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Managed property, the reserve fund, *ultra vires* doctrine and other issues in interpreting the *Condominium Property Act*

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Case commented on:
Maciejko v Condominium Plan No. 9821495, 2012 ABQB 607

Maciejko v Condominium Plan No. 9821495 ("*Shores*") is posed to be an extremely significant case for the *Condominium Property Act*, RSA 2000, c C-22 the ("*Act*"). The case deals with questions that go to the root of the practice area. How should the powers of a condominium corporation be interpreted? What is a "unit"? What is the role of the condominium plan? The answers to such fundamental questions have a significant impact not only for *Shores* itself, but also for hundreds of other condominiums in Alberta similarly set-up. The questions also have significant importance to the entire condominium practice area and, at a more practical level, the use of the *Act* as a tool for the development and empowerment of condominium communities.

Unfortunately, in addition to addressing important issues, the case is also highly problematic. The result of the case, as described by Justice Adam Germain himself in the decision, is "bizarre" (at para 42) and the "worst possible outcome" from a business perspective (at para 45). Further, there is some reason to believe that the case could result in significant problems for the condominium unit re-sale market because, arguably, the decision undermines a key consumer protection component of the *Act*. What is more, hundreds of condominium corporations may now require an application to the court to amend their condominium plan or some other solution to address issues raised by the case. (At writing, it is unknown if the decision will be appealed). Accordingly, a comment is appropriate to clarify the impact of the decision.

I begin this comment with some background about the *Act*, which is helpful in framing the dispute. I will then set-out the facts of *Shores* and the findings on the two issues raised in the case: (a) whether a condominium corporation can agree to repair part of a unit, and (b) whether a condominium corporation can assess for the cost of repair of a unit as part of the reserve fund. I will then examine the doctrine of *ultra vires* and what the *Act* determines the condominium corporation's powers are, arguing the doctrine of *ultra vires* (a) does not warrant strict construction, and (b) does not serve to void condominium corporation conduct in the post-2000 *Act*. Then, I will examine the finding that a condominium corporation can take on responsibility for the "managed property," and (i) note several contextual supports that were not mentioned in *Shores* but support the case's conclusion on the first issue, (ii) note several contextual supports surrounding the *Act* that, although not mentioned, also support the court's finding, (iii) note several problems with the Corporation's position that were not addressed in the decision, and (iv) elaborate on a collection argument which is also arguably addressed in the decision. Then I will address the finding that a reserve fund could not be expanded to include "managed property,"

and argue, based on (a) the legislative history, (b) the mechanics of the *Condominium Property Regulation*, Alta Reg 168/2000, (the "*Regulation*"), (c) the scheme of the *Act*, and (d) the context of the clause in the *Act*, that the interpretation accepted by in the *Shores* is problematic and that "managed property" should be included in the reserve fund.

Primer on the *Act* and a key concept:

(a) *What is a condominium?*

While the word "condominium" is often used to refer to a residential high-rise building or residential townhouse, this is not how the word is used at law.

Condominiums, at law, do not need to refer to buildings and do not even need to be residential property. "Condominium," at law, refers to a specific system of ownership of property that is created by statute, namely one where property is divided into individually owned "units" and shared or "common property," coupled with a corporation to manage the property (see *2475813 Nova Scotia Ltd. v Rodgers,* 2001 NSCA 12 ("*Rodgers*") per Justice Cromwell, as he then was, at para 3).

In Alberta, a condominium and a condominium corporation are created when a condominium plan is registered at the Land Titles Office dividing the parcel into "units" and "common property." Units have separate title until the condominium status of the parcel is terminated and may be owned by an individual. Common property is shared among the unit owners as tenants in common in shares equal to each of their unit's unit factor.

The division of a parcel into units and common property may be done by reference to walls, floors and ceilings or by reference to survey markers. A condominium divided by reference to walls, floors and ceilings, which usually creates three dimensional units, is commonly known as a "conventional condominium." A condominium divided by reference to survey markers is commonly known as a "bare land condominium." The first part of the dispute in *Shores* relates to the extent to which a bare land condominium may be made to function similarly to a conventional condominium.

(b) W*hat is a unit? What is the role of a condominium plan?*

While it is undisputed that there is a difference as to whether property is designated as a "unit" or as "common property" on a condominium plan, there is dispute as to why and where the distinction may be relevant. It has been argued that the distinction creates a separation of responsibilities that cannot be changed by the bylaws of the corporation. That is, common property is the collective responsibility of the unit owners and each unit is only the responsibility of its individual unit owner. In such an argument, the legislature is taken to have intended to provide clarity to consumers as to what type of a condominium was being purchased based on the condominium plan. Others suggest, at least since the last major amendment to the *Act* in 2000, that the separation is foremost a means of reference and, at least in respect of a unit, the distinction does not necessarily entail a separation of personal from collective responsibility. Rather, the owners are collectively responsible for the affairs of the corporation. I believe the latter approach to be correct for the reasons set out throughout this comment.

(c) *How should the powers of a condominium corporation be interpreted?*

It is undisputed that a condominium corporation is a statutory corporation that lacks the powers of a natural person. Accordingly, any action of the condominium corporation must be found expressly or by implication in the governing statute or the action is *ultra vires*. However, there is some dispute as to how restrictively the condominium corporation's powers should be read and what results from a finding of *ultra vires*. Some have argued that a condominium corporation's powers must be read restrictively so as to ensure that unit owners' rights are not infringed. Others have suggested a broader reading is appropriate to enable the condominium corporation to fulfill its mandate under the *Act* to the benefit of its owners/members.

I argue, as was the finding of Justice Germain, that the doctrine of *ultra vires* does not entail a narrow reading of a condominium corporation's powers. However, I also argue that a finding of *ultra vires* under the *Act* does not automatically mean an action is a nullity, and that courts should instead craft a remedy that is fair in the circumstances.

(See, generally, *Ashbury Carriage Co. v Riche*, (1875) LR 7, H 653, *Attorney-General v Great Eastern Railway*, (1880) 5 App. Cas. 473 (H.L.), and *Bonanza Creek Gold Mining Co. v R.*, [1916] 1 AC 566, 10 WWR 391, 34 WLR 177, 25 Que. K.B. 170, 26 DLR 273 at 278-79) and LCB Gower, J.B. Cronin, A.J. Easson and Lord Wedderburn, *Gower's Principles of Modern Company Law,* 4th ed (London: Stevens & Stevens, 1979) ("*Gower*") at page 163.)

Facts:

On April 8, 1998, a condominium plan was registered to create Condominium Corporation No. 9821495 (the "Corporation") in respect of a project known as "The Shores" (the "Project"). The Project was intended to be a "care free" living community for people over the age of 45.

Residents would be collectively responsible for "all of the exterior elements of the units making the condominium" and "the owner [would be] responsible for only the interior of [his or her] unit" (at para 5). However, each resident would also have title to his or her yard (presumably to allow near exclusive access to the owner and avoid complications arising from leasing the common property). Accordingly, the Project was set up as a bare land condominium, and the bylaws (the "Bylaws") made the Corporation responsible for maintaining the exterior of the buildings and yards, by referring to same as "managed property" (likely for ease of reference), despite being within a unit.

As the Project aged, the cost of shared maintenance increased, which was compounded by amendments to the *Act*, and the owners began to dispute the standard of maintenance of the Project. Further, there was concern about inequitable distribution of the costs, as each unit did not share the same amenities.

