March 11, 2013

Condominiums, Caregivers and Human Rights

Written by: Jennifer Koshan

Case commented on:

Condominium Plan No. 9910225 v Davis, 2013 ABQB 49

Anyone who has seen the film *Amour* knows that caring for an ill and elderly loved one can be an impossibly demanding task, both physically and emotionally. Many families turn to live-in caregivers in these circumstances. When those being cared for live in a condominium, and the condominium's bylaws purport to restrict the use of live-in caregivers, what legal avenues are open to challenge the bylaws, or decisions made on the basis of the bylaws? This scenario arose in *Condominium Plan No. 9910225 v Davis.* Justice R. G. Stevens dealt with the issue as one of interpretation of the bylaws, but also suggested that human rights legislation was not an option in this type of case. I will argue in this post that human rights legislation does apply in the context of condominiums, and provides an important avenue of redress.

Allen and Adelaide Davis lived together in a condominium unit in Medicine Hat, Alberta from January 2000 to October, 2011. Allen Davis is elderly and blind, and Adelaide Davis has dementia. In the fall of 2009, Allen Davis hired a live-in caregiver, Pacienta Subrado, through the Government of Canada's Foreign Worker Program for a two year term. Ms. Subrado's employment contract stipulated that she would assist the Davises with cleaning, meal preparation, laundry, dressing and bathing Mrs. Davis, and medical procedures such as administration of medications and checking blood pressure. Ms. Subrado was to provide 24-hour care, which required her to live with the Davises. The contract also provided that Ms. Subrado's accommodation costs of $336 per month would be deducted from her pay.

The Bylaws of Condominium Plan No. 9910225 provide as follows:

> **Article 62(a)**
>
> An owner SHALL NOT:
>
> iv. use or permit the use of his Residential Unit other than as a single family dwelling or for a purpose other than for residential purposes. …
>
> **Article 65**
>
> The restrictions in use in these By-Laws have the following purposes:
>
> a. To provide for the health and safety of condominium occupants;

b. To maintain the Residential Units, Parking Units and Common Property Units in such a manner as to preserve property values;

c. To provide for the peace, comfort and convenience of the Owners and occupants;

d. To develop a sense of community.

The Bylaws define "Single Family Dwelling" as "a Unit occupied or intended to be occupied as a residence by one family alone and containing no more than one kitchen and in which no roomers or boarders are allowed". "Roomer" and "boarder" are then defined as "a person to whom room and board is regularly supplied for consideration."

The Board of Condominium Plan No. 9910225 (9910225) became aware that the Davises had a caregiver residing with them in December 2009. The Davises were informed that if a complaint was received, the Condominium Board "would have no option but to enforce the By-laws" (at para 6). A motion to revise the By-laws to permit live-in caregivers was rejected by approximately 90% of the voting unit holders at the Condominium Owners Annual General Meeting in May 2010 (it is unclear from the reported decision whether it was the Davises or someone else who brought forward this motion). In September, 2011, 9910225 served a notice upon the Davises to the effect that they must comply with the By-laws, otherwise they would be subject to a sanction of $50 per day starting October 1 for as long as Ms. Subrado continued to live with them. In October 2011, Adelaide Davis moved into a nursing home, but Allen Davis continued to reside in the condo. In November, 2011 the Condominium Board passed a resolution "directing that notice be provided to any owner in violation of the By-laws prohibiting roomers or boarders with notice to allow them to resolve the contravention or vacate their unit by March 31, 2012" (at para 6). Mr. Davis received such notices from the Board by registered mail on December 9, 2011 and February 7, 2012. On April 12 2012, Ms. Subrado was directed by the Board to vacate the premises via a formal notice handed to Mr. Davis. As of August 1, 2012, Ms. Subrado no longer resided in the Davises' condominium unit.

Condominium Plan No. 9910225 sought a declaration that the Davises were in violation of its bylaws, and an injunction "restricting the use of live-in caregivers or the occupancy of the Respondents' condominium unit by anyone other than those individuals permitted by the By-laws." 9910225 also sought a monetary sanction of $10,000 against the Davises, and solicitor-client costs (at para 1).

Justice Stevens began his reasons for decision by noting that condominium bylaws are in essence a contract amongst the owners, citing *Condominium Plan No. 931 0520 v Smith*, 1999 ABQB 119. He indicated that there were no binding or persuasive authorities on the issue of whether live-in caregivers qualify as roomers or boarders. Applying the "modern principle of interpretation" to the construction of the Condominium bylaws (at para 12), Justice Stevens reviewed the purpose statement in Article 65 as part of the context for interpreting Article 62(a)(iv). He held that in light of the purposes of health, safety, comfort and convenience of condominium owners, Article 62(a)(iv) should be interpreted to permit live-in caregivers "required to provide necessary assistance" to residents (at para 14). He noted that prohibiting a live-in caregiver providing necessary care "could be devastating to the unit holder," and it was "debatable" whether such a restriction would even provide "marginal enhancement to the other unit holder[s] in terms of property values" (at para 14).

