Court of Queen's Bench of Alberta

Citation: 934859 Alberta Inc. v. Condominium Corporation No. 0312180, 2007 ABQB 640

Date: 20071024
Docket: 0601 03730
Registry: Calgary

Between:

934859 Alberta Inc.

Applicant/Respondent on Appeal

- and -

Condominium Corporation No. 0312180

Respondent/Appellant

Corrected judgment: A corrigendum was issued on November 1, 2007; the corrections have been made to the text and the corrigendum is appended to this judgment.

Corrected judgment: A corrigendum was issued on October 25, 2007; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of the
Honourable Mr. Justice P. Chrumka

Introduction

[1] Condominium Corporation No. 0312180 (the "Condo Corp") appeals the Order of the Master, granted on June 16, 2006 directing it to reallocate certain common expenses on other than a unit factor basis and the parking spaces on a unit factor basis.

[2] 934859 Alberta Inc. (934859) had applied, by Originating Notice, to the learned Master, for a declaration in respect of the "improper conduct" of Condo Corp, particularly:

a. that the Respondent (Condo Corp) has not complied with the Act (Condominium Property Act), the regulations or the condominium bylaws of the Respondent (the "Bylaws") by, without limitation, inequitably assessing the expenses, costs or charges of the Respondent to the Applicant (934859) and other owners on the basis of Unit Factors and in doing so failing to weigh, allocate and assess against the Owners and their respective Units such expense, costs and charges in an equitable manner and further by inequitably distributing the parking spaces which are the common property of the Respondent both as is provided for by the bylaws of the Respondent (the "improper conduct");

b. confirming that the conduct of the business affairs of the Respondent has been in a manner that is oppressive or unfairly prejudicial to or unfairly disregards the interests of the Applicant; and

c. that the Respondent has exercised the powers of the Board of Directors in a manner which is oppressive or unfairly prejudicial to or unfairly disregards the interests of the Applicant.

[3] The grounds relied upon by 934859 were:

a. that Condo Corp through its Board of Directors has failed to exercise its powers and discharge its duties honestly and in good faith;

b. that the conduct of Condo Corp has been improper in breach of s. 67(1)(a) of the *Condominium Property Act*, R.S.A.2000, c.C-22; and

c. that Condo Corp was given notice of the breach of its bylaws but Condo Corp has ignored the notice and continues to breach the bylaws and as such continues to engage in "improper conduct" as defined in the *Condominium Property Act* (Alberta).

Facts and Positions of the Parties

[4] Douglas Glen Business Centre (the "Building") is a two storey commercial condominium complex located at 10836 - 24th Street S.E., Calgary, Alberta. Condo Corp is the registered owner of the common property pursuant to the *Condominium Property Act*, RSA 2000, c. 22 and the Regulations thereto. Condominium Plan 0312180, registered at Land Titles on August 7, 2003 in relation to Lot 6, Block 18, Plan 021 1223, created 10 condominium Units. Units 1 through 6 are located on the first level. Units 7 through 10 were located on the second level. Unit 7 was re-

divided creating two additional units and it became Units 11 through 13 and the Building now comprises 12 units.

[5] The first floor units are comprised of bays which can be used as retail/warehouse space. Each of these units is self-contained and entrance to these units is made directly. There is no hallway or vestibule required to be entered to obtain access to the six first floor units.

[6] 934859 is the owner of four first level condominium units, namely Units 1, 2, 3, and 4, at Douglas Glen Business Centre. 934859 does not occupy any of the units. It owns these four units for investment purposes and it rents the units to four businesses.

[7] The owners of the two other first floor units were not parties to the application before the learned Master, nor are they parties to this appeal. 934859 was the original Applicant and is presently the sole Respondent.

[8] The second floor units are office units. They are reached by entering a foyer and then either walking up a stairway or using the elevator.

