Standing is not synonymous with the legal capacity to commence a proceeding. The distinction was described by Chief Justice Drapeau of the Court of Appeal of New Brunswick in *Province of New Brunswick v. Morgentaler*, 2009 NBCA 26, citing Justice Cromwell, then a professor of law at Dalhousie University:

> [47] In my respectful judgment, the following passage taken from *Locus Standi – A Commentary on the Law of Standing in Canada*, captures the essential difference between legal capacity and standing:
>
> > The distinction between capacity and standing is that capacity generally depends on the personal characteristics of the party divorced from the merits of the proceeding or the nature of the question in issue in it. It concerns the right to initiate or defend legal

> proceedings generally. Standing is concerned with the appropriateness of the court's dealing with the particular issue presented at the instance of the particular plaintiff. It is more concerned with the nature of the issue and the context in which it is raised than with the personal characteristics such as age, mental capacity, etc., of the plaintiff. A party may have capacity to sue but lack standing. [p. 3.]

[8] Accordingly, standing in this case incorporates the question of the Strata Corporation's legal capacity to sue. The *SPA* gives a strata corporation the capacity to sue on a broad range of matters, including, arguably, the three other causes of action that were initially pled in the notice of civil claim, being breach of contract, breach of fiduciary duty, and unjust enrichment, but eventually abandoned at the commencement of the trial. The issue here, however, is whether a strata corporation has the standing to bring a statutory claim under s. 22(3) of the *REDMA.* Accordingly, I shall use the term "standing" to frame this issue.

Background

[9] GPI Developments Inc. ("GPI") was the developer of a residential property project located in Ladysmith, British Columbia called Seaview. GPI purchased Seaview, which contained 44 individual rental suites, with the intention of converting the apartment building into a strata development. Mr. Findlay was a director of GPI.

[10] On April 12, 2011, GPI deposited its strata plan for Seaview with the Land Title Office. The Strata Corporation came into existence shortly thereafter: *SPA*, s. 2. The strata units were sold to individual purchasers between May 2011 and December 2011.

[11] Prospective purchasers were provided with a marketing brochure prior to entering into a contract of purchase and sale (the "Brochure"). The Brochure contained information on Seaview, including projected rental income, renovations proposed to be completed by GPI, and other matters that GPI committed to completing. The Brochure also contained a memorandum signed by Mr. Findlay that stated GPI would undertake common area and exterior renovations, including a new asphalt parking lot and line painting, the replacement of the entrance communication

system, and the establishment of a contingency reserve fund with an initial capitalization of $55,000.

[12] GPI also filed a disclosure statement for Seaview (the "Disclosure Statement") with the Superintendent of Real Estate as required by s. 14 of the *REDMA*. The Disclosure Statement, dated September 22, 2010, was signed by Mr. Findlay, both in his personal capacity and on behalf of GPI. The Disclosure Statement was incorporated by reference into each and every contract of purchase and sale between GPI and the initial purchasers of each strata unit at Seaview. There was no other disclosure statement for Seaview.

[13] As with the Brochure, the Disclosure Statement contained statements that referred to:

(a) contributing a one-time amount of $55,000 to the contingency reserve fund;

(b) replacing Seaview's plumbing supply lines;

(c) replacing the asphalt parking surface, including resurfacing and the repainting of parking lines; and,

(d) replacing the entrance communication system.

[14] There was no dispute that GPI did not make the $55,000 contribution to the contingency reserve fund, nor did it replace the plumbing, asphalt parking surface, or entrance communication system.

[15] On May 25, 2015, GPI was dissolved.

[16] On June 3, 2016, the Strata Corporation filed a notice of civil claim seeking damages for breach of contract, breach of fiduciary duty, and unjust enrichment.

[17] On November 19, 2019, the Strata Corporation filed an amended notice of civil claim to add a claim under s. 22(3) of the *REDMA* so it could seek damages

against GPI and Mr. Findlay personally for misrepresentations made by GPI in the Disclosure Statement.

[18] At trial, the Strata Corporation abandoned its claims for breach of contract, breach of fiduciary duty and unjust enrichment, and advanced only the *REDMA* claim.

[19] Mr. Findlay was self-represented at the trial, which took place over five days in February 2023. At the time the action was initially commenced, all of the owners of strata units at Seaview were the initial purchasers of the development units from GPI. By the date of trial, 13 of the 44 strata units were owned by subsequent purchasers who had not purchased units directly from GPI.

