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"What Were They Thinking?" Condominiums, Oppressive Conduct and Human Rights

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Case Commented On: *Condominium Corporation No 072 9313 (Trails of Mill Creek) v Schultz*, 2016 ABQB 338 (CanLII)

I have commented a couple of times previously on the application of human rights legislation to condominiums (see here and here). In *Condominium Corporation No 052 0580 v Alberta (Human Rights Commission)*, 2016 ABQB 183 (CanLII), Justice Robert Graesser of the Alberta Court Queen's Bench held that the *Alberta Human Rights Act*, RSA 2000, c A-25.5 (*AHRA*), does apply to the relationship between condominium owners and their condominium corporations. There is, however, a caveat. Section 4 of the *AHRA* protects against discrimination in the context of goods, services and facilities customarily available to the public, but does not list "age" as a protected ground. This means that age discrimination complaints cannot be brought against condominium boards (nor against other service providers or landlords; see section 5 of the *AHRA*, which excludes age as a protected ground in tenancy relationships). In the condominium context, an alternative remedy exists – section 67 of the *Condominium Property Act*, RSA 2000, c C-22 (*CPA*), allows courts to remedy "improper conduct" on the part of condominium corporations, including that which is "oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit" (*CPA* section 67(1)(a)(v)). The application of this section was at issue in the recent case of *Condominium Corporation No 072 9313 (Trails of Mill Creek) v Schultz*, 2016 ABQB 338 (CanLII).

Stacey Schultz purchased a condominium unit in the Trails of Mill Creek in 2012, when she was estranged from her husband. Her offer to purchase the unit was conditional on her minor son Brett being permitted to reside with her in this "adults only" building. She was told by a representative of the Developer that "this would not be a problem" (at para 3). In March 2014, the Condominium Board decided that Brett could not live with his mother in the unit, even temporarily, and gave notice that he had to leave by July 6, 2014. The Condominium Bylaws relied upon by the Board provide as follows in section 63:

> (b) A Unit shall not be occupied by a person or persons who have not attained or will not have attained his or her eighteenth (18th) birthday within twelve (12) months of occupancy of the said Unit (hereinafter referred to as "18th birthday") or by any child/children of the owner who are under the age of eighteen (18).
>
> (c) Notwithstanding the above paragraph 63(b), *a Unit may be occupied by a person who has not attained his or her 18th if the Board authorizes a person to occupy a Unit for specified periods of time for compassionate reasons. The permission granted by the Board may be revoked by a special Resolution at the duly convened meeting of the Corporation.* (emphasis added)

Following the Board's decision, Ms. Schultz tried to sell her unit, and was unsuccessful in spite of using two realtors, lowering her listing price, and accepting two separate offers that fell through. At a meeting in November 2014, under the authority of section 43 of the Bylaws, the Board imposed a fine commencing January 1, 2015 of $250.00 "for every 2 weeks the Bylaw breach continues and the underage occupant remains in the unit." (at para 5) As noted by Master W.S. Schlosser, "Ms. Schultz was caught between the decision of the board and her legal and moral obligation to her son. There was little more that she could do." (at para 6) In May 2015, the Board commenced an originating application to the Court of Queen's Bench to evict Brett and obtain its fines and enforcement costs under section 43 of the Bylaws. Ms. Schultz brought a cross-application under section 67 of the *CPA* for relief from the Board's improper conduct. By the time of Master Schlosser's hearing of the matter, eviction had become moot, as the condominium unit had been sold. He identified four issues for consideration (at para 12):

1. The ability of the Developer to bind the Condominium Corporation.

2. The nature and the sufficiency of the evidence in support of the originating application;

3. The sufficiency of the Board's reasons in levying these fines;

4. The role of the Court in reviewing the decision of the properly elected condominium board.

On the first issue, Master Schlosser he cited *Condominium Plan No. 931 0520 v Smith,* 1999 ABQB 119 (CanLII) for the point that "private arrangements between a Developer and an individual cannot bind the subsequent owners of a Condominium Corporation." (at para 13) In any event, the Condominium Board's consent to allow Brett to live in the unit was withdrawn, making the central issue "the propriety of the decision to fine Ms. Schultz for breach of the by-law and the Board's ability to recover their enforcement costs." (at para 14)

On the second and third issues, Master Schlosser noted that originating applications are intended to be used when there are no facts in dispute, and the evidence tendered on such applications must be first-hand, direct, and personal rather than based on hearsay (at para 15, citing *Alberta Rules of Court*, Alta Reg 124/2010, Rules 3.2(2) and 13.18(3)). The Condominium Board's application was supported by the affidavit of John Krysler, the property manager of the Trails of Mill Creek. Master Schlosser noted that his evidence was that of a bystander rather than coming from first-hand knowledge, and that it did not provide any explanation for the Board's decision to levy the fines against Ms. Schultz. Although Krysler's affidavit referenced "observations and complaints made about the underage occupant", there was no evidence providing details about any incidents of concern regarding Brett (para 18). On the other hand, Ms. Schultz's affidavit deposed that her son was not causing any nuisance, and her evidence was uncontradicted as to the efforts she had made to sell her unit. Master Schlosser found that it was "not self-evident how a fine could correct Ms. Schultz's behavior, if that was what was intended." (at para 18)