[9] Photographs of the exterior of the Douglas Glen Business Centre are filed as Exhibit "G" to the Affidavit of Darcy Walls sworn November 30, 2006. The second photograph shows the entrance to the foyer and the turret in which are located the stairs and the elevator. The third photograph shows the front of the building and the 6 first floor units. The three other photographs show the lights, garbage receptacles and the rear of the ground floor units and trucks.

[10] Pursuant to s.25 of the *Condominium Property Act* the owners of the units in the Building comprise the Condo Corp.

[11] A number of issues and matters were raised by 934859 in the application before the learned Master and again before me. I will attempt to address them in the order raised.

1. Was there a physical denial of access by Condo Corp to 934859 to the second floor and to the foyer of the Building?

[12] Access to the second floor units and common property areas is through a lobby at the south end of the Building. Inside the lobby is a stairway leading to the second floor and an elevator providing access to the second floor. Additionally, in the lobby are in-wall mailboxes for use by all of the first and second floor units. During the normal business hours access to the foyer and common property areas is unrestricted. The door from the exterior of the building to the lobby is secured after business hours and an access card is then required to obtain entry. The public washrooms for the building and access to the rooftop heating and air conditioning equipment of all units is located on the second floor.

[13] Marcus Perron, the President of 934859, deposes, in his Affidavit sworn March 20, 2007, that he was informed by the Developer, prior to purchasing the four first floor units, that no access would be provided to the foyer and second floor of the Building to any of the first floor owners because the first floor units were self-contained. He states that as a consequence of this lack of access, 934859 was required to install handicap washrooms in each of its four first floor units to satisfy the City of Calgary health requirements.

[14] 934859 submits that the Condo Corp has secured access to the second floor by installation of a secure access system on the entrance to the foyer. Its position is that at no time has equal access to the foyer and second floor been provided to it. 934859 also states that Condo Corp insisted, prior to the purchase of the four units by 934859 and throughout until January 4, 2007 that 934589 would not be given equal access to the foyer and the second floor.

[15] In its Brief, at para. 5, 934859, in part, states:

> The installation of the secure access system by the Condo Corp and the insistence by the Directors of the Condominium Corporation No. 0312180 that the first floor owners shall not have equal access to the foyer and the second floor and the refusal to provide equal access has created a situation whereby the foyer, stairway, elevator and second floor are treated as exclusive use areas.

[16] Condo Corp submits that from a reading of Allan Sherlock's Affidavit sworn on March 22, 2006 and filed in the application before the learned Master, one could reasonably understand that there is a physical denial of access to the foyer and second floor to the first floor unit owners. Mr. Sherlock deposed at para. 3:

> 3. Douglas Glen Business Centre is a two storey complex with the main floor being comprised of bays which can be used as retail/warehouse space. The second floor is used as office space. The second floor has been secured by the installation of a secure access system which the owners of the main floor units do not have access to. As such the common property on the second floor is used exclusively by the second floor owners and their invitees. The parking spaces have all been designated as common property.

[17] Condo Corp submits that this is not the case. It points to Darcy Walls' Affidavit, sworn May 29, 2006, to which is attached, as Exhibit C, the actual condominium plan for the complex. Plan No. 0312180, registered on 7 August, 2003, diagrams on the bottom left the first level units and the foyer, which is shown as "common property". In the middle of the Plan are shown the second level units. A corridor, runs down the middle of the floor and two-thirds of the way is a bathroom. The corridor and the bathroom are "common property".

[18] Condo Corp states that the entrance to the foyer is pictured in photograph Exhibit "G" of Darcy Wall's Affidavit sworn November 30, 2006. Condo Corp states that within the foyer are stairs that lead to the second level. Also there is an elevator in the turret which goes to the second level. Further, in the foyer, are mail boxes that are in the walls and which are used daily by the

four businesses to whom 934859 leases the four first floor units as well as the two other first floor businesses.

[19] Condo Corp contends that the foyer and second level bathroom and units are accessible to the public and all six businesses during normal business hours. The exterior door to the foyer is locked after normal business hours to prevent the public from entering this part of the Building after hours. Condo Corp states that to obtain access to the foyer and second level after normal business hours one needs an access card.