[20] It was common ground that when the action was commenced, no ¾ majority resolution had been passed at an annual or special general meeting to authorize the action as required by s. 171(2) of the *SPA*. A ¾ majority resolution was not passed until the Strata Corporation's annual general meeting that was held on June 28, 2021.

Reasons of the Trial Judge: 2023 BCSC 500

[21] The judge first addressed the preliminary issue of whether the Strata Corporation had standing to bring the action, noting that no individual owners of strata units in Seaview were listed as plaintiffs in the action.

[22] It was common ground at trial that: (1) Seaview strata units were development units under the *REDMA*; (2) GPI was the developer; and (3) Mr. Findlay was a director of GPI and also the person described in ss. 22(3)(b)(iii), (iv) and (v) of the *REDMA*.

[23] The judge found that s. 171 of the *SPA* gave the Strata Corporation the standing to bring the action as a representative of the individual owners for claims made under the *REDMA.* In considering the standing issue, the judge noted that all of the individual owners were the initial purchasers at the time the action was

commenced, though that was no longer the case at the time of trial. Further, he relied on the reasoning in *Strata Plan LMS 1468 (Owners) v. Reunion Properties Inc.,* 2002 BCSC 929 [*Reunion Properties*] in which that court held that s. 171 "now permits representative actions in respect of claims for strata lots as well as claims concerning common areas": at para. 28.

[24] The trial judge observed he was not directed to any authority that definitively decided the ability of a strata corporation to commence an action as a representative of the owners for claims made under the *REDMA*, but he was satisfied such claims fell under s. 171 of the *SPA*: at para. 25.

[25] The judge found the broad language of s. 171 of the *SPA* supported the conclusion that a strata corporation can commence an action as a representative of the owners for claims made under the *REDMA*: at para. 28. Further, he recognized the subject matter of this action fell within the enumerated types of matters listed under s. 171(1)(b) and (c) of the *SPA*: at paras. 29–30.

[26] The judge went on to find that the Strata Corporation's failure to obtain the ¾ majority vote approving the claim pursuant to s. 171(2) of the *SPA* did not invalidate the claim. He was of the view that the "plain words" of s. 173.1 of the *SPA* were "a complete answer to this issue": at para. 31.

[27] The judge then considered whether the fact that, at trial, not all strata unit owners were the initial purchasers had an impact on the ability of the Strata Corporation to bring the claim. He found that "s. 171 does not provide that an action may be commenced in the name of the Strata Corporation … only when all of a strata's unit owners are the owners that originally purchased the units from the developer": at para. 32.

[28] After concluding that the Strata Corporation had standing to commence the proceeding, the judge then considered whether the claim was brought within the limitation period set out in s. 22(9) of the *REDMA*, which reads:

> An action for damages under this section may not be commenced more than 2 years after the misrepresentation on which the action is based first comes to the knowledge of the purchaser.

[29] The judge had "no trouble" concluding the plaintiff's action was commenced within the two-year limitation period prescribed by s. 22(9) of the *REDMA*: at para. 44.

[30] Based on assurances given by Mr. Findlay, the judge found it was reasonable for the Strata Corporation to assume that the renovations and contribution to the contingency reserve fund would be complete by the end of summer 2014 and that the Strata Corporation would have first had knowledge of the misrepresentations on September 21, 2014, at which time it had become clear that the promises would not be fulfilled: at para. 45.

[31] The judge found that GPI made four misrepresentations in the Disclosure Statement for which Mr. Findlay was personally liable. The Strata Corporation's entitlement to damages was therefore limited to those representations: at paras. 60, 67.

[32] Thus, the judge found the Strata Corporation was entitled to damages in respect of the repaving of the parking lot (and accepted the unchallenged expert evidence on the costs to do so, of which the estimated quote was $90,000), but not for the cost of replacing the underlying base material: at paras. 60–61. The judge accepted that the Strata Corporation incurred expenses of $30,000 to repair the plumbing system as a direct result of GPI's failure to replace it, which Mr. Findlay acknowledged in cross-examination, and that the Strata Corporation had to pay $3,460 to replace the entranceway communication system: at paras. 65–66.

[33] As for the reserve fund, GPI contributed $7,500 in 2011, and the judge found no evidence to indicate this should not be included as part of the $55,000 contribution promise, so the judge awarded $47,500 in damages, which was subject to pre-judgment interest: at para. 56.

Issues on Appeal

[34] The determinative issue on this appeal is whether the Strata Corporation had standing to advance a representative statutory cause of action under s. 22(3) of the *REDMA* by relying on s. 171 of the *SPA*.

