

The Unusual Appointment of an Investigator under the Condominium Property Act

By Jonnette Watson Hamilton

Cases Considered:

Morris v Condominium Corporation No. 074 0215, [2012 ABQB 265](#)

This April 23, 2012 decision by Master Lorne Smart appears to be the first to consider the appointment of an investigator under section 67(2) (a) of the [Condominium Property Act](#), RSA 2000, c C-22. Section 67 allows a court to grant a variety of remedies if the court is satisfied that there has been “improper conduct” as defined in subsection 67(1) (a). Although many interested parties have used section 67 to seek injunctions, compensation and other remedies, the appointment of an investigator to review the improper conduct and report to the court is not a popular option. This decision is interesting for what it tells us about when it is appropriate to seek this particular remedy, when a court will exercise its discretion in favour of appointing an investigator, and what qualities make a particular person an appropriate investigator.

Facts

The applicant in this case is Camonia Morris, the owner of one unit in a three-story, 40-year-old apartment complex that had been converted to a condominium in 2007 by the developer, 1359522 Alberta Ltd. The developer still owns thirteen of the units and rents them out to tenants. The condominium has suffered many problems in its short life, including problems with bedbugs, smoking, water damage, mould contamination, a lack of annual meetings, a lack of financial statements, delayed repairs and expense misallocations.

Many of these problems had been addressed before this application, some as a result of previous court orders. There was an October 2009 Consent Order for a third party inspection of the owner’s unit and subsequent repairs to the damage that inspection revealed. There was also a December 2010 Order for the completion of financial statements for 2008, 2009 and 2010. Master Smart also specifically mentions (at para 5) a 2007 Reserve Fund Study that had been entered into evidence, a document required for the establishment and maintenance of a capital reserve fund. The exhibit was only a portion of the actual Study, and the Master characterized it as not only seriously outdated but also superficial.

Law

Section 67 of the *Condominium Property Act* is the only relevant law:

67(1) In this section,

(a) “improper conduct” means

(i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,

(ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,

(iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit,

or
(v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;

(b) “interested party” means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.

(2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:

(a) direct that an investigator be appointed to review the improper conduct and report to the Court;

(b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;

(c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;

(d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;

(e) award costs;

(f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

(3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court. (emphasis added)

Judgment

Master Smart first notes that a poor understanding of the fundamental nature of condominiums and condominium ownership on the part of the owner and the developer and, to a lesser extent, the property manager. He concludes (at para 6) that this lack of understanding, together with the past and current state of the condominium ownership, has resulted in a condominium corporation that is “dysfunctional and unable to comply with the duties and responsibilities under the Act.” The definition of “improper conduct” includes non-compliance with the Act by a condominium corporation in section 67(1) (a) (i). Access to remedies such as the appointment of an

investigator is guarded by a requirement in section 67(2) that the court be satisfied that improper conduct has taken place. With Master Smart’s conclusion of non-compliance with the Act, and thus improper conduct, the remedies become available.

The remedies in section 67(2) are all discretionary. In exercising his discretion, Master Smart considered (at para 7) the request by the owner for an investigator “to help resolve the current state of affairs” — a rather vague mandate — at a cost of \$225 per hour, with the cost to be borne by the developer. He juxtaposes this request with the developer’s view that matters could be resolved through the normal litigation process and the cost of an investigator would be a significant and unnecessary burden on the condominium corporation. He also takes note of the lack of reported decisions appointing investigators under section 67 — an absence confirmed by my own quick read of the 27 cases which CanLII lists as considering that section — which is said to demonstrate the reluctance of courts to invoke the remedy.

Master Smart concludes (at para 8) that this is “a classic case for the appointment of an investigator.” Unfortunately, he does not spell out exactly what makes it a “classic case.” It appears to be the relative cost of litigation and investigation. He takes a jibe at counsel by noting (at para 7) that their combined hourly rates “would cause that of the investigator to pale by comparison.” He also states (at para 9) that the litigation of the owner’s concerns would be a costly and inefficient way to achieve “the ultimate goal of a properly functioning Condo Corp.”

The Master does address the developer’s concern about the cost of the investigator (and her seemingly open-ended mandate) by limiting the hours she is to spend on matters. He orders the appointment of the individual recommended by the owner, Deborah Howes, as an investigator and imposes an initial limit of 20 hours on her, with her costs to be paid by the condominium corporation. Her mandate is not specified by the Master but under section 67(2) (a) she is to “review the improper conduct and report to the court.”