The Corporation made several attempts to amend their Bylaws to reduce the Corporation's responsibilities for maintaining managed property, but were consistently opposed by a group of owners representing more than 25% of the total unit factors. A resolution signed by 75% of the unit owners and representing not less than 75% of the total unit factors is required under the *Act* to amend the Bylaws, so the Corporation was unable to modify its Bylaws. However, upon retaining legal counsel, the Corporation was given the opinion that their Bylaws were "questionable" and then proceeded to delay all non-essential maintenance.

A group of owners brought an application to require the Board to enforce the Bylaws, and the Corporation brought a counter application to have the Bylaws declared *ultra vires*, arguing (1) the bylaws of a corporation cannot permit a corporation to maintain portions of an owner's unit and (2) the corporation cannot "pre-collect" any expenses except as set out in the reserve fund.

Issue 1: Can a corporation accept responsibility to maintain part of an owner's unit or more broadly agree to provide services in addition to its minimum responsibilities set out in the *Act*?

The Corporation argued that it could not be empowered to maintain an owner's unit, i.e. the portion of the Bylaws requiring the Corporation to do so was *ultra vires*. In other words, because section 25 of the *Act* provides that the *Companies Act* and the *Business Corporations Act* do not apply to a condominium corporation, a condominium corporation does not have the powers of a natural person. As was stated in *Condominium Plan No. 8222909 v Francis*, 2003 ABCA 234, leave to appeal denied [2003] SCCA No. 446 ("*Francis*"), a case that has been widely affirmed, a condominium corporation is not "broadly empowered like an individual or a conventional business corporation" and "cannot assume more powers than are granted by that legislation, nor should the [corporation] presume ancillary powers simply because those are convenient." Accordingly, a condominium corporation's powers are limited to those powers set out in the *Act* and as prescribed in the *Interpretation Act,* RSA 2000, c I-8, and those reasonably ancillary to those powers. As there is no express power in the *Act* to maintain an owner's unit and as there is no express power in the *Act* to raise contributions from owners for the common expenses for the purposes of undertaking such maintenance, the power is *ultra vires*. Furthermore, the Corporation argued a scheme to maintain other owners' property was an indirect scheme to provide collect money from certain owners to redistribute the money to other owners, which was not permitted by *Francis*.

However, Justice Germain held in favour of the owners' demand for compliance with the Bylaws, holding that *Francis* and *Condominium Plan No. 992 5205 v Carrington Developments Ltd.,* 2004 ABCA 243 ("*Carrington*"), which subsequently upheld *Francis*, were distinguishable factually from the situation in *Shores*, because the maintenance of a unit could not truly be characterized as an indirect scheme to benefit another owner. Rather, he found (at para 34):

> What this condominium corporation is empowered to do by bylaw, and has implicitly contracted to do by properly passed bylaw, is to ensure that all units in the condominium corporation are maintained to a standard that is reasonable. To the extent that it reflects the repair and maintenance of a certain amount of private property, nevertheless these contractual obligations relate directly to the betterment and well-being of the condominium corporation and directly to the benefit of all of the owners, both on an individual narrow basis (i.e. their steps and decks are getting repaired), but also on a wider basis because these repairs and services ensure that the entire condominium, visible to all from the court yard, has a consistent condition and appearance, and therefore a consistent value. [Emphasis added.]

Justice Germain accordingly reasoned that an application of the reasoning in *Francis* and *Carrington* would lead to an overly broad reading of the principal, noting (at para 37):

> It is one thing to restrict the condominium corporation from non-related business frolics and to narrowly interpret its statutory powers, in that context. It is quite

> another for the courts to conclude that a condominium corporation cannot by bylaw undertake the repair and maintenance of all of the units.

He adopted a pragmatic approach to interpreting the statute, expressly adopting the approach taken by Master Prowse (wrongly identified in *Shores* as Master Laycock) to interpreting the powers of a corporation vis-à-vis the individual owners in *Condominium Plan No. 8210034 v King*, 2012 ABQB 127 (Masters) ("*King*"), noting (at para 33) that "an appropriate reading of the *Act* requires that a corporation be empowered to properly run its business affairs." Accordingly, (at para 33) "if the result of a restricted characterization of the condominium's authority had an illogical result, then an ancillary power may be appropriate." (Although not cited in the decision, a similar finding was made in *Mancuso v York Condominium Corp. No. 216,* 2008 CarswellOnt 2519, 292 DLR (4th) 737 (ONSC) ("*Mancuso*").)

Justice Germain remarked on the importance of a restrictive covenant also registered on title, noting the owners had chosen to bind themselves through contract outside of the *Act* and in a sense entered into a "unanimous shareholders agreement" (at paras 35 and 36).

He concluded (at para 37):

> that there is no legal prohibition from a condominium corporation exercising an ancillary power to keep the condominium that it administers in a good state of repair, even if it means an indirect benefit to an individual owner.

Issue 2: Can a condominium corporation use its reserve fund to collect for long-term obligations in addition to those long-term obligations expressly set out in the *Act*?

The Corporation argued that the *Act* provides no basis for collecting funds for the repair and replacement of elements of a unit (exterior of a building), so the reserve fund cannot be used to collect for such expenses. Further, the reserve fund is expressly stated to be for the purposes of the repair of the real and personal property of the condominium corporation and the common property, so the reserve fund cannot be used for the maintenance of an individual owner's unit. In addition, pursuant to section 38(3) of the *Act*, the Corporation is not permitted to distribute the reserve fund to owners, so it cannot use the reserve fund to repair or replace the property of an owner. Finally, based on the judgment, it would appear that the Corporation argued that there was no basis for pre-collecting for the long-term expenses of the Corporation aside from through the reserve fund, as the same would not be subject to the numerous checks and balances intended by the legislature.

The owners' argument appears to have been that the power to add items to the reserve fund was an ancillary power.

The Court held (at para 44):

> It would be an inappropriate stretch to conclude that among the condominium's powers is an ancillary authority permitting the pre-extracting of funds that are not needed immediately for the operation of the condominium. Were it so, individual owners would face potential uncontrolled and unregulated demands to prepay all types of futuristic expectations irrespective of whether or not the eventuality ever came to pass. This is why the elaborate objective "reserve fund" with its parallel

> structure of checks and balances was devised and implemented when the Legislature amended the [*Act*].

He also noted (at para 43), that "there is no other pre-collection concept expressed in the [*Act*] to which my attention has been directed," so the Corporation is precluded from pre-collecting funds.

Comment:

Justice Germain's finding on the first issue — Can a corporation accept responsibility to maintain part of an owner's unit or more broadly agree to provide services in addition to its responsibilities for the condominium project set out in the *Act*? — is pragmatic. However, certain parts are worthy of note. First, while not commented on by the Court, there is certain boldness in the Corporation's advancing a defence that it did not follow its Bylaws because they were *ultra vires* for including a power not set out in the *Act*, when there is also no power in the *Act* for a condominium corporation's board to assess or otherwise determine whether any of its own bylaws are *ultra vires*. Second, several additional factors should be noted to support the Justice's conclusion. Third, the decision does not address a major concern with the Corporation's argument. Finally, some comment should be made respecting *Francis*.