[20] Condo Corp alleges that the Building has been up and running since 2003 and that there is no evidence that any body, other than Marcus Perron has complained about not having access. Condo Corp points out that 934859 does not carry out any business in the Building. It is an investor owner. The Board of Directors of Condo Corp state that if 934859 wishes to have an access card, all that it need do, is ask for one. It submits that the "equal access argument" raised by 934859 is about whether it wants an access card or not and if it does want one it will be given one and then it will have equal access.

[21] In reply to 934859's complaint that it has no access card and has never been offered one, Condo Corp says that access cards are available to unit owners upon request and that 934859 need only ask if, as an investment owner, it wishes one.

[22] In considering all of the relevant evidence on this issue, I am satisfied that 934859 had equal access to all common areas and the installation of the security system did not have the effect of denying it after business hours access as all that 934859 needed to do was request or indicate that it wanted an access card. This question of whether access was denied by Condo Corp to 934859 to the foyer and second floor of the Building is addressed again and further in paras. 56 to 61 herein.

2. Has Condo Corp changed the historic method of assessing common expenses?

[23] The next claim of 934859 addressed by Condo Corp was the allegation that Condo Corp had changed the historic method of assessing common expenses. In its Brief at para. 5, p. 2, 934859 states:

> The installation of the secure access system by the Condo Corp and the insistence by the Directors of the Condominium Corporation No. 0313180 that the first floor owners shall not have equal access to the foyer and the second floor and the refusal to provide equal access has created a situation whereby the foyer, stairway, elevator and second floor are treated as exclusive use areas. Notwithstanding this the Condo Corp has over three years shifted the burden of paying the expenses associated with the foyer, stairway, elevator and second floor to the first floor owners creating a disproportionate benefit to the second owners. (Emphasis Added)

[24] Condo Corp submits that it has not changed the historic method of assessing common expenses but has consistently assessed common expenses exactly the same way since it started. It submits that 934859's allegation is based on para. 3 of Marcus Perron's Affidavit sworn March 20, 2007, wherein he deposes:

> The budget for 2002/2003 which was provided to me by Morbank Properties Inc. (the Condominium Corporation No. 0312180 prior property manager) indicates clearly that no charge was being levied for the elevator, janitorial, or Exclusive Use Area utilities or security costs. A copy of this letter and budget is attached as **Exhibit "A"** to this my Affidavit. The Developer is an owner of a unit on the second floor of Douglas Glen Business Centre and operates its business from this unit. The subsequent budgets and actual expenses for Douglas Glen Business Centre doubled and reflected the addition of elevator, janitorial, or Exclusive Use Area utilities or security costs.

[25] Condo Corp states that the document headed "Douglas Glen 2002/2003 Operating Budget" is not a condominium budget, firstly, because it includes $66,975.00 as property taxes. This represents more than half of the total of that budget. Condo Corp states that in a Condominium each owner pays their own property taxes. Condo Corp further submits that as the Condominium Corp was formed in August, 2003 and the Condominium Plan was filed in August 2003 the document, Exhibit "A", relates to a period prior to condominiumization and therefore is not a condominium budget. Condo Corp argues that this document is the sole document upon which Mr. Perron relies to say that somehow the Board changed the historic method of assessing common expenses.

[26] Condo Corp's budgets for the years 2003 and 2004 are Exhibits "A" and "B" to the Affidavit of Darcy Walls sworn March 28, 2007 and the budgets for 2005 and 2006 are Exhibit "F" to the Affidavit of Darcy Walls sworn November 30, 2006. Further Condo Corp submits that an Estoppel Certificate, in the form of Exhibit "E" to the Affidavit of Darcy Walls sworn November 30, 2006, was signed by an owner at the time of purchase of a unit. This Estoppel Certificate states in part, "Contributions are determined on the basis of the unit factor." It submits that from these documents it is evident that the unit factor basis was to be applied to divide up common expenses and that was done.