Turning to the fourth issue and section 67 of the *CPA,* Justice Schlosser noted several general principles that apply in the context of this "oppression remedy" (at para 23, citing *Leeson v Condo Plan No. 9925923*, 2014 ABQB 20 (CanLII) and T. Rotenberg, *Condominium Law and Administration*, Carswell, vol 2, (Looseleaf), ch 23):

(a) It is a broad remedy, broadly applied; attempts to narrow its impact and effectiveness should therefore be resisted.

(b) The purpose of the oppression remedy is to protect the objectively reasonable expectation that caused the relationship to begin or continue.

(c) Either the cumulative results of the conduct complained of or a specific egregious act ultimately determines whether there is an actionable wrong.

(d) The court must balance the competing interests of the minority, who are to be treated fairly, with the rights of majority to govern. Only if the minority's interest is unfairly treated will the courts intervene.

(e) The selection of a remedy must be sufficient to achieve the desired result. Remedies should not be narrowly limited, and may be granted against individuals in appropriate cases.

Using colourful language in his focus on (b), the reasonable expectations principle, Master Schlosser stated that "a unit owner could reasonably, or legitimately expect that she would not be fined when there would be no useful purpose served by it. Both the by-law about minor persons staying in the complex and the power to levy a fine are discretionary. … The by-laws are not to be treated as a version of legislated inhumanity." (at para 25) He also noted that although decisions of condominium boards are typically granted considerable deference, "[a]rbitrary decision making cannot immunize the Board from scrutiny by this Court." (at para 26).

Under the heading "What Were They Thinking", Master Schlosser reiterated that the Board had provided no reasons for its decision to fine Ms. Schultz, nor any evidence of complaints or issues with respect to her son. The absence of reasons suggested that it was not "a wild assumption" that the Board's decision was arbitrary; "there is no apparent reason how a fine could correct Ms. Schultz's behavior or to cause her to do anything other than what she had diligently been doing." (at para 30) Master Schlosser dismissed the Board's application for fines and recovery costs and allowed Ms. Schultz's cross application under section 67 to set aside the fines, with costs payable to her by the Board.

He concluded by setting out a template for how such applications should be decided in the future (at para 35):

1. Apply a reasonable or legitimate expectations analysis to determine the nature of the right or interest affected, and to identify whether there is threshold conduct for the application of section 67(1)(a)(ii)-(v);

2. Consider the nature and the sufficiency of the evidence in support of the application; especially with Rule 13.18(3) in mind;

3. Identify the type of the decision (i.e., whether it involves a question of law like the interpretation of the *Condominium Property Act,* or a by-law, or an exercise of discretion based on a set of facts). Condominium Boards may be especially in tune with the needs and interest of the unit owners but unless demonstrated, their election gives them no special ability to interpret questions of law. This leads to the fourth question which is to;

4. Consider what level of deference the Court should afford the decision. That is, what standard should be applied: reasonableness, or correctness;

5. If the decision involves an interest that is not trivial, and if the result is not self-evident, the Court should ask whether reasons are necessary and whether the rules of natural justice have been followed.

Commentary

I began this post by noting that "age" is not a protected ground of discrimination under some sections of Alberta's human rights legislation. Would inclusion of age in the legislation make much of a difference in the kind of case discussed here? It would allow someone in the position of Ms. Schultz to bring a human rights complaint in circumstances where an "adults only" policy was enforced against her and her child – and indeed it would preclude "adults only" policies in the first place (unless they could be justified as "reasonable and justifiable under section 11 of the *AHRA*). That being said, family status is a protected ground under section 4 of the *AHRA*, and could have formed the basis of a discrimination claim against the Board. Moreover, the earlier cases on which I blogged both involved adverse treatment by condominium boards against unit owners with disabilities, another protected ground under section 4 of the *AHRA*, showing that prohibitions against discrimination will not necessarily shield condominium unit owners from discriminatory behaviour by their boards. And although human rights procedures are intended to be relatively accessible – for example many parties are not represented by counsel in hearings before the Alberta Human Rights Tribunal – there is a backlog in processing complaints that may make a human rights route just as challenging as a court application under section 67 of the *CPA*. There is also the policy question of whether "adults only" condominiums (along with apartments and other goods, services and facilities) are something we wish to continue shielding from the application of human rights legislation. If the *AHRA* remains unchanged on this basis, at least section 67 of the *CPA* can provide some relief from the actions of oppressive condominium boards for persons in the position of Ms. Schultz. Master Schlosser has provided a useful template for future cases of this kind.

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