The second part of the decision — Can a condominium corporation use its reserve fund to collect for long-term obligations in addition to those long-term obligations expressly set out in the *Act*? — is, however, more problematic. The "worst possible" result arises, in part, from inconsistent reasoning on the two issues: is the Corporation fulfilling an obligation or making a distribution? What is more, the decision ignores (as this comment largely will), the issue of whether the Bylaws granted the Corporation some type of an interest in the exterior of the units. If the Bylaws did grant an interest, it would mean that the exterior of these structures would fall within the scope of section 38 and the Corporation would be obligated to include the exterior of the unit in calculating its reserve fund. However, those issues are less relevant than the decision which, arguably, frustrates a carefully crafted legislative scheme and overlooks several sections of the *Act* and *Regulation,* which could have been considered in determination of the issues.

However, before continuing to discuss these issues, it is important to address a pernicious idea about what the doctrine of *ultra vires* means and does in respect of the *Act*.

I. Concerns with the doctrine of *Ultra Vires*:

(a) Why is Ultra Vires relevant to the construction of the Act?

While it is clear that the doctrine of *ultra vires* applies to a condominium corporation, in that a condominium corporation does not have the powers of a natural person (see section 25(5) of the *Act*), the doctrine of *ultra vires* does not necessitate strict interpretation. The purpose of the *ultra vires* doctrine is to provide for consumer protection through disclosure. Historically, a person could find out what a special purpose corporation was likely to do by consulting the specific statute creating that corporation (see *Gower* at page 161). If the condominium corporation, as a special purpose corporation, performed an act outside of its statutory purpose, an investor in the corporation would be protected, as the act would be a nullity. That has nothing to do with strict construction.

Rather, the doctrine is about reasonably according with statutory purpose, so a normal and reasonable meaning of the statutory purpose needs to be ascertained. As the Supreme Court of

Canada stated in *Hongkong Bank of Canada v Wheeler Holdings Ltd.*, [1993] 1 SCR 167 at pages 42-43:

> It has long been recognized that the *ultra vires* doctrine should not be applied restrictively. *Attorney-General v Great Eastern Railway Co.* (1880), 5 App. Cas. 473 (H.L.) stated at p. 478 that the *ultra vires* doctrine
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> > ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not (unless expressly prohibited) to be held, by judicial construction, to be *ultra vires*.
>
> As is noted in *Palmer's Company Law* (24th ed. 1987), vol. 1, at pp 143-44, "in modern law the courts are unlikely to hold a contract to be *ultra vires* the company unless, on a reasonable construction of the objects clause and the other clauses of the memorandum and articles, there are compelling grounds to arrive at that result." Such an approach is amply demonstrated by such cases as *Bell Houses Ltd. v City Wall Properties Ltd.*, [1966] 2 Q.B. 656 (C.A.), and *In re New Finance and Mortgage Co.*, [1975] Ch. 420.
>
> In Canada it is particularly important not to interpret corporate capacity restrictively, since, as discussed above, the *ultra vires* doctrine has been abolished in most Canadian jurisdictions, including Alberta. It would be anachronistic for the courts to interpret corporate powers narrowly when most Canadian Legislatures have indicated that companies should have all the legal powers of natural persons.

While such an approach does not permit anything short of express conflict (see *Airco Aircraft Charters Ltd. v Edmonton Regional Airports Authority*, 2010 ABCA 364), clearly there is something more than a mere absence of express wording required. As applied to a condominium corporation, this likely means that the condominium is akin to a feudal subject, in that a condominium corporation's powers and existence are tied to land.

Such a conclusion is not in conflict with *Francis* or the other two Alberta Court of Appeal decisions on point, being *Condominium Plan No. 9621019 v 412316 Alberta Ltd.*, 2003 ABCA 235 ("*9621019*") and *Carrington*. *9621019* and *Francis* dealt with a scheme to afford a different condominium fee arrangement that would require a court to ignore part of the *Act* (see *Francis* at para 30) and undermined the certainty of the fee arrangement under the *Act*. *Carrington*, again, involved a scheme where common property was leased in a manner that did not accord with the manner expressly permitted by the *Act* and pursuant to an agreement whose terms were never disclosed to the ultimate purchasers of the project. All the cases, accordingly, raised an issue with non-compliance with an express provision of the *Act*, as opposed to a restrictive interpretation of a section of the *Act*. All the cases also preceded the 2000 amendment to the *Act.*

What is more, there is no reason to limit, and at least four good reasons to afford, the *Act* a broad and permissive construction.

First, the *Act* does not fall within the normal categories of legislation where a restrictive reading is appropriate. While there is some suggestion that a specific section of the bylaws may be

understood as restricting rights at common law (see for example *The Owners: Condominium Plan No. 8111679 v Elekes*, 2003 ABQB 219 at para 12), it does not appear to follow that the bylaws must, as a general rule, be read restrictively (see *Condominium Plan No. 9524710 (Owners) v Webb*, 1999 ABQB 7 ("*Webb*") at para 20 and *Leitch v Owners: Condominium Plan No. 7510322*, 2002 ABQB 645 ("*Leitch*")). In any event, it is dubious that a restrictive reading of the bylaws should extend to the *Act* as a whole or should be generally applicable to the powers of a corporation under the *Act.*

The *Act* is permissive in nature, facilitating the voluntary sharing of land in a manner that would be difficult at common law because of the inability of some positive covenants to run with the land and the right of an owner to partition and sale. (See *Condominium Corporation No. 8810455 v Spectral Capital Corp.*, 112 AR 213 (QB)). Simply, people choose to live in a condominium in part because it enables them to do things they could not otherwise do, so the statute is not akin to a statute limiting common law rights or permitting expropriation or taxation. While it is plausible that under some circumstances, such as any one of, the removal of an owner from a unit, the corporation's right to enter a unit without notice or a potential infringement of human rights legislation, a restrictive reading of the Act may be appropriate (see *Metropolitan Toronto Condominium Corporation No. 946 v J.V.M.*, 2008 CanLII 69581 (ONSC) and *Condominium Plan No. 822 2909 v 837023 Alberta Ltd.*, 2010 ABQB 111), it is dubious whether such a restrictive reading should be used to frustrate a mutually beneficial scheme.

Second, the *Act* itself suggests a permissive construction is appropriate. The *Act* has a single statement of purpose for all corporations governed by it, which will have a wide variety of purposes, as opposed to historic statutory corporations (see *Gower* at pages 167 to 169) or corporations created under the *Societies Act*, RSA 2000, c S-14, each of which had, or has, its own single statement of purpose for each corporation. So the object of the corporation must be interpreted broadly, as an overly restrictive definition of the corporate objects may prohibit a valid objective. Further, the *Act*, at section 28(7), expressly permits members of a corporation to limit the powers given to a board, which would specifically empower individual owners to limit a broader corporate purpose. There is no similar right to expand the corporate purpose, which would suggest the appropriate starting point is a broad understanding of the purpose. Thus, one must assume that the condominium corporation is created with broad powers, which may then be limited by the owners.

