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Alberta Human Rights Act Applies to Condominium Corporations

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Case Commented On: *Condominium Corporation No 052 0580 v Alberta (Human Rights Commission)*, 2016 ABQB 183 (CanLII)

A few years ago I wrote a post arguing that the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*), applies to the relationship between condominium owners and their condominium corporations. The Alberta Court of Queen's Bench was recently faced with a case where it had to address that issue directly. In *Condominium Corporation No 052 0580 v Alberta (Human Rights Commission)*, 2016 ABQB 183 (CanLII), Justice Robert A. Graesser held that the *AHRA* does indeed apply to condominium corporations. This post will explain his reasons for decision, and comment on a remark he made about the lack of authoritativeness of blog posts as secondary sources.

This case arose when Condominium Corporation No 052 0580 (the Corporation) brought an application for judicial review challenging the jurisdiction of the Alberta Human Rights Commission to investigate a human rights complaint by one of its owners. The underlying dispute involved Dennis Goldsack, the owner of a condominium unit in Tradition at Southbrook, Edmonton, who was confined to a wheelchair and had been assigned a parking stall closest to the building's elevators. The Corporation's Board decided to repurpose that stall for bicycle parking and storage, and reassigned Goldsack a parking stall that was further from the elevators and narrower. After failed negotiations with the Corporation, Goldsack brought a human rights complaint against it under section 4 of the *AHRA*. This section prohibits discrimination on the ground of physical disability (as well as other grounds) in the provision of "goods, services, accommodation or facilities that are customarily available to the public".

In its judicial review application, the Corporation argued that the Alberta Human Rights Commission lacked jurisdiction to investigate Goldsack's complaint, based on its contention that section 4 of the *AHRA* does not apply to condominium corporations and their owners. In response, the Commission argued that Justice Graesser should not hear the Corporation's application for judicial review on the merits, as the decision of the Commission to proceed to an investigation was a matter of "screening and administration, not of adjudication" (at para 36, citing *Halifax v NS (Human Rights Commission)*, 2012 SCC 10 (CanLII)). It also argued that the Corporation should have proceeded by way of an application for prohibition rather than judicial review (at para 50). Justice Graesser decided to hear the Corporation's jurisdictional challenge on the merits, finding that resolution of this issue would be economical and expedient (at paras 51-57). The standard of review of the Commission's decision to investigate was found to be reasonableness (at para 39).

On the merits, Justice Graesser examined *Ganser v Rosewood Estates Condominium Corporation*, 2002 AHRC 2 (CanLII), a decision of the Alberta Human Rights Tribunal finding that the previous version of *AHRA* section 4 did apply to condominium corporations. In *Ganser*, Tribunal member Deborah Prowse relied on the leading case involving services customarily

available to the public, *University of British Columbia v Berg*, 1993 CanLII 89 (SCC), [1993] 2 SCR 353, in which the analogous section in British Columbia's human rights legislation was interpreted broadly so as to include the provision of services to particular subsets of the general public. According to *Berg*, "every service has its own public", and Prowse applied *Berg* to hold that Alberta's human rights legislation applies to condominium corporations offering services such as parking to condominium owners (2016 ABQB 183 at para 14).

Condominium Corporation No 052 0580 argued that *Ganser* was not binding and should not be followed (at para 15). It also argued that the applicability of the *AHRA* to condominium corporations had been decided in the negative in other decisions of the Court of Queen's Bench: *Condominium Plan No 931 0520 (Owners) v Smith*, 1999 ABQB 119 (CanLII) and *Condominium Plan No 991 0225 v Davis*, 2013 ABQB 49 (CanLII) (at para 30).

Justice Graesser noted that the *Davis* decision relied on *Smith*, which in turn relied on a Supreme Court case, *Gay Alliance v Vancouver Sun*, [1979] 2 SCR 435, which had been "effectively overturned" by *Berg* (at para 61). I made the same point in my post on the *Davis* decision. I also noted that, in any event, *Davis* did not directly consider the applicability of the *AHRA* to condominium corporations, and *Smith* involved a complaint based on age, which is not a protected ground under the *AHRA* in the area of services customarily available to the public.