I have no quarrel with this aspect of Justice Stevens' decision – he took an appropriately contextual approach to the interpretation of the bylaws in a way that protected the interests of all the parties. However, Justice Stevens stated that because the bylaws amounted to a private contract, they were not subject to section 4 of the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*), because:

> that section prohibits discrimination against any person or class of person with respect of accommodation or facilities that are *customarily available to the public*, and of course condominium units are not. It is not at all uncommon, for example, for condominium By-laws to discriminate on the basis of age, and it is well established that a condominium corporation is legally entitled to do so (at para 9, citing *Condominium Plan No. 931 0520 v Smith* at para 6).

It is this aspect of Justice Stevens' judgment with which I take issue. Section 4 of the *AHRA* provides as follows:

> No person shall
>
> > (a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or
> >
> > (b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,
>
> because of the race, religious beliefs, colour, gender, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.

At the outset, it must be noted that age is not a protected ground under section 4 (although it is protected for some other areas of discrimination, such as employment – see *AHRA* section 7). Justice Stevens' comment that there is "wide acceptance of age restrictions in condominium By-laws" (at para 15) may relate more to the exclusion of age from section 4 than the wholesale exclusion of condominiums from section 4.

There is authority in Alberta for the proposition that section 4 of the *AHRA* applies to condominiums. In *Ganser v Rosewood Estates Condominium Corporation*, 2002 AHRC 2, an 87 year old woman with disabilities resided in a condominium, the bylaws of which were amended to allow indoor parking spaces only for those owners who held a valid driver's license. Ganser was not able to drive because of her disabilities, but her granddaughter and friends used the stall when they were assisting her in attending medical appointments and providing other types of care. Nevertheless, Ganser lost her parking stall in accordance with the revised bylaws, and brought a human rights complaint against the condominium corporation. The Human Right Panel Chair, Deborah Prowse, considered the application of section 3 of the *Human Rights, Citizenship and Multiculturalism Act*, RSA 2000, c H-11.7 (*HRCMA*), which was the precursor to section 4 of the *AHRA*. She noted that the section applies to "persons," which includes condominium corporations. Moreover, the protection for services "customarily available to the public" could be interpreted to cover condominium owners. According to Prowse:

> The relationship between the condominium corporation and condominium owners is created when a person purchases property subject to the management by such a corporation. There are no selection or eligibility criteria other than the willingness and ability to purchase the property. Any member of the general public potentially could be a resident owner. The corporation provides services and the resident owners are the recipients or users of those services. Generally, the corporation provides management services in relation to the upkeep, development and maintenance of the property to the owners (2002 AHRC 2 at 14-15).

Prowse found support for her decision in *University of British Columbia v Berg,* [1993] 2 SCR 353, where the Supreme Court held that ""every service has its own public" and once this 'public' is defined, the Act prohibits discrimination against the members of that public on the prohibited grounds" (2002 AHRC 2 at 15, citing *Berg* at 383). In *Ganser*, condominium owners were the "public" to whom services were customarily available, so section 3 of the *HRCMA* applied. Prowse went on to find that the condominium's bylaws discriminated against Ganser on the basis of her disability, and that the condominium corporation had failed to establish that it had fulfilled its duty to accommodate her.

Condominium Plan No. 931 0520 v Smith, relied on by Justice Stevens in *Davis,* dealt with an age-based restriction in condominium bylaws, so section 3 of *HRCMA*, which governed at the time, was clearly inapplicable in that case. Nevertheless, Justice Hawco cited *Gay Alliance v Vancouver Sun,* [1979] 2 SCR 435 for authority that protections of accommodation customarily available to the public apply to "such matters as accommodation in hotels, inns and motels" and not to condominiums, which are governed by private contract between condominium owners and the condominium corporation (1999 ABQB 119 at para 7).

In *Gay Alliance*, the Supreme Court set out a longer list of the sorts of matters that should be included in provisions such as section 4 of the *AHRA* (and section 3 of *HRCMA* before it). According to the Court:

> "Accommodation" refers to such matters as accommodation in hotels, inns and motels. "Service" refers to such matters as restaurants, bars, taverns, service stations, public transportation and public utilities. "Facility" refers to such matters as public parks and recreational facilities. These are all items "customarily available to the public" (at 454-55).

In *Berg*, the Supreme Court noted that *Gay Alliance* had been interpreted in some subsequent cases to have created an exhaustive list of accommodations, services and facilities. It disagreed with this approach, and further noted the "danger of applying a purely quantitative analysis … to decide that as soon as the public as a whole is reduced to a subset through an admissions or eligibility process, the admitted few lose their identity as members of the public" (at 382). The Court thus rejected "any definition of "public" which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public" (at 383). In *Ganser*, Panel Chair Prowse relied on this qualification of *Gay Alliance* by *Berg*, and her reasoning is to be preferred over that of Justice Hawco in *Condominium Plan No. 931 0520 v Smith.* To reiterate, unit owners are the "public" to whom services are "customarily available" in the context of condominiums, so section 4 of the *AHRA* applies.

The Davises did not bring a human rights complaint against Condominium Plan No. 9910225. If they had, the Human Rights Commission would have had jurisdiction to consider their complaint

based on the adverse impact of the condominium bylaws on the basis of disability under section 4 of the *AHRA*. Although the Davises' rights prevailed in Justice Stevens' decision on the condominium's injunction application, it is important to clarify that human rights complaints remain an option for other persons in their situation.

To subscribe to ABlawg by email or RSS feed, please go to **http://ablawg.ca**
Follow us on Twitter **@ABlawg**