Third, in addition to the usual emphasis of reviewing title under a Torren's system and the fact that the condominium corporation is inherently tied to a specific space (meaning most of its members will be aware of its doings in any event), the *Act* and *Regulation* place a great deal of emphasis on disclosure. In addition to carefully reviewing title, parties are expected to inform themselves by reading the bylaws and using the various disclosure mechanisms pursuant to sections 44-46 and section 48 of the *Act* and section 29 of the *Regulation*. Accordingly, the risk that a party could be misled because the rights granted under a condominium plan could be, like other subdivision plans, modified by registered instrument is significantly smaller than the risk that a purchaser could be misled because an instrument registered on title was rendered invalid by a very restrictive reading of the powers of a corporation under its governing legislation. (Ontario has gone so far as to create a rebuttable presumption of validity in favour of the declaration — under the Ontario *Condominium Act*, 1998, SO 1998, c 19, SO 1998, c 19, there are two instruments that serve a similar function to the bylaws under the *Act*, the declaration and the bylaws, the former being more narrow in function than the bylaws and harder to amend, but the latter being easier to amend and less constitutional in being set by the board, as opposed to all the owners — so long as the declaration is not unfair in the circumstances (see *Walia Properties*

Ltd. v York Condominium Corp. No. 478, 2007 CanLII 11732 (ONSC), *Niagara North Condominium Corp. No. 125 v Kinslow,* 2007 CanLII 49188) and *Webb* at paragraph 21 for a statement about the arguable applicability of the same in Alberta. Also see *Leitch* at paragraph 21 and *Devlin v Condominium Plan No. 962647*, [2002] AJ No. 488, 2002 ABQB 358, at paragraphs 2 and 3, for a statement about a similar presumption in Alberta.)

Fourth, the *Act* is a difficult one to interpret, and making the *Act* more difficult to interpret serves to make the *Act* unworkable. The *Act* involves a number of different areas of law being applied in relatively novel situations (see *Rodgers* at paragraph 5 and *Condominium Plan 86-S-36901 v Remai Construction (1981) Inc.*, (1991), 84 DLR (4th) 6 (SKCA)). This means many legal concepts are likely applicable. Given that condominium corporations, unlike railway companies, are typically run by parties who are not businessmen or lawyers, it would follow that requiring an *Act* that creates novel legal relations to be read in an unusual manner would make the *Act* even more difficult for a lay person to understand and use. As it is already unlikely that an individual will know the *Act* so well as to be surprised by the current state of affairs of a condominium corporation acting in an *ultra vires* manner (the risk is certainly less than an individual being surprised that what he or she thought was an acceptable state of affairs was actually *ultra vires*), it is odd to suggest that making the *Act* less accessible and increasing the chances that a condominium corporation commits an *ultra vires* act will promote accessibility. It should be remembered that complexity arises from parties trying to use legal tools to achieve a desired outcome, not from a desire for complexity itself. So it is unclear how an inaccessible and rigidly interpreted *Act* advances the cause of consumer protection or the careful balancing of the tension between the individual and the collective, quasi-democratic interest (see *Rodgers* at paragraphs 3 and 4) necessary to ensure the survival of a condominium corporation. A simple statement that a condominium corporation's actions must be related to its powers and obligations under the *Act* is much more likely to promote clarity than rigid distinctions that cause the law to frustrate beneficial arrangements.

Accordingly, the correct approach to interpreting the *Act* is likely that stated by the Manitoba Court of Appeal in *Winnipeg Condominium Corp. No. 12 v Edwardian Estate Ltd.* (1995), 1995 CarswellMan 17, 123 D.L.R. (4th) 16 (Man. C.A.) at paragraph 15, namely, the *Act* "is to be interpreted in a fair and equitable way, and that considerable latitude should be given to achieve such a result." (Also see: *Eglinton Place Inc. v Ontario (Ministry of Consumer & Commercial Relations)*, 2000 CanLII 22336 (ONSC) and *Metropolitan Toronto Condominium Corp. No. 539 v Chapters Inc.*, 1999 CarswellOnt 2308 (ONSC), and *Maverick Equities Inc. v Owners: Condominium Plan 942 2336*, 2008 ABCA 221, the latter being a case where such an approach was, arguably, adopted.)

(b) Does ultra vires still mean void?

The *Act* no longer appears to provide that an *ultra vires* act automatically results in an action being void. The Supreme Court of Canada clearly expressed that the *ultra vires* doctrine could be modified by statute, specifically in *Pickles* at pages 23-24, holding:

> Of course, it is open to the legislature to rebut this presumption because, for example, the legislature may provide for other remedies short of invalidity for acts contrary to the statute.

Such an intention is arguably present in the current section 67 of the *Act*. Section 67 purports to deal with "non-compliance" with the *Act*, specifically:

> non-compliance with this *Act*, the *Regulation* or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner …

This would, presumably, include a situation where a board has acted in a manner that is not permitted by the statute. Section 67 then goes on to enumerate a very wide list of remedies and expressly empowers the Court to "give any other directions or make any other order that the Court considers appropriate in the circumstances" [emphasis added]. This should, arguably, be read as not requiring a court to invalidate an *ultra vires* act. (See *Condominium Corporation No. 8110264 v Farkas*, 2010 ABCA 294 ("*Farkas*") at paragraph 7 for a similar description of the breadth of the powers granted by section 67.)

What is more, as earlier indicated, *Francis*, *9621019*, and *Carrington* all deal with a version of the *Act* that did not include section 67, and *Francis* suggests a different result might have occurred had such a section been available, holding (at paras 32 and 33):

> The scheme of the Act does not permit a court to impose what it considers to be fair on a case-by-case basis…
>
> The trial judge relied on several decisions from other jurisdictions in concluding that the scheme was not ultra vires… . However, a review of each of these decisions reveals that they either did not go as far as the trial judge determined, or were based on legislation which authorized the court to achieve "equitable" results. Similar provisions are not found in the *Act*.

This is presumably, a reference to *Winnipeg Condominium Corp. No. 12 v Edwardian Estates* (1995), 100 Man. R. (2d) 234, 123 DLR (4th) 16 (Man CA), which dealt with sections 5.11 and 5.13 of the Manitoba *Condominium Property Act,* RSM 1987, c C170, which permit similar remedies to those permitted by section 67.

Accordingly, it is somewhat surprising, in a situation where the project was set up to function in a particular manner and a super majority of 75% of the owners representing 75% of the unit factors affirmed that manner of operation on several occasions, and a board unilaterally declared its own bylaws void, that the worst possible result would be elicited, as opposed to making some sort of an order in favour of the aggrieved Owners. (See *Fraser v Strata Plan VR1411 et al*, 2006 BCSC 1316 (BCSC), where an alternative remedy was ordered on a finding of *ultra vires* on similar facts to *Shores*, albeit in circumstances with a clearer prohibition and a delegation of responsibilities to owners.)

II. Additional support to the conclusion

Here, I argue that no resort had to be made to the doctrine of *ultra vires* in any event, as a condominium corporation is likely, either expressly or impliedly, empowered under the *Act* to maintain part of an owner's unit if required to do so under its bylaws.

(a) Additional Support in the Act

A careful reading of the *Act,* when combined with the presumptions of consistent and recurring expression, strongly suggests the bylaws are the appropriate place to describe the division of responsibility for maintenance of a unit. Section 37(1) of the *Act* makes clear that: "[a]

corporation is responsible for the enforcement of its bylaws and the control, management and administration of its real and personal property and the common property" [emphasis added]. Section 37(2) clarifies that "control, management and administration" includes repair and maintenance, as it states that "[w]ithout restricting the generality" of 37(1), a corporation is required "to keep in a state of good and serviceable repair and properly maintain the real and personal property." The phrase "control, management and administration" is then used in section 32, to provide "[t]he bylaws shall regulate the corporation and provide for the control, management and administration of the units, the real and personal property of the corporation and the common property" [emphasis added]. The repeated use of the phrase triggers the interpretive principle of consistent and recurring expression (see Ruth Sullivan, *Sullivan on the Construction of Statutes, Fifth Edition*, Markham (Lexis Nexis, 2008) at 214-219) and entails that the bylaws are to provide for the obligation to maintain and repair the units.