Justice Graesser also referenced several cases from British Columbia cited by the Commission, where the courts "have had no difficulty" with the applicability of human rights legislation similar to Alberta's to condominium corporations (at para 65). Moreover, the Supreme Court of Canada applied Quebec's human rights legislation to a condominium corporation without comment in *Syndicat Northcrest v Amselem*, 2004 SCC 47 (CanLII).

Condominium Corporation No 052 0580 also made an interpretive argument for why section 4 of the *AHRA* should not apply to condominium corporations. It argued that because section 5 of the *AHRA* provides specific protection against discrimination for tenants of commercial and self-contained dwelling units, section 4 of the *AHRA* "inferentially excludes residents who are property owners" (at para 23). To hold otherwise, argued the Corporation, would create a redundancy in the *AHRA*, because residential tenants would fall under both sections 4 and 5. Justice Graesser found that there was "nothing inconsistent with providing express remedies for tenants" in section 5, which was "intended to deal with landlords refusing to rent premises to people on the basis of their personal characteristics", and at the same time, interpreting section 4 broadly enough to include landlords and condominium corporations (at paras 84-5).

Another argument by the Corporation was that the *Condominium Property Act*, RSA 2000, c C-22, section 67, provides a "complete code" for complaints by condominium owners against their corporations in circumstances of "oppressive conduct" by the latter (at para 68). However, the Corporation did not provide any precedents where that section had been used "to address human rights-prohibited discrimination" (at para 69). Section 67 requires the commencement of an action in the Court of Queen's Bench, which Justice Graesser noted is "a difficult and expensive process" before a body that does not have specialized expertise in human rights (at para 72). He found that there was likely concurrent jurisdiction under both the *AHRA* and *Condominium Property Act*, as the latter did not oust the jurisdiction of the Commission (at paras 74-5).

Lastly, the Corporation argued that condominium corporations are owed deference as democratically elected boards, and that they are unique given their decision making and bylaw making powers in relation to condominium owners. In support of this argument, the Corporation cited a blog post by Calgary lawyer, Richard I. John, *Condominium Complexes are Private: A Defense Against the creeping expansion of the Alberta Human Rights Commission* (at para 79; see that post here). Justice Graesser indicated that he was "doubtful that self-published blogs should be considered as authorities for court purposes" (at para 80). In any event, he rejected the substance of John's blog post, finding that it ran contrary to the broad scope given to human rights legislation by the courts. In a helpful statement of why we need human rights legislation, Justice Graesser also found that no deference was owed to condominium corporations, as "the tyranny of the majority does not withstand unlawful discrimination" (at para 86).

I believe that Justice Graesser's decision is correct – in fact I argued in favour of this interpretation of the *AHRA* in my post on the *Davis* case, and Richard John's blog post was published as a response to my comments on *Davis*. And while I disagree with John's analysis, I also disagree with Justice Graesser's suggestion that blog posts "should [not] be considered as authorities for court purposes." It may be that Justice Graesser was only expressing doubt about the persuasiveness of "self-published blogs", in which case ABlawg and similar law school blogs could be distinguished as institutional publications. It bears mention that ABlawg posts have been cited in a number of judicial decisions – see for example the references to Jonnette Watson Hamilton's posts on the Residential Tenancy Dispute Resolution Service in *Abougouche v Miller*, 2015 ABQB 724 (CanLII) and *Hewitt v Barlow*, 2016 ABQB 81 (CanLII). However, Université de Montréal Professor Paul Daly's blog, Administrative Law Matters, could be dismissed as "self-published" because it is the work of a single law professor, and yet it is an award-winning blog that should be seen as a valuable resource for courts and other decision makers in the challenging area of administrative law.

As Coordinator of ABlawg I may be biased, but I believe that it is important to recognize that law blogs provide accessible commentary on law and policy that is available much more expeditiously than case comments in traditional law review format. Courts and other legal decision-makers are not bound to follow the analysis in blog posts any more than they are bound to follow traditional case comments or academic analyses, but it would be unwise in my view for these decision-makers to ignore the rich source of commentary and analysis provided by law blogs.

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