Analysis

I indicated in my introduction that this very brief judgment is interesting for what it tells us about when it is appropriate to seek this particular remedy, when a court will exercise its discretion in favour of appointing an investigator, and what qualities make a particular person an appropriate investigator. I will address each point in turn.

In connection with the first point, it might seem that the appointment of an investigator would be useful as an information gathering exercise. The effective use of the rest of the remedies — injunctions, compensation and much more — depends on the interested party possessing the relevant information and providing it to the court. However, section 67(2) sets the bar high and requires that a court be “satisfied” that improper conduct has taken place before it has the power to order an investigator be appointed. The investigation cannot be used to establish the existence of the improper conduct. An interested party may not have access to the information required to meet this high standard. That may be one reason why *Morris v Condominium Corporation No. 074 0215* appears to be the first reported decision to consider the appointment of an investigator.

The investigator remedy in the *Condominium Property Act* is not much like the one offered for improper conduct in a more familiar and general statute. In section 231(2) of the *Alberta Business Corporations Act*, [RSA 2000, c B-9](#), it merely has to “appear” to the court “that there are sufficient grounds to conduct an investigation” into whether or not there has been improper conduct in order for a court to order an investigation into a corporation. Under section 231 of the

Business Corporations Act, an investigation can establish improper conduct. Under section 67 of the *Condominium Property Act*, on the other hand, a court may only appoint an investigator to review already proven improper conduct. In the latter case, an interested party in possession of enough facts to satisfy the court that improper conduct has taken place may well have little or no need for an investigation and its attendant costs. That may be another reason why *Morris v Condominium Corporation No. 074 0215* appears to be the first reported decision to consider the appointment of an investigator.

This brings me to my second point. In the *Business Corporations Act* context, the courts have traditionally been reluctant to order an investigation unless a shareholder can demonstrate that the information is not otherwise available. That requirement would not be appropriate in the context of the *Condominium Property Act*, however, due to the need for the interested party to satisfy the court that improper conduct has taken place. That means that at least some of the information has to have been available through other means in order for the applicant to satisfy the burden on him or her.

The interested party in this case, the owner, did have access to the information required to prove improper conduct. Why was it appropriate to appoint an investigator to review that improper conduct and report of the court? Given his focus on the relative costs of litigation as compared to the costs of an investigator's review of the improper conduct, the efficiency of a neutral fact-finding review and report appears to be what appealed to Master Smart.

What would a review entail? Unfortunately Master Smart's decision does not answer this question. We know the review cannot establish improper conduct, but perhaps it can confirm its existence or uncover more. I have to wonder at just what instructions the lawyers gave or will give the appointed investigator. Will they merely ask her to "review the improper conduct," to quote section 67(2) (c) of the Act? Will they ask her to "help resolve the current state of affairs," to quote the Master's account of the owner's reason for bringing the application (at para 7)?

On the third point, the court does not indicate why it found the owner's nominee, Deborah Howes, an appropriate person to appoint. A look at her qualifications gives some idea. Ms. Howes is the President and CEO of [High Clouds Incorporated](#), an Edmonton-based dispute resolution service that specializes in the resolution of condominium disputes. Ms. Howes holds a BA and LLB, is both an Associate and a Fellow of the Canadian Condominium Institute (ACCI and FCCI), holds a Certificate in Tribunal Administrative Justice, and is both a Chartered Mediator and a Chartered Arbitrator. High Clouds offers many seminars about condominiums, including seminars on "The ABC's of Condominium," "Creating Harmony in Condominium," "The Condo Property Act," "New Owners & Boards—what you need to know," "Effective Meetings," and "Dispute Resolution in Condominium." Apparently the owner and developer in this case are not the only people who do not understand the fundamental nature of condominiums and condominium ownership. It is probably her specialization in condominium disputes, her provision of educational services, and her obvious familiarity with the relevant law, rights and duties that made Ms. Howes an appropriate person to appoint.

It will be interesting to see if this matter results in another written decision following the delivery of Ms. Howes' report. Perhaps we will find out what an investigator's mandate is or what recommendations it is appropriate for an investigator to make in her report as a result of her review of improper conduct.