[27] From this Affidavit evidence and the documents presented, it is evident, to me, that there was no shifting of the burden, as alleged, from the second floor owners to the first floor owners throughout the history of the Building as a condominium. The Developer first and then the Board assessed common expenses on a unit factor basis.

3. Is Condo Corp controlled by the second floor owners?

[28] Condo Corp submits that the statement in para.15 of 934859's Brief, filed April 5, 2007, namely that "The Condo Corp is controlled by the second floor members." needs to be corrected. It submits that it is correct that all of the Board members are second floor owners but it is also

clear that the first floor units have more that 57% of the unit factors and votes. The first floor owners, because of their majority, could elect what ever Board they wanted. The Minutes of the Annual General Meeting of Condo Corp, held on March 29, 2006, record that the existing Board members were re-appointed and that there were no nominations from the floor. The existing Board members are Glen Gurr, Gerry Masuch and Darcy Walls. These Minutes, which are Exhibit "G" to the Affidavit of Darcy Walls sworn May 29, 2006, include a discussion of Mr. Perron's lawsuit.

4. Were the first floor owners paying their own utilities and also paying for utilities used for the second floor and common areas?

[29] In para. 21 of his judgment, the learned Master said:

> The applicant complains that the main floor units do not have access to 2nd floor lobbies or elevators and that the 2nd floor unit holders enjoy janitorial and other services not needed by the main floor. In particular, the main floor units have separate utility meters, so they are paying not only their own utilities, but a portion of the utilities used for the second floor and common areas. The applicant requested the board to review these matters and to determine that some of the expenses were being inequitably charged based on unit factors, rather than use and benefit. In response, by letter dated November 17, 2005, the board of directors having reviewed the applicant's complaints responded that it would continue to assess based on unit factors. The response states in part:
>
> > ...We believe this to be the case because it is impossible to allocate specific expenses to specific units. For example, your clients have heavy trucks delivering various items and they cause more damage and wear and tear to the pavement than other units vehicles do, but we do not charge you a larger portion of the reserve fund that will be required to resurface or repair the asphalt. We have to shovel the sidewalks directly in front of your units, but we all pay for the snow clearing. We water and care for the landscaping outside the units, but we all pay for landscaping. You have lights illuminating your signs but we all share in the cost of electricity. Your units may use the garbage containers more, but we all share in the expenses. As you see it is not possible to allocate the expenses other than based on unit factors.

[30] 934859 submits that certain common expenses incurred by the Condo Corp, namely elevator maintenance, janitorial service and security, are more for the benefit of the second floor office units than for the benefit of the first floor units. 934859's position is that the Board of Directors of Condo Corp should exercise a discretion, granted to it by the Bylaws of Condo Corp, and allocate such expenses on other than a unit factor basis. The Board of Directors considered this complaint and as, in its view, there are other common expenses which may operate more for the benefit of the first floor owners than the second floor owners, it declined to exercise a discretion to depart from the customary unit factor allocation which has been in place since the Condo Corp was established.

[31] Condo Corp submits that the learned Master, in para. 21 of his Memorandum of Decision, was under the misapprehension that the first floor owners paid their own utilities but the second floor owners utility costs were bourne by the Condo Corp. Condo Corp states that counsel for 934859 concedes, before me, that is not the case but that all unit owners pay the utility costs for their own units and only common property utility costs are bourne by the Condo Corp.

[32] In para. 24 of his decision the learned Master noted that the assessment of common property utility costs on a unit factor basis is fair. This, Condo Corp, submits is what it has been doing throughout. This question of allocation of expenses for common areas is further addressed in paras. 62 to 66 herein.

5. Distribution of Parking Spaces.

[33] 934859 further submits and complains that the Developer's allocation of parking stalls, according to which unit owners purchased their units, is inequitable. It asserts that they should be redistributed by the Condo Corp according to unit factors.