This conclusion is bolstered by looking to section 37(2)(b) of the *Act*. Section 37(2)(b), in stating the corporation's duty as being "repairs to or work to be done in respect of the parcel" entails a repair obligation to the whole of the project (units and common property), arguably shows the intention that the corporation is responsible for the whole of the parcel. This conclusion is also supported by the purpose of the *Act*, which is to provide a unique way of dividing property and to allow positive obligations to flow with title.

The conclusion is also strengthened by an examination of Appendix 1 of the *Act*, which provides the initial set of bylaws for all corporations (see section 33 of the *Act*). Section 2(a)(ii) of Appendix 1 makes the Corporation responsible for "maintaining, repairing or replacing pipes, wires, cables and ducts existing in or on the unit and used or capable of being used in connection with the enjoyment of any other unit or common property." This would suggest the legislature expressly contemplated corporations assuming responsibility for the maintenance, repair and replacement of part of a unit. So, while the weight of a Schedule, or here, Appendix, may vary, it may be relied on to clarify a section of the Act (see Sullivan at page 402), and would appear relevant here.

Finally, it is notable that there is no express prohibition on such a delegation or even an express obligation on the unit owner to maintain the unit, except in accordance with the bylaws. As mentioned, section 37(2)(a) expressly places an obligation on the condominium corporation to maintain and repair the property of the corporation and the common property, but there is no equivalent section for a unit. It is notable that the equivalent legislation in British Columbia, the *Strata Property Act*, SBC 1998, c 43, at Part 2, section 3 clarifies that the corporation cannot delegate its duty. If the intention of the *Act* was to prevent delegation of responsibility for a unit, it is a bit surprising that there is no section of the *Act* actually requiring an owner to even be responsible for his unit.

(b) Additional Contextual Support

There are four contextual reasons that support an interpretation of the *Act* to enable the bylaws to divide responsibility for maintenance of the unit.

First, the bylaws are of the utmost importance under the *Act*, and it is intuitive that responsibilities for maintenance of the unit would be found in the bylaws. The *Act* is clear that the bylaws bind each owner as a contract (section 32(6)). (Note the similarity of the bylaws to a unanimous shareholders agreement as described in section 146 of *Business Corporations Act*, RSA 2000, c B-9.) This contract serves as the central governing document of the condominium

corporation. The bylaws must be registered on the Condominium Additional Document Sheet, which forms part of the Condominium Plan, so the bylaws are public and readily available to all owners and prospective purchasers. What is more, only a super majority of 75% of the owners representing at least 75% of the total unit factors can change the bylaws and, even then, any change may be subject to challenge pursuant to section 67 (the "oppression remedy"). Further, the bylaws provide the basis for sanctioning owners (section 35), voting (section 26(1)), the constitution of the board (section 28(1)) and the dividing of the common expenses (section 38(1)(c)(ii)). In fact, one might even note it is intuitive that a description of expenses would be found in the same place that describes the division of those expenses. In sum, the bylaws are the constitution to the democracy that is the condominium corporation, and one would expect the constitution to clarify the corporation's, as opposed to the owner's, responsibilities.

Second, the *Act* would prove unworkable in many situations if a strict distribution of responsibility on the basis of "unit" as opposed to "common property" was required. The fundamental problem with expecting all common use property to be shown on a plan is that such a requirement is unworkable. Because sections 22 to 24 inclusive grant easements for utility systems as among the corporation and each of the owners, and it is often far easier to run utility lines through the common property and unit, support systems such as heating, ventilating, plumbing, electrical and air conditioning systems rarely follow boundary lines between units (likely the reason for the enactment of section 2(a)(ii) of Appendix 1). Rather, these systems zigzag underneath flooring and through non-load-bearing walls to achieve a more pragmatic assembly, which is also a major benefit of developing using the condominium concept. The utility plans are much more difficult to understand than a bylaw. Further, it is dubious that the legislature intended owners to actually be responsible for the water main serving the other units in the project just because it runs under the owner's unit.

Third, the interpretation accords with an examination of the *Act*'s background. While Canadian courts, as opposed to American and British courts, are still somewhat reluctant to attribute significant weight to Hansard (see Sullivan at 595 and 606-07), it has increasingly been used for context and purpose (Sullivan at 271-73 and 608-09), especially after an ambiguity is established or in the context of a government minister. Further, here the background materials are extremely probative. Mrs. Pat Nelson, then the Honorable Minister of Government Services, the Minister responsible for the Bill, stated:

> Finally, Mr. Speaker, Bill 16 brings these amendments and those of the Condominium Property Amendment Act, 1996, into force on September 1, 2000. This will allow time to develop both the *Regulation* required for this legislation and the information and educational materials that condominium stakeholders are asking for. Hopefully, this will bring a close to a long battle over having an amended Condominium Property Act (Alberta, Legislative Assembly, Hansard, April 3, 2000, at 662).

In the Service Alberta Consumer Tips materials entitled "Buying and Owning a Condominium, Condominium Property Act" the following may be found (at page 2):

> In a bare land condominium, the exterior walls, roof, the foundations, driveways and at least part of the landscaping are usually inside the unit boundaries, so part of the unit must be repaired and maintained by the individual owner. <u>However, the exterior repair and maintenance obligations of the individual bare land unit</u>

> <u>owner may be transferred to the condominium corporation through the registration of properly worded by-laws</u>. If the bare land condominium corporation is not required or authorized by its by-laws to repair and maintain the doors and windows, funds for their repair should not be calculated into the reserve fund requirement [emphasis added].

While such a statement of statutory intention is certainly not conclusive, one might expect some weight to have been attributed to such a statement given that the information was published as advice in consumer protection materials prepared with the *Act.* (See Sullivan at 621-630.)

Fourth, it is unclear what purpose would be furthered by a finding that such an arrangement is prohibited. Had the Project been set-up as a conventional condominium, the exterior yards could have been leased to the individual owners. Further, there is at least an argument that the Corporation could have leased the exterior of the building from the individual owners. So, what is being objected to is form, not substance. Accordingly, there is argument that such an arrangement should not be void. (See *Peel Standard Condominium Corp. No. 668 v Dayspring Phase 1 Ltd.*, 2006 CarswellOnt 767 (ONSC); but see *Lightner v Owners: Condominium Plan No. 772 3097*, 2009 ABQB 3).)

(c) Concerns with the Corporation's Argument

While Justice Germain noted (at para 38) that there is always some form of benefit in such a communal form of ownership, he did not elaborate on how problematic the Corporation's argument that a corporation was not allowed to confer a benefit on another owner actually was.

First, this argument overlooks that Appendix 1 of the *Act* expressly permits a corporation to provide a service to owners and maintain part of an owner's unit, and hence, what the Corporation argued was a "distribution." Section 3(f) of Appendix 1 provides the corporation may make an agreement with an owner or tenant of a unit for the provision of amenities or services by it to the unit or to the owner or tenant of the unit. So, in addition to section 2(a)(ii) of Appendix 1, which expressly permits the corporation to maintain " pipes, wires, cables and ducts" upon a unit, a corporation is empowered to provide other services. So it would presumably follow that further services may be provided or further repair obligations assumed (See *Mancuso* for a case where a similar argument was held to be persuasive in Ontario). So, again, while the weight of a Schedule, or here, Appendix, may vary, it may be relied on to clarify a section of the *Act* (see Sullivan at page 402), and here it would appear relevant.