[35] If there is no error on that issue, then the appellant advances two additional grounds of appeal in which he claims the trial judge erred:

(a) by failing to consider when the individual purchasers of strata units at Seaview first had knowledge of misrepresentations in the Disclosure Statement as required by s. 22(9) of the *REDMA*; and

(b) by assessing damages on the expectation measure rather than the reliance measure.

Standard of review

[36] Statutory interpretation involves questions of law that are reviewed on a standard of correctness: *Zongshen (Canada) Environtech Ltd. v. Bowen Island (Municipality)*, 2017 BCCA 267 at para. 35; *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 at para. 30.

Discussion

[37] The statutory interpretation at issue on this appeal is whether a strata corporation, pursuant to s. 171 of the *SPA*, may advance a representative statutory cause of action under s. 22(3) of the *REDMA*. More specifically, the *REDMA* claim here is one for damages arising out of a disclosure statement which allegedly contained a misrepresentation made to the purchasers of a development unit.

[38] The judge found the Strata Corporation could do so because the language of s. 171 of the *SPA* supported the conclusion that a strata corporation has standing to bring claims made under the *REDMA*.

Parties' positions on statutory interpretation

[39] Mr. Findlay argues that the trial judge's interpretation of s. 171 of the *SPA* distorts an underlying *REDMA* cause of action by expanding a developer's liability and allowing a majority vote under the *SPA* to compel a *REDMA* purchaser to enforce the purchaser's rights.

[40] He submits that only initial purchasers of a development unit from a developer have a *REDMA* cause of action and that the legislature intended to circumscribe the liability of a developer in this way.

[41] He also says that, given not all strata units were owned by initial purchasers at the time of trial, the trial judge's interpretation of s. 171 of the *SPA* would allow subsequent purchasers, as owners under the *SPA*, to benefit from the Strata Corporation's action as their representative for a *REDMA* cause of action they never had.

[42] In response, the Strata Corporation submits that the *SPA* does not require that, for a proceeding to be commenced under s. 171, all owners at the commencement of the proceeding must remain owners through to the conclusion of trial, exhaustion of appeals, and execution on the judgment. If an action under s. 171 required all owners at the start of the proceeding to remain owners through to the end, then, practically speaking, s. 171 could rarely be utilized.

[43] The Strata Corporation also argues that Mr. Findlay's submission that subsequent purchasers do not have a *REDMA* cause of action assumes that initial purchasers' *REDMA* claims would have to be assigned to subsequent purchasers and assumes that no such assignments were made.

Principles of statutory interpretation

[44] Neither the judge in the reasons nor the parties on appeal specifically addressed the principles that govern statutory interpretation.

[45] The modern approach to statutory interpretation was recently summarized by this Court in *G.D. v. South Coast British Columbia Transportation Authority,* 2024 BCCA 252:

> [73] The modern approach to statutory interpretation requires that the words of a statute be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the statute and its objects and purposes: *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 S.C.R. 27 at para. 2, 1998 CanLII 837; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26; *Wang v. British Columbia (Securities Commission)*, 2023 BCCA 101 at para. 39. This modern approach is sometimes described succinctly as the "contextual and purposive approach": *Canada Trustco Mortgage Co. v. Canada,* 2005 SCC 54 at para. 10. Consistent with this is the requirement of s. 8 of the *Interpretation Act*, R.S.B.C. 1996, c. 238, that every statute be construed as remedial, and "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects".
>
> [Emphasis in original.]

[46] To interpret s. 171 of the *SPA* and s. 22(3) of the *REDMA* correctly, these two provisions must be read within this analytical framework.

Legislative provisions at issue

[47] Section 171 of the *SPA* provides in part:

> **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.

[48] Sections 22(1) and (3) of the *REDMA* provide:

> **22** (1) In this section:
>
> "developer" means a developer that is required by the Act or regulations to
>
> (a) file a disclosure statement with the superintendent, or

> (b) provide a disclosure statement to a purchaser
>
> in respect of a development property;
>
> "director" means a director of a developer at the time that the developer
>
> (a) filed a disclosure statement with the superintendent, or
>
> (b) provided a disclosure statement to any purchaser
>
> in respect of a development property.
>
> …
>
> (3) If a developer files a disclosure statement respecting a development property and the disclosure statement contains a misrepresentation, a purchaser of a development unit in the development property, whether the purchaser received the disclosure statement or not,
>
> (a) is deemed to have relied on the misrepresentation, and
>
> (b) has a right of action for damages against
>
> (i) the developer,
>
> (ii) a director,
>
> (iii) a person who consented to be named, and was named, in the disclosure statement as a developer or director,
>
> (iv) a person who authorized the filing of the disclosure statement, and
>
> (v) a person who signed the disclosure statement.
>
> [Emphasis added.]