[34] The distribution of parking spaces or stalls was addressed by Darcy Walls in paras. 4 to 7, inclusive, of his Affidavit sworn on November 30, 2006. Therein he described the reasons for the present distribution of the parking stalls.

[35] Condo Corp submits that the City of Calgary Land Use By-Law required the office units to have slightly more than twice as many parking stalls on a per square metre basis than the retail/wholesale units and accordingly the Developer allocated the parking stalls in such proportion. Condo Corp states that Units were sold at prices calculated to account for the differing parking stall allocations. It states further that as owners have sold units, their allocated parking stall privileges have been assumed by the new owners. Condo Corp states that presently no owner complains of having insufficient parking stalls.

[36] Condo Corp alleges that 934859 applied for a finding of oppression and some corrective action and the learned Master, in the absence of evidence, which has been now provided , determined that parking spaces be reallocated based on unit factor, but this solution and "approach would ignore the Land Use By-Law, the purchase prices paid by the owners and the historical allocation accepted by the owners. A further analysis of this issue is made in paras. 67 to 69 herein.

The Order of the Learned Master

[37] On June 16, 2006, 934859's application for relief under 67 of the Act was heard by the learned Master. On July 28, 2006 the learned Master issued a Memorandum of Decision and determined that Condo Corp had unfairly disregarded the interests of 934859 and the interests of the other main floor owners. The learned Master directed the Board of Directors to reallocate

utility, security and janitorial expenses largely or entirely to the second floor units and directed that the parking stalls be reallocated on a unit factor basis.

[38] The Order was filed on October 26, 2006. The learned Master ordered that:

1. The conduct of the business affairs of the Respondent and the conduct of the Board of Directors of Condominium Corporation No. 0312180 has unfairly disregarded the interest of the Applicant and the other main floor owners in Douglas Glen Business Centre and as such the conduct of the Respondent is improper.

2. The Board of Directors shall reallocate the costs of utilities of Douglas Glen Business Centre by assessing these charges, less recognition of some amount for outside signage, against the unit owners on the second floor or shall pay for all of the utilities for the unit owners on the first floor and add them to the Respondent's budget.

3. The Board of Directors shall charge only the unit owners on the second floor with the security and janitorial expenses for Douglas Glen Business Centre.

4. The Board of Directors shall make the changes indicated in paras. 2 and 3 herein to the 2006 budget and shall provide a credit to the Applicant and owners of units on the first floor of Douglas Glen Business Centre for the 2006 year based on a revised budget.

5. The Board of Directors of Condominium Corporation No. 0312180 shall reallocate the number of parking stalls available at the Douglas Glen Business Centre for each unit based on the unit factors for each unit and the Board of Directors shall have regard to the location of the spaces in relation to the respective units in reallocating the parking stalls.

6. The Applicant is granted party - party costs of this application. These costs and legal fees payable by the Respondent shall not be allocated to the Applicant in any future assessment.

[39] None of the other first floor were parties to the application before the learned Master.

Analysis

[40] An appeal from a master's order to a judge in chambers is a hearing de novo. (*Richards v. Gammell,* 2004 ABCA 289 at para. 11.)

[41] Condo Corp submits that at the hearing before the learned Master, its then counsel defended the application, essentially, on a bare jurisdictional basis and a proper evidentiary

response was not made. A more complete and extensive evidential response was made on this de novo hearing..

[42] 934859 submits that there is conflicting evidence before the Court in respect of the application. Additionally it makes reference to the recent amendments to the *Condominium Property Act*, R.S.A. 2000, c. C-22. It submits that this is really the Court's first real opportunity to deal with situations where the actions taken by the Condominium Board arguably impact negatively and prejudicially on the owners. 934859 submits that the Condominium Board has acted improperly and it is seeking the relief set out in para. 2 of Section 67.