First, this argument overlooks that Appendix 1 of the *Act*, which provides the initial set of bylaws for all corporations (see section 33 of the *Act*), expressly permits a corporation to provide a service to owners and maintain part of an owner's unit, and hence, what the Corporation argued was a "distribution." Section 3(f) of Appendix 1 provides the corporation may make an agreement with an owner or tenant of a unit for the provision of amenities or services by it to the unit or to the owner or tenant of the unit. Similarly, section 2(a)(ii) of Appendix 1, expressly permits the corporation to maintain " pipes, wires, cables and ducts" upon a unit. (See *Mancuso* for a case where a similar argument was held to be persuasive in Ontario). This would seem to entail some type of provision for the benefit of the owners. While the weight of a Schedule, or here, Appendix, may vary, it may be relied on to clarify a section of the *Act* (see Sullivan at page 402).

More importantly, as the *Act* separates the concepts of day-to-day use, residual value and responsibility to pay, the Corporation's argument is seriously undermined. First, as mentioned, the bylaws, not the degree of benefit, determine who is to pay (see section 39(c)). This avoids problems of uncertainty and disputes because a party can anticipate how much of the common expenditures he or she will pay based upon the bylaws. Further, even the default measure under the *Act* does not deal with benefit. Unit factor, prescribed as the only method for dividing common expenses prior to 2000 and removed in the amendments of 2000 (which, among other things, is the method of dividing value of the project after termination of the condominium status of the project), is also not based on benefit. Rather, unit factor is determined by a method chosen by the developer (see sections 8(j) and 13(d) of the *Act*). So while lawyers will often try to link unit factor and apportionment of the common expenses to benefit or use, the *Act* does not. So as is the case with all real estate, one must read the instruments registered against title to see how title has been encumbered.

Finally, as will be discussed in part III of this comment, upon termination of the condominium status of the parcel, all the owners take title to the whole of the parcel as tenants in common in proportion to their unit's unit factor (see section 62(2) of the *Act*). Accordingly, capital repairs and replacements to any part of the parcel, arguably, enrich each owner. So without more information, it is difficult to establish whether an owner was receiving a benefit at the cost of the other owners.

(d) Related Arguments about collection

The Corporation might have also advanced an argument about whether a corporation has the right to collect the costs incurred in respect of a unit by means of an assessment of common expenses. This argument rests on section 39(1)(d) of the *Act*, which empowers a corporation:

> (d) to recover from an owner by an action in debt any sum of money spent by the corporation
> (i) pursuant to a bylaw, or
> (ii) as required by a municipal authority or other public authority,
> in respect of the unit or common property that is leased to that owner under section 50.

Accordingly, one might argue, as was done successfully in *Condominium Corporation No. 0425177 v Jessamine*, 2011 ABQB 644 (Master) and *Condominium Plan No. 8722887 v Callaghan*, 2011 ABQB 638 (Master), that there are two types of common expenses under the *Act*, expenses related to the common property "administrative expenses", which are dealt with under sections 39(1)(a) to 39(1)(c) and those related to the unit, which are dealt with under section 39(1)(d), and must first be assessed against an owner.

This argument appears to be based on either: (i) the maxim of *expressio unius est exclusio alterius* being applicable or (ii) that section 39(1)(d) cannot be afforded a meaning unless other sections of the *Act* are limited.

There are four concerns with this reasoning.

First, as was noted in paragraphs 34-36 of *King*, which, as noted, was cited with approval at paragraph 33 of Shores, it is unclear why the sections need to limit each other. While it is clear the two sections cannot be pursued at the same time, there is nothing that suggests one must be

chosen over the other. The whole of section 39 is phrased as a list of powers, not obligations, so each of the subsections are permissive not mandatory. Accordingly, it would, presumably, be open to a corporation to pursue one form of collection as opposed to the other. This is evident because, if an individual owner is judgment proof, both the cost incurred in respect of the unit and in obtaining a judgment under section 39(1)(d) would become expenses collectable under section 39(1)(c). Further, the two sections are phrased differently, one referring to "raising amounts" and the other referring to "recovery." One would think that the two sections would be phrased in a parallel fashion were they to be linked. Finally, while one might argue that contextually an express reference is required to derogate from a common law property right (see Sullivan at 478); here such an argument is of dubious impact as both sections clearly provide for such a right. Accordingly, there is no intrinsic reason to believe giving a liberal interpretation to each section would rob the other of meaning.

Second, the argument calls for a very subtle distinction as between the sections, as opposed to a stark one. As the effect of the section is to restrict the condominium corporation's express power to contract (provided at section 16(b)(2) of the *Interpretation Act* and 3(f) of Appendix 1 to the *Act*), and, arguably, also the unit owner's ability to contract with a third party to alienate rights and obligations with respect to his unit, one would have expected a fairly clear prohibition. It should be remembered that there appears to be no express prohibition on such an arrangement in the *Act*, so if this was the only section prohibiting such an arrangement, one would expect an express, as opposed to implied exclusion.

Third, if an owner can delegate rights with respect to his or her unit to better reflect the distinction between collective obligations of the condominium and individual obligation, it follows that a condominium corporation is also empowered to pass back that collective obligation to the unit owners. Again, it is dubious the legislature intended a water line passing through a non-structural wall of a conventional condominium to be an individual responsibility, especially in light of section 2(a)(ii) of Appendix 1. The courts appear to have recognized that there are a wide variety of factors that could be relevant for a board in deciding how to allocate expenses, so it would be surprising that such an inflexible approach was appropriate (see *Owners: Condominium Plan No. 982-2595 v Fantasy Homes Ltd.*, 2006 ABQB 325 (Master), varied on other grounds 2010 ABCA 39 and cited with approval in *934859 Alberta Inc. v Condominium Corporation No. 0312180*, 2007 ABQB 640.) What is more, since the bylaws may set the basis for allocating fees, it is unclear why a court would disrupt a scheme, where, with sufficient support, the owners could modify the scheme on their own (see section 39(1)(c) of the *Act*).

Finally, it is unclear why the *expressio unius est exclusio alterius* maxim is of relevance. The maxim means "legislative exclusion can be implied when an express reference is expected but absent" (see *University Health Network v Ontario (Minister of Finance)*, 2001 CanLII 8618 (ONCA) at para 31). It is unclear what is expected, but absent. It should be remembered that the maxim is not to be applied without caution (see Sullivan at page 252). Simply, two subsections being part of the same section does not mean the two subsections must be read to restrict each other (see, for example, *Texaco Canada Resources Ltd. v Alberta (Assessment Appeal Board)*, 1988 ABCA 385).

Accordingly, although otherwise often advanced by advocates of a strict distinction between unit and common property, it is unclear why, if a corporation is permitted to accept responsibility for a unit, it could not include that responsibly in its assessments against owners.

III. Why the decision arguably frustrates the statutory scheme

The lack of reference to the *Regulation,* Hansard, and certain sections of the *Act* suggests the Justice's attention may not have been directed to relevant background materials. These materials would have provided a major interpretive obstacle to concluding that the object of section 38 was a careful balancing of the need to collect funds in advance against the problem of over-collection, rather than supporting a conclusion that the key to section 38 was disclosure, and thereby supporting an understanding that the expenditures that must be included in the reserve fund are a statutory minimum only.