[49] Section 1 of the *REDMA* defines a "purchaser" as:

> (a) a purchaser, from a developer, of a development unit,
>
> (b) a lessee, from a developer, of a development unit, and
>
> (c) a prospective purchaser or lessee, from a developer, of a development unit.

Analysis

1. The trial reasons

[50] The purpose of reasons for judgment is to hold judges accountable to the public, to ensure transparency in the adjudicative process, and to satisfy the parties that justice has been done. Reasons for judgment must, when read in context as a whole and in light of the live issues at trial, "explain what the trial judge decided and

why they decided that way". An appellate court's role is not to "finely parse the trial judge's reasons in a search for error": *R. v. G.F.*, 2021 SCC 20 at paras. 68–69.

[51] The judge's analysis focused on interpreting certain provisions of the *SPA* and he reached the following conclusions:

- claims made under the *REDMA* fall within s. 171 of the *SPA* (para. 25);
- the language of s. 171 "suggests" the capacity of a strata corporation to pursue an action on behalf of the owners is broad and would encompass claims commenced under the *REDMA* (para. 28); and,
- the subject matter of the *REDMA* claim "falls squarely" within s. 171(b) and (c) of the *SPA* (affecting the common property and the use or enjoyment of a strata lot) and for which a strata corporation may pursue a representative action (para. 29).

[52] Respectfully, where the judge fell into error, in my view, is that he did not explain why the language of the *SPA* "suggests" the capacity of a strata corporation to pursue an action on behalf of the owners is broad enough to encompass *REDMA* claims and why the subject matter "falls squarely" within s. 171(b) and (c) of the *SPA.* A statutory interpretation analysis needs to be grounded in more than suggestions or conclusory statements. There is no reference by the judge, explicitly or implicitly, to the framework to which I have referred.

[53] With respect, the flaw in the judge's analysis of the statutory interpretation principles resulted in an error of law because he focused on s. 171 of the *SPA* in isolation from the clear wording of s. 22(3) of the *REDMA*, which limits the cause of action to "a purchaser of a development unit in the development property". "Purchaser" is defined in s. 1 of the *REDMA*, but the judge did not engage with or consider its application to his analysis.

[54] Nowhere in the judge's reasons did he focus on a statutory interpretation of the *REDMA,* including the language in s. 22(3)*,* which provides that it is the purchaser of a development unit who has "a right of action for damages".

[55] When I apply the proper analytical framework to the relevant sections in the *SPA* and *REDMA* at issue in this case, I reach the opposite conclusion from the judge. As I shall explain, in my view, the Strata Corporation's attempt to advance the statutory *REDMA* claim was unavailable to it at the outset.

2. Judicial consideration of the issue

[56] Apart from the judge's reasons, other cases have considered the issue of whether s. 171 of the *SPA* provides a strata corporation with the standing to pursue a claim under the *REDMA.* There, the issue was described as "arguable", "an interesting question" or "not frivolous".

[57] For example, in *The Owners, Strata Plan LMS 1463 v. Krahn Bros. Construction Ltd.*, 2003 BCSC 903 [*Krahn*], the plaintiff strata corporation in a "leaky condo" action, as those proceedings are at times referred to in the case law, sought to amend its pleadings to advance a claim arising from a material omission in a disclosure statement filed under the *Real Estate Act*, R.S.B.C. 1996, c. 397 (the previous version of the *REDMA*). The plaintiff alleged that three of the directors of the development company had signed disclosure statements that improperly omitted mention of outstanding litigation liabilities. A number of the owners in the condominium development purchased their units after the date of the impugned disclosure statements.

[58] Justice Bennett, as she then was, concluded that the strata corporation in *Krahn* could bring the action under the *Real Estate Act* if properly authorized:

> [29] With respect to the claim pursuant to s. 75 of the *Real Estate Act*, I am satisfied that this raises a proper cause of action and is not frivolous. I do not see why the plaintiff strata corporation cannot bring this action pursuant to the s. 75 of the *Real Estate Act* if it is properly authorized.