[43] The *Condominium Property Act* grants various powers to a condominium corporation. The powers are listed under various heading. With respect to administrative expenses it provides, in part, in Section 39 the following:

> (1) 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 obligations of the corporation;
>
> (b) to determine from time to time the amounts to be raised for the purposes mentioned in clause (a);
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> (c) to raise amounts so determined by levying contributions on the owners
>
> (i) in proportion to the unit factors of the owners' respective units, or
>
> (ii) if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units;

[44] Pursuant to Section 39 a condominium corporation is empowered to raise funds to pay administrative expenses and to raise the funds "by levying contributions on the owners", namely condo fees, in proportion to the unit factors of the owners' respective unit, or, if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units.

[45] Condo Corp's General By-Law permits Condo Corp to assess expenses on a unit factor basis or on some other equitable basis. Section 3.3 of the By-Law, under the heading Powers of Corporation, provides:

> 3.3 In addition to the powers and rights conferred upon the Corporation under the Act, the Corporation may, and is hereby authorized to:

(k) raise amounts so determined by levying assessments on the Owners in proportion to their Units Factors for their respective units (subject to Clause 3.3 (s) hereof) or as otherwise herein provided;

(s) whenever and if the allocation of expenses, costs or charges hereunder are inequitably assessed on the basis of Unit Factors, weigh, allocate and assess against the Owners and their respective Units such expenses, costs and charges in such equitable manner as the Board shall from time to time and at any time resolve, provided that such manner of weighing, allocation and assessment will be notified to Owners on assessment and without limiting the generality of the foregoing, allocation and assessment of the whole of an expense, cost or charge to a single Owner of Unit shall be permitted.

[46] Section 7.3 of the General By-Law provides under the heading Allocation of Assessments:

> For the purposes of assessment for contributions to Common Expenses by the Owners, the Common Expenses of the Corporation shall subject to section 3.3(s) hereof be assessed by the Corporation in proportion to and on the basis of the Unit Factors for each respective unit, provided that:
>
> (a) if and whenever the Board is of the opinion, acting reasonably, that assessment upon another basis is better reflective of an equitable allocation of contribution to Common Expenses, the Board may employ such alternative method of assessment, provided that, in so doing, the Board shall advise the Owners, in writing, advise the Owners of the change to and method of such alternative allocation; and
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> (b) should the Board, from time to time and at any time, determine, acting reasonably, that a single Owner or less than all the Owners are responsible for certain items of Common Expense to the exclusion of any other Owner(s), the Board may assess the Owner(s) so determined responsible for such Common Expense alone and to the exclusion of the other Owner(s), provided that, in so doing, the Board shall advise the Owners, in writing, advise the Owners of such limited assessment.

[47] In para. 2 on p. 9 of its Brief, 934859 submits that, pursuant to clause 3.3(s) of the General By-Law, Condo Corp has a positive obligation to "weigh, allocate and assess" the expenses, costs and charges in an equitable manner. It submits that the obligation is triggered if the allocation of expenses, costs or charges are inequitably assessed. It also submits that clause 7.3 is not applicable as it is subject to the application of clause 3.3(s).

[48] It is submitted that the Court has the jurisdiction to affirm the Order of the learned Master based on the provisions of s.67 of the *Condominium Property Act*.

[49] 934859 submits that Section 39(1)(c)(ii) of the *Condominium Property Act*, empowers Condo Corp to raise amounts, it determines, "...for the control, management and administration of the common property... by levying contributions on the owners...if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units." Condo Corp's General By-Law, in Section 3.3(k), authorizes Condo Corp to raise the amounts by levying assessments on the owners in proportion to their unit factors for their respective units or as other wise provided within the General By-Law. Clause 3.3(k) is subject to Clause 3.3(s) which authorizes Condo Corp to

> (s) whenever and if the allocation of expenses, costs or charges hereunder are inequitably assessed on the basis of Unit Factors, weigh, allocate and assess against the Owners and their respective Units such expenses, costs and charges in such equitable manner as the Board shall from time to time and at any time resolve....