This part of the case comment will examine the legislative history, mechanics of the reserve fund, and relevant sections of the *Regulation* and argue the key to the reserve fund is disclosure. It will then examine statutory support for a conclusion that the items to be included in the reserve fund are a statutory minimum, and finally will examine why an objective of careful balancing is highly unlikely.

(a) What problem was the legislature trying to address?

The *Act* was comprehensively amended and updated in 2000 after extensive consultations. (See Alberta, Hansard, (April 3, 2000) (Hon. Mrs. Pat Nelson, then Minister of Government Services at 661) and 662 (Mr. Ed Gibbons)).

One of the additional elements adopted in 2000 was the reserve fund, which was added to "ensure that the housing stock in the province does not become dilapidated and worn down" and for "consumer protection" (see *Scotwick* at para 6). This latter concern, in particular, requires further elaboration.

A major concern that had arisen in the marketplace in the 1990s was the failure of many condominium corporations to save money for future repairs. This meant that individual owners could be hit by huge repair bills, which, in many cases, could not be secured by a mortgage on a unit as there was no additional equity, and purchasers in the re-sale market had no way to ascertain whether a special assessment would be required without hiring a home inspector to inspect the whole of the project. (For a discussion of these concerns, see Alberta, Hansard, May 15, 2000 at 1559 (Debbie Carlson, MLA for Edmonton-Ellerslie) and Alberta, Hansard, May 10, 2000) at 1497 (Mary O'Neill, MLA for St. Albert). Also see *Condominium Plan 832 1384 v McDonald*, 1998 ABQB 677 (Master)). The scheme of the *Act*, the legislative history and case law suggest the reserve fund was intended to ameliorate the above problems, and thus serve a consumer protection purpose in the re-sale market. As noted by Justice Slatter, as he then was, in *Scotwick Realty Services Inc. v The Owners: Condominium Plan No. 7510479*, 2003 ABQB 550 ("*Scotwick*") at paragraph 6:

> The new provisions of the *Act* respecting the creation of a reserve fund have certain obvious objects. One object is presumably to ensure that the housing stock in the province does not become dilapidated and worn down. By ensuring that funds are set aside for major repairs, the government can ensure that condominiums will be renovated when the time comes. There is also an element of consumer protection involved. If a consumer was to buy a condominium unit with a large, unfunded repair liability, the consumer is arguably not getting what he or she expects. There is also an element of owner discipline involved. Making

> the reserve fund mandatory forces condominium corporations to take a more conservative financial approach to their repair obligations, and helps overcome the problems associated with special assessments in the democratic environment of a condominium corporation.

The consumer protection purpose is affected, as will be discussed, largely through disclosure. If section 38 was intended to function only to ensure enough money was put away for future repairs, the *Act* would afford little protection to consumers. The words "sufficient" and "reasonably" are employed in section 38 to describe the amount to be put away, instead of a hard funding formula, suggesting deference is appropriate to any decision by the board about the reserve fund. What is more, because a position on the board is usually a volunteer position held by an unsophisticated party, it is doubtful whether a purchaser could look to the individual board members for compensation. The Hansard excerpts relating to the initial reserve fund amendment indicate such a situation was intentional. A specific formula was avoided to permit owners to decide themselves how much was required to be put away (see Alberta, Hansard, (May 15, 1996) at 1905 and 1906 per Mrs. Bonnie Laing, the Honorable Member for Calgary Bow and sponsor of the bill). This effectively means that there will be a wide range in the amount of money put away and that it is highly likely that in many situations the judgment of the board will be inaccurate. Accordingly, consumers still run the risk of a special assessment.

The *Act* and *Regulation*, however, affords additional consumer protection through disclosure. This intention may be seen in the statement by Pat Nelson, defending the *Act*, stating:

> Insofar as disclosures, one of the things that is good about this bill is that it does require that there be a capital upgrade or capital maintenance report done and filed with the condo association every five years. That alleviates surprises for people coming in to purchase a condo and not knowing what lies ahead insofar as capital maintenance that would be required. I think that's important. Now, then it's up to the condo association to do the scheduling and determine how in fact they're going to deal with the short-term and the long-term report as to types of capital maintenance that have to take place. That is addressed in this bill. So when someone does come to buy a condo from someone, they can look at those reports – they must be filed and readily available – and can in fact make some planning and determination as to whether this is a venture they want to enter into... The other thing that's important, Mr. Chairman, is that the reserve fund that is put in place by each condominium association is, again, determined by that association as to the amount that they will require to maintain the condominium complex based on the evaluation by a qualified person as to what type of capital will be necessary. They will make that determination, not the government. (Alberta, Hansard (May 15, 2000) at 1561).

Accordingly, the key to the consumer protection aspect of the 2000 amendments was disclosure.

This is also seen in the mechanics of the reserve fund as provided for in the *Regulation*. The *Regulation* specifies that a corporation must have a "qualified person" ("qualified" being without definitive academic or professional standing) prepare a study and report of all the property to which a corporation will be required to make non-annual repairs or replacements over the next 25 years, listing how much the qualified person believes the repairs and replacements will cost and when they will occur (see sections 23(1) and (2) of the *Regulation*). The board then adopts a plan, based on the report, as to how it will deal with the obligations addressed under the report

(see section 23(4) of the *Regulation*). A corporation then prepares reports as to how it is doing every year (section 29 of the *Regulation*) and updates the study, report and plan every five years (see section 30 of the *Regulation*). All this information is distributed to the owners, mortgagees and prospective purchasers in addition to the current amount of the reserve fund (see section 44(j) of the *Act* and sections 23(6), 29(2), 30(d), 31 of the *Regulation*). Accordingly, an owner, mortgagee or purchaser can review and determine whether he, she or it is comfortable with these materials before dealing with a corporation, a unit or the project and make his, her or its own plans as to whether to supplement a corporation's plan.

It should be noted that the conclusion about disclosure as consumer protection is also supported by a reading of the *Act*'s other consumer protection sections. The major theme running through these other provisions is also disclosure. Plans, bylaws, instruments and numerous other items must be disclosed to prospective purchasers 10 days (the "cooling off period") before a sale can be finalized (see sections 11-13). Prospective purchasers in the new sale market are thus provided an opportunity to make an informed decision. The attitude of the *Act* could be stated to be that, if one knew something was the case, then one cannot later complain about it.

Such an approach makes contextual sense. The normal approach to re-sale homes can be best described as being both *caveat emptor* (buyer beware) and *laissez-faire* (free market). Government and the courts are not expected to supervise the specific offerings of individual sellers, but to let the market work. It is assumed that by each party pursuing his or her own self-interest the best possible outcome will be reached on a well-functioning market. However, as with securities law (see Mark R. Gillen, *Securities Regulation in Canada*, *Third Edition*, Toronto: Thomson Carswell, 2007 at pages 58-60 and 73-74) and other areas of consumer protection, government is known to intervene to ensure the preconditions to a well-functioning market exist, such as the precondition of perfect knowledge (i.e. assuring no one is at an informational disadvantage). So, here, a scheme to protect the public by requiring a condominium corporation collect and disclose information about anticipated repairs and replacements and the corporation's plan to pay for those repairs and replacements, makes contextual sense. Both buyers and sellers can be assumed to have perfect, or near perfect, information, and the market can be left to function.

Accordingly, the key component to section 38 is to facilitate disclosure of a corporation's long-term capital expenses. In precluding the inclusion of additional capital items in the reserve fund, the decision, arguably, deprives consumers of needed information and undercuts the object of section 38 of the *Act.*

(b) Sections evidencing the reserve fund requirement is a minimum

There are three major reasons to believe that the items that are required to be included in the reserve fund are a minimum.