[59] In *Owners v. Lark Odyssey Project Ltd.*, 2008 BCSC 316 [*Odyssey*], an action was brought on behalf of the unit holders for disclosure and misrepresentations under the *REDMA*. Relying on the decision in *Krahn,* Justice Preston refused to strike the claim, commenting at para. 20 that "the plaintiff could cure the defect, if there is a defect, by adding the individual owners as plaintiffs". He went on to state that the "court should not interpret a statute in a manner that would lead to pleadings being struck out if the statutory interpretation point is arguable": at para. 21.

[60] On appeal, in *Odyssey CA*, this Court considered the argument that claims for damages for material misrepresentations in disclosure statements under the *Real Estate Act* and the *REDMA* are restricted to initial purchasers of strata lots and do not extend to subsequent purchasers of those lots: at para. 11. In that case, the statements of claim did not distinguish between the remaining initial purchasers of the development units and subsequent purchasers.

[61] Still, Justice Mackenzie for the Court observed that the issue was arguable, stating:

> [12] ... It is at least arguable that the financial interests of owners in shared expenses and their benefit from additional common facilities affects their use and enjoyment of their strata lots. I think that the standing of the strata corporation to bring claims for disclosure statement misrepresentation on behalf of owners is also arguable.

[62] The issue did not need to be resolved following *Odyssey CA* because the strata corporation's application to add the individual strata owners as plaintiffs to the claim for misrepresentations in the disclosure statement and on the constructive trust claim was subsequently granted: *The Owners, Strata Plan LMS 1564 v. Odyssey Tower Properties Ltd*., 2009 BCSC 1024.

[63] In *Bosworth*, Hinkson J.A. upheld the certification of a class action asserting a *REDMA* claim, as the representative plaintiff was unable to bring a representative proceeding under another statute because the *SPA* authorizes a strata corporation rather than a representative to bring the action. He then stated:

> [30] The standing of a strata corporation to bring representative claims on behalf of strata unit owners based upon allegations of misrepresentation in a disclosure statement was described simply as "arguable" in *Strata Plan LMS 1564 v. Lark Odyssey Project Ltd.*, 2008 BCCA 509 at para. 12. Given my view that Mr. Bosworth's claim is not barred by s. 41(a) of the *CPA*, it is unnecessary to resolve this interesting question.

[64] The comments of this Court in *Odyssey CA* that the issue was "arguable", in *Bosworth* that it was "interesting", and in *Krahn* that it was "not frivolous" are, respectfully, not of assistance on this appeal. Given the context in which those comments were made, as applications either to strike or to amend pleadings, the substantive issues were not considered within the context of the application of the statutory interpretation framework and in relation to the specific provisions of the *SPA* and *REDMA* and its predecessor.

[65] I would add that certain authorities referred to below and which were not considered by the judge in *Odyssey*, or by this Court in *Odyssey CA* or *Bosworth,* or by the Supreme Court in *Krahn*, support, in my view, the conclusions I would reach on this appeal.

3. Statutory interpretation of the *REDMA*

[66] In my view, a *REDMA* claim is fundamentally different from what is contemplated in s. 171 of the *SPA.* As I have observed, the trial judge's analysis did not correctly consider the context, ordinary meaning, object, and intent of the *REDMA.* A review of those principles of statutory interpretation lead me to the conclusion that s. 22(3) is intended to restrict "the right [to bring] a cause of action for damages" to "purchasers of a development unit in the development property".

[67] The broader purpose of the *REDMA* is to regulate "the marketing of real estate developments and to ensure that purchasers are protected": *Drake v. North Ellis Developments Ltd.*, 2012 BCCA 256 at para. 36 [*Drake*]. The *REDMA* is consumer protection legislation and one of its central objectives is "to ensure that material facts are provided to purchasers when developments are marketed to them": *Drake* at para. 36, citing *Pinto v. Revelstoke Mountain Resort Group Ltd.,* 2011 BCCA 210 at para. 17. Consumer protection legislation is therefore meant to

be interpreted generously in favour of the consumer: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at para. 37.

[68] The *REDMA* has two goals — to afford consumers protection while also enabling efficient and profitable operation of the real estate development sector: *Drake* at para. 38.