It is contended that Section 3.3(s) causes a problem as it is not a discretionary provision in that it does not say that the Board may but the language is that the Corporation shall. (emphasis added)

[50] In this respect, 934859, in its Brief submits:

> 2. It is submitted that pursuant to clause 3.3(s) of the Bylaws of the Condo Corp the Respondent (Condo Corp) has a positive obligation to "weigh, allocate and assess" the expenses, costs and charges in an equitable manner. This obligation is triggered if the allocation of expenses, costs or charges are inequitably assessed. It is also submitted that clause 7.3 is not applicable based on this clause being subject to the application of clause 3.3(s) of the Bylaws of Condo Corp.
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> 3. It is submitted that by the Condo Corp failing to so "weigh, allocate and assess" the expenses, costs and charges in an equitable manner the Board of Directors is acting in a manner which creates a disproportionate benefit to the Owners of the second floor of Douglas Glen Business Centre and a corresponding detriment to the first floor Owners. Moreover, it is submitted that such failure to so "weigh, allocate and assess" the expenses, costs and charges in an equitable manner is burdensome, harsh, wrongful, lacking in probity or fair dealing, and has been done in bad faith.
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> 4. Based on the fact that the first floor units have been designed as self contained units, have been required to install their own handicapped washrooms, and that access to the second floor has been historically restricted to the Owners of the units on the second floor, it is incumbent upon the Board of Directors of Douglas Glen Business Centre to allocate the expenses associated with the elevator,

janitorial, second floor common area utilities, and security costs to the Owners of the units on the second floor. The only utilities which should be charged in common with the first floor Owners should be those associated with the exterior of buildings as was Ordered by Master Laycock.

[51] However, in Section 7.3, the General By-Law authorizes the Board

(7.3) For the purposes of assessment for contributions to Common Expenses by the Owners, the Common Expenses of the Corporation shall subject to 3.3(s) hereof be assessed by the Corporation in proportion to and on the basis of the Unit Factors for each respective Unit; provided that

(a) if and whenever the Board is of the opinion, acting reasonably, that upon another basis is better reflective of an equitable allocation of contribution to Common Expenses, the Board may employ such alternative method of assessment...

(b) should the Board, from time to time and at any time, determine, acting reasonably, that a single Owner or less than all Owners are responsible for certain items of Common Expense to the exclusion of any other Owner(s), the Board may assess the Owner(s) so determined responsible for such Common Expense alone and to the exclusion of the other Owner(s)...(emphasis added)

[52] In my view, the argument that Section 3.3 of the General By-Law offers no discretion to the Board of Directors and that there is no discretionary aspect in clause 3.3(s) must fail. Section 3.3, in opening, offers a discretion to the Corporation, the Board of Directors, by extending to it the powers referred to in (k) and (s). In the preamble, Section 3.3. provides that in addition to the powers and rights conferred upon the Corporation under the Act, the Corporation may and is authorized to exercise the powers under (k). If the allocations are inequitably assessed on the basis of unit factors it may exercise the powers under (s) "...in such equitable manner as the Board shall from time to time and at any time resolve...." There is a discretionary aspect to both Section 3.3 (k) and (s). In particular, in my view Section 3.3(s) does not mandate a reallocation of expenses, it gives the Board of Directors a discretionary authority to reallocate.

[53] Section 7.3 is relevant and applicable and offers the Board of Directors a discretion when it considers the assessment of contributions in certain circumstances, set out therein, or when considering which owners are to be responsible for certain items of common expenses.

Should a Court defer to elected Boards?