First, section 38(2) of the *Act* permits the removal of reserve funds for capital improvements (e.g. adding a pool) if excess reserve funds exist. While not evidencing a clear intention to permit removal for other purposes, it is clear that the legislature was not opposed to "over collection" or it would have taken steps to ensure no more funds were collected in such instance, rather than allowing the money in the reserve fund to be used for an alternative purpose.

Second, section 21(1)(a) of the *Regulation* adopts the definition of "common property" found at section 14(1) of the *Act* for the purposes of Part 2 of the *Regulation*. Section 14(1) defines "common property" as:

> "common property" includes facilities and property that are intended for common use by the owners notwithstanding that the facilities or property may be located in or comprise a unit or any part of a unit;

It is noteworthy that "common property" is not used in Part 2 of the *Regulation*. Accordingly, one could, and should, understand the section as an expansion of the definition of "common property" for the purposes of section 38, specifically broadening of the corporation's responsibilities under section 38 to include part of an owner's unit. This suggests that the legislature expanded the corporation's responsibilities under the reserve fund in the *Regulation*, and supports the conclusion that the items that are required to be included in the reserve fund may be added to.

(c) Why a balancing object does not make sense

The context of the *Act* also calls into question the interpretation of the reserve fund as a system of checks and balances. The Court's comment (at para 34) that "there is no other pre-collection concept expressed in the [*Act*] to which my attention has been directed" indicates that the Court may not have been directed to several sections of the *Act* and *Regulation* that would seem to provide a firm basis for pre-collection and further comments of the Court suggest the borrowing powers of the corporation had also not been brought to the Court's attention. Accordingly, there is some reason to believe the Court effectively ordered the Corporation to simply maintain an additional parallel reserve fund or borrow the money, notwithstanding *obiter* comments to the contrary.

First, section 39(1)(a) is phrased to require a corporation establish a "fund" for administrative expenses. The establishment of a fund on such basis must entail expenses that were not to be assessed after the fact, but rather collected in advance. While one could establish a fund to pay for expenses that were due, the section refers to the fund being for the aggregate of expenses, so seems to refer to pre-collection. Such an interpretation is furthered by the clarification that the fund is to be "sufficient in the opinion of the corporation" and accordingly, is unnecessary if monies were already expended and now owed. If the *Act* indeed forbid pre-collection of expenses, a corporation would be forbidden from collecting in summer the amounts in the budget to require snow removal.

Second, the scheme of the *Act* dealing with investment indicates that a corporation is anticipated to have money to invest outside the reserve fund. The legislature chose to deal with investment separately from reserve funds in creating the legislative scheme of the *Act.* Investment is dealt with in section 43 of the *Act* and made the lone section of a Part of the *Regulation*, being Part 2.1, as opposed to forming a section in the much larger Part 2 of the *Regulation* which deals with the reserve fund. It is notable that there is no reference in the decision to Part 2.1 or section 43 of the *Act*, as, arguably, the sections evidence an understanding that the corporation will have other types of long term investments.

Third, the initial bylaws of a corporation expressly empowered the corporation to borrow funds (see section 3 of Appendix 1). Accordingly, one would presume a corporation was able to

borrow these amounts. This leads to a fairly superficial distinction between paying in advance and paying after the fact.

Fourth, it is likely that if a corporation has a duty to do something, it also has the ability to collect for the same from the Owners. Section 39(1)(a) of the *Act* provides:

> In addition to its other powers under this *Act*, the powers of a corporation include the following: (a) to establish a fund for administrative expenses sufficient, in the opinion of the corporation, for the control, management and administration of the common property, for the payment of any premiums of insurance and for the discharge of any other obligation of the corporation [emphasis added].

The section is also notable as it requires the corporation to establish a fund to pay for its expenses in advance. This section would seem to empower a corporation to collect funds for all of its duties in advance. This interpretation is furthered by section 39(1) of the *Act*, which expressly allows the corporation to collect money for "the discharge of any other obligation of the corporation." Such a conclusion is also bolstered by reference to section 25(2) of the *Interpretation Act*, which provides:

> If in an enactment power is given to a person to do or enforce the doing of any act or thing, all other powers that are necessary to enable the person to do or enforce the doing of the act or thing are deemed to be given also.

If a corporation is empowered to take on additional expenses, it would presumably have the ability to collect for the same.

Fifth, section 10 of the *Interpretation Act* proves problematic for the "checks and balances" interpretation. Providing "[a]n enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects" overcomes any gap in the *Act* and *Regulation* (see Sullivan at 182-183). For example, a broad and liberal reading of this section requiring a corporation to maintain an adequate reserve fund for all its capital expenses may be appropriate.

Sixth, there is no section in the *Act* that allows for capital improvements. Accordingly, the result of the decision appears to mean a condominium corporation is incapable of saving for a capital improvement or facelift to the project, effectively freezing the project in time. While one might argue there must be flexibility in the definition of "repair," as was accepted in *Scotwick,* one could reply why not also some flexibility in "common property"-like property?

Finally, it is unclear why any owner would be prejudiced by an over-collection. Ultimately, an owner can sell his or her unit only so long as the parcel maintains its condominium status. Upon the termination of the condominium status, the owners own a share in the parcel as tenants in common and a share in the reserve fund, both in proportion to each owner's former unit's share of the unit factor. So the benefit of any capital in the project is maintained and shared among owners. One would think a healthy reserve fund and a well maintained project would be positively considered in the price of every unit. Even if an owner had to pay to fix capital items on his or her unit, other owners would benefit at that owner's expense on termination. So, while there is still a risk of owners paying money for the benefit of other owners, the problem is unrelated to the distinction between unit and common property or what capital can be used for.

Accordingly, it is unclear how restricting the reserve fund to common property provides a check or a balance.

Conclusion:

One of the animating principles of the *Act* is "fairness." While fairness may entail distributive fairness (the crux of the Corporation's argument), it also entails other factors like the state of affairs parties have relied upon, the intention of the parties, whether the parties have agreed to a state of affairs and many more are relevant. It is likely next to impossible to categorize the specific facts that will be relevant in every instance, which is likely why the legislature enacted section 67 of the *Act*.

Section 67 allows a court to tailor the remedy and decisions to the facts, at least in so far as concerning an "interested party," as defined in section 67, as opposed to adopting a more legalistic approach. This not only allows for the development of specific instantiations from which general principles can be distilled, but also permits a novel legal tool to be creatively widely applied to the various uses. There is no such thing as a one-size-fits-all approach to development and, as our municipalities increasingly require a move away from traditional single-dwelling housing, novel forms of development will likely arise. Condominiums are likely to be involved in a majority of these novel developments because, as our municipalities grow denser, a vehicle is increasingly needed to permit a body to provide for shared management of areas of land between users. Rural municipalities, for example, have used the tool to create shared sanitary sewers that are operated and paid for by users. However, most importantly, such an approach allows a court the needed flexibility to avoid the "worst possible outcome" when it comes to someone's home.

The maxim that a person is the king or queen of his or her castle remains a good one. A person's home is inherently personal and tied to his or her sense of identity and control of his or her life. Disputes involving homes are, accordingly, extremely personal and divisive, and a wide variety of remedies may be needed. Unfortunately, however, the maxim cannot be blindly applied because the individual rights and duties of a person in his or her home must be balanced with his or her shared, communal rights and duties.

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