[69] In *Drake,* this Court discussed part of the legislative history and intent behind the *REDMA*:

> [37] The *Act* was introduced to the Legislature on first reading and described in the following way:
>
> > The *Real Estate Development Marketing Act* will reduce the regulatory burden on developers by providing clearer and more consistent marketing rules relative to the current *Real Estate Act*. The new act will also enable developers to pre-sell more developments and to make better use of deposit moneys and will require the filing of only one form of disclosure agreement document regardless of the nature of development property.
> >
> > As well, the new act will maintain and enhance consumer protection. Purchasers will continue to have the benefit of full and plain disclosure as well as enhanced rescission rights. All purchasers, regardless of the type of development property they buy, will be given a standardized period in which to rescind their purchase agreements. Deposit moneys from purchasers will have to be placed with regulated professionals who are familiar with trust account responsibilities.
> >
> > The new act will create a framework for smarter regulation of the real estate development sector in British Columbia. Smarter regulation and the competitive tax environment are two of the ways in which this government is contributing to the growth of the development sector, a key economic driver in British Columbia.
>
> (See British Columbia, Legislative Assembly, *House of Commons Debates*, 37th Parl, 5th Sess, Vol 25, No 5 (6 May 2004) at 10914 (Hon. G. Abbott)).

[70] Considering this broader purpose when interpreting s. 22 of the *REDMA* specifically, it is apparent that claims for misrepresentation made under the legislation are intended to be limited to the initial purchaser and not to all subsequent purchasers or owners of the development unit.

[71] Certain authorities also support the conclusion that the statutory cause of action under s. 22(3) is limited to initial purchasers. For example, in *Grenoble v.*

6853477 Holdings Ltd., 78 B.C.L.R. (2d) 166, 1992 CanLII 820 (C.A.), this Court held that a restriction of the statutory cause of action to initial purchasers from a developer applied under the *Real Estate Act* (the former *REDMA*):

> [20] … While there is no doubt that Part 2 of the Act is designed for the protection of the public, it is unreasonable to suppose that the Legislature intended Part 2 to create an indefinite and unlimited liability on developers of property and on the other persons described in s. s. 59(1)(b) of the Act. I do not accept the proposition advanced by the plaintiff that s. s. 59 (1)(a) of the Act creates a form of statutory tort which makes developers, and the others described in s. s. 59(1)(b) of the Act, liable in damages to all purchasers of subdivided property for all time.
>
> [Emphasis added.]

[72] In *Dimaulo v. Sun Peaks*, 2000 BCSC 369, Justice Blair dealt with the ability of a subsequent purchaser to bring an action under the *Real Estate Act*:

> [6] In *Grenoble v. MacNaught* (1992), 1992 CanLII 820 (BCCA), 78 B.C.L.R. (2d) 166, the Court of Appeal held that the purchaser referred to in s. s. 75, then s. s. 59, included only purchasers who bought subdivided land directly from the party filing the required prospectus under the Act. In the instant case, the plaintiffs purchased from the Mooneys, not Sun Peaks, and I find the plaintiffs cannot base their claim on the deemed reliance provisions of the Act relating to subdivisions. Where the plaintiffs' claim rests on the deemed reliance provisions, I find it discloses no reasonable claim.
>
> [Emphasis added.]

[73] The *Real Estate Act* did not define “purchaser”. *REDMA* has since included a definition of “purchaser” to mean: (a) a purchaser, from a developer, of a development unit; (b) a lessee, from a developer, of a development unit; and (c) a prospective purchaser or lessee, from a developer, of a development unit.

[74] *REDMA* is finite legislation directed at specific individuals who are provided the benefits of the legislation, namely the initial purchasers who purchase directly from the developer. It is for this reason, in my view, that *REDMA* claims for misrepresentation do not require what would otherwise be an essential component of a claim for misrepresentation in a tort action at common law: reliance on the alleged misrepresentation. The *REDMA* presumes that such reliance existed.

[75] *REDMA* claims for misrepresentation are also distinguishable from other causes of action, such as "leaky condo" cases, as those cases involve defects that affect all owners, regardless of whether they purchased directly from the developer or a subsequent owner. Most "leaky condo" cases are framed as claims in negligence or misrepresentation: *The Owners, Strata Plan VIS 3815 v. Polo Pacific et al*, 2003 BCSC 1811 at para. 1.

[76] In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2007 BCSC 1262, Justice Wedge considered the statutory cause of action and deemed reliance on the disclosure statement:

> [344] On January 5, 2005 the *Real Estate Act* was repealed and the *Real Estate Development Marketing Act*, S.B.C. 2004, c. c. 41 (the "*REDMA*") came into force. Section 22(3) of the *REDMA* is similar to s. 75(2) of the *Real Estate Act*, but is qualified by s. 22(5), which permits a developer to avoid liability by proving the purchaser had knowledge of the misrepresentation at the time of receiving the prospectus:
>
> > 22(5) A person is not liable to a purchaser under subsection (3) if the person proves that the purchaser had knowledge of the misrepresentation at the time at which the purchaser received the disclosure statement.

[77] The trial judge found that purchasers under s. 75(2) of the *Real Estate Act* were deemed to have relied on material misrepresentations and that such deemed reliance was non-rebuttable. On appeal, this Court overturned the judge and found that deemed reliance under s. 75(2) of the *Real Estate Act* was rebuttable: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2009 BCCA 224 at para. 59.

[78] In *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, 2011 SCC 23, Justice Rothstein for the Court stated:

> [116] I do not accept Sharbern's argument that the purpose of the *Real Estate Act* would be undermined by allowing deemed reliance to be rebutted. The successor legislation to the *Real Estate Act*, *the Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, allows for the deemed reliance provided in s. 22(3) of that Act to be rebutted under s. 22(5) when it can be proven that "the purchaser had knowledge of the misrepresentation at the time at which the purchaser received the disclosure statement". The related *Securities Act* also provides at s. 131 for rebuttable deemed reliance on misrepresentations in a prospectus. The existence of rebuttable

> presumptions under this successor and related legislation suggests that such presumptions accord with the investor protection purposes of those Acts.
>
> …
>
> [129] I would add one observation on the fourth *Cognos* requirement — reasonable reliance. In this case, Sharbern did not adduce evidence of actual reliance. Instead it relied upon the statutory deeming provision in the *Real Estate Act*. While the trial judge appears to have contemplated the necessity of individual trials on the issue of reliance at the outset of this litigation, her failure to differentiate between the common law and statutory claims in her reasons conveys the impression that the statutory deeming provision can establish common law reliance, removing the need for further trials. This approach would be problematic. I do not think a plaintiff may dip into a statutory cause of action for a helpful element in order to establish the "actual reliance" required to maintain a common law claim for negligent misrepresentation.
>
> [Emphasis added.]

[79] I would thus conclude that on a proper reading of s. 22(3) of the *REDMA*, the cause of action is personal in nature and available only to the purchaser of a development unit from the developer, that is, the initial purchaser. As I discuss below, this is a fundamentally different claim from those arising under s. 171 of the *SPA* that affect common areas of a strata where there is no direct liability of directors and the plaintiff is required to establish the cause of the defect on a balance of probabilities.

4. Statutory interpretation of the *SPA*

[80] The *SPA,* in contrast to the *REDMA*, permits a strata corporation to bring an action on behalf of owners of the strata lots. In my view, when the *SPA* is considered in the context of the modern principles of statutory interpretation, it reinforces my conclusion that the scheme and its intent are quite distinct from the *REDMA*.

[81] The *SPA* distinguishes between owners and purchasers in the definitions in s. 1 of the statute:

> **"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;
>
> …
>
> **"purchaser"** means a person, other than an owner developer, who enters into an agreement to purchase a strata lot or to acquire a strata lot lease in a leasehold strata plan as defined in section 199, but to whom the strata lot or strata lot lease has not yet been conveyed or assigned;

[82] The *SPA*'s definition of "purchaser" is different and broader than that in the *REDMA* in that it includes a person who has entered into an agreement to purchase a strata lot. A "purchaser" under the *REDMA* is limited to a purchaser, from a developer, of a development unit. In contrast, s. 171 of the *SPA* permits the strata corporation to act on behalf of the "owners" as defined in the *SPA*, but does not refer to purchasers as defined in either Act.

[83] A strata corporation is a separate legal entity, of which individual owners are members: *Wong v. AA Property Management Ltd*., 2013 BCSC 1551 at para. 21. Subject to the *SPA*, a strata corporation has the power and capacity of a natural person of full capacity.

[84] In performing the correct statutory interpretation analysis of the *SPA* in this case, it is of assistance to consider certain basic principles as well as specific provisions in the Act itself.

[85] An individual owner cannot sue if the wrong alleged is one done to the strata corporation. When the wrong alleged is to the strata corporation, the strata corporation must sue as a representative of all owners under s. 171: *Extra Gift Exchange Inc. v. Collins*, 2004 BCCA 588 at paras. 4–5.

[86] Since a strata corporation does not own common property or strata lots, absent statutory authority, it cannot sue in relation to either. Section 171 permits the

strata corporation to sue as a representative of all owners when the matter affects the strata corporation: *Reunion Properties* at paras. 23–24.

[87] A strata corporation's ability to sue under s. 171 of the *SPA* and the examples of matters that may affect a strata corporation in paragraphs (a) to (d) of subsection (1) are consistent with a strata corporation's role and responsibilities under the *SPA* as a whole. Shortly after the *SPA* was introduced, for example, it was confirmed that "s. 171 is intended to cover suits such as 'leaky condo' claims": *Reunion Properties* at para. 28.

[88] Section 3 of the *SPA* provides that a strata corporation is responsible for "managing and maintaining the common property and common assets of the strata corporation for the benefit of the owners". Section 72 of the *SPA* creates a duty of the strata corporation to repair and maintain common property. Paragraph (b) of s. 171(1) of the SPA allows the strata corporation to sue for a matter relating to the common property and common assets that it is required to manage, maintain, and repair.

[89] According to s. 119(1) of the *SPA*, a strata corporation is required to have bylaws. It may also make rules related to the use, safety and condition of common property and common assets under s. 125 of the *SPA*. Paragraph (a) of s. 171(1) clarifies the strata corporation is permitted to sue regarding questions about the application or interpretation of the *SPA*, the regulations, and the bylaws and any rules. Paragraph (d) confirms the strata corporation can sue for money owing to the strata corporation, including fines under the *SPA*, bylaws or rules. In this way, s. 171(1) permits the strata corporation to enforce the bylaws it must have and the rules it may have.

[90] Paragraph (c) of s. 171(1) describes the "use or enjoyment of a strata lot" as a matter affecting the strata corporation. Section 119(2) of the SPA permits a strata corporation to make bylaws that provide for the "use and enjoyment" of strata lots. With the necessary authorization under section 171, a strata corporation can sue for section 173(1) remedies to address nuisance caused by an owner, which affects the

use and enjoyment of other owners' strata lots: *The Owners Strata Plan LMS 2768 v. Jordison*, 2012 BCSC 31, rev'd in part 2012 BCCA 303.

[91] In these ways, s. 171 allows a strata corporation to sue when a matter affects the strata corporation, consistent with its role and duties under the *SPA*. In my view, misrepresentations made to purchasers of a development unit are not matters affecting the strata corporation. It also does not necessarily follow that representations made to purchasers who then become strata unit owners are ones that affect the strata corporation.

5. Does a strata corporation have standing to bring a *REDMA* claim?

[92] Applying the foregoing framework, I would conclude that only "a purchaser, from a developer, of a development unit" as defined in the *REDMA* "has a right of action" and it cannot be brought by the strata corporation under s. 171 of the *SPA*.

[93] In my view, once the wording of s. 22(3) of the *REDMA* and s. 171 of the *SPA* are read harmoniously with the surrounding provisions of each Act, and in light of the objectives of s. 22 of the *REDMA*, it is apparent that the strata corporation does not have the standing to advance a representative *REDMA* claim for the personal statutory causes of action of the initial purchasers of development units from the developer.

[94] To summarize, it bears repeating that by the time the trial commenced, the Strata Corporation had abandoned certain causes of action that it arguably could have advanced pursuant to s. 171 of the *SPA*. The sole claim remaining was the statutory cause of action under the *REDMA.*

[95] The effect of the trial order is that initial purchasers of a development unit can permit a strata corporation to advance a representative claim on their behalf against a developer that is not incidental to the common property but rather a personal statutory cause of action under the *REDMA* arising from alleged misrepresentation made to them prior to purchasing their unit from the developer that is not incidental to the common property.

[96] The judge's analysis effectively considered the provisions of the *SPA* in isolation from those in the *REDMA*. His conclusion was not harmonious to the surrounding provisions and in keeping with the respective objectives of the *REDMA* and *SPA*.

[97] Accordingly, I would accede to Mr. Findlay's first ground of appeal. The judge erred in his interpretation of the *SPA* and *REDMA* and the Strata Corporation cannot rely on the *SPA* to advance the initial purchasers' individual claims under s. 22(3) of the *REDMA*. Accordingly, the owners of strata units in Seaview could not by special resolution authorize the Strata Corporation to continue a cause of action which, at law, it did not have the standing to commence at the outset.

[98] It is thus not necessary to address any of the remaining issues raised by the parties. The Strata Corporation does not have standing to advance the *REDMA* cause of action against Mr. Findlay. That conclusion is determinative of the appeal.

[99] This is not to say that purchasers of development units are without a remedy. They can bring their own action or, if the expense of doing so or other access to justice issues arise, be added to an existing action, subject to limitations issues (*Odyssey CA*), or bring a class proceeding (*Bosworth)*.

Disposition

[100] For these reasons, I would allow Mr. Findlay's appeal, set aside the order for judgment, and dismiss the action.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Mr. Justice Voith"