[54] A review of the cases submitted indicates that a court should defer to elected Boards as a matter of general application. In a number of the cases, from the various provinces, the decisions related to situations where there is a provision similar to Section 67 of the *Condominium*

Property Act. The authorities cited, by Condo Corp, in support of the proposition that a Court should not lightly interfere in the decision of the democratically elected board of directors, acting within its jurisdiction and substitute its opinion about the propriety of the board of directors opinion unless the board's decision is clearly oppressive, unreasonable and contrary to legislation are:

> *Maple Leaf Foods Inc. v. Schneider Corp.* (1998) 42 O.R. (3d) 177, per Weiler, J.A. at pp. 191 and 192;
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> *Desjardins v. Winnipeg Cond. Corp.* 75 [1991] 2 W.W.R. 193, per Krindle, J. at p.195;
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> *York Condominium Corp. No. 382 v. Dvorchik* [1997] O.J. No. 378 per the Court at para.5;
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> *Schaper-Kotter, et al v. The Owners, Strata Plan 148* 2006 BCSC 634 per Brooke, J. At paras 10 to 12 inclusive
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> *Condominium Plan No. 932 2887 v. Redweik* [1994] A.J. No. 1020 per Master Quinn at paras 10 and 12.

[55] In my view, as a matter of general application, Courts do defer to duly elected condominium boards. However if improper conduct is alleged and a Court is satisfied that improper conduct has taken place, the Court, pursuant to Section 67(2) of the Condominium Act, may then direct and/or grant any of the remedies set out therein.

Was access to the common areas denied to 934859?

[56] The initial issue addressed was whether 934859 has been denied access or equal access to the foyer and the second floor of the condominium. 934859 alleged before the learned Master that basically there was an absolute denial of access particularly by reason of the installation by Condo Corp of a secure access system which the owners of the main floor units did not have. In para. 3 of his Affidavit sworn March 22, 2006 Allen Sherlock deposed:

> The second floor has been secured by the installation of a secure access system which the owners of the main floor units do not have access to. As such the common property on the second floor is used exclusively by the second floor owners and their invitees.

[57] In its Brief, 934859 submits in paras. 4 and 5:

> 4. The Condo Corp has secured access to the second floor by the installation of a secure system on the entrance to the foyer. The evidence of 934859 is unequivocal that at no time has equal access to the foyer and second floor been provided to 934859. The Condo Corp has also insisted from prior to the purchase of the four

units by 934859 until January 4, 2007 that 934859 would not be given equal access to the foyer and the second floor.

5. The installation of the secure access system by the Condo Corp and the insistence of the Directors of the Condominium Corporation No. 0312180 that the first floor owners shall not have equal access to the foyer and the second floor and the refusal to provide equal access has created a situation whereby the foyer, stairway, elevator and second floor are treated as exclusive use areas. Notwithstanding this the Condo Corp has over three years shifted the burden of paying the expenses associated with the foyer, stairway, elevator and second floor to the first floor owners creating a disproportionate benefit to the second floor owners.

[58] In para. 2 of his Affidavit, sworn March 20, 2007, Marcus Perron, the President of 934859, deposed:

2. I met with Greg Gutek, a principal of Bannister Road Development Corporation, the developer of Douglas Glen Business Centre (the Developer), prior to 934859 Alberta Ltd. making an offer to purchase suites 113 (unit 1), 117 (unit 2), 121 (unit 3) and 125 (unit 4) all at 10836 - 24th Street S.E. The Developer informed me that no access would be provided to the foyer and second floor of the Douglas Glen Business Centre (the Exclusive Use Areas) as the units which the corporation was considering purchasing were self contained. As a consequence of the lack of the access 934859 was required to install handicapped washrooms in each of the four units to satisfy the City of Calgary requirements.

[59] The averments and submissions by 934859 that there was an absolute denial of access to it, by Condo Corp to the foyer and second floor is incorrect. The evidence indicates that there was no denial access during normal business hours. All owners and occupiers of the ground floor units had access as everybody else. Access after normal business hours was available through the use of a security access card. Mr. Perron was an investor who did not carry on any business in the building and if he now wishes an access card one would be supplied to him. No access card was offered to him earlier nor did he request one. I agree with counsel for Condo Corp that it was not something that would immediately spring to mind that Mr. Perron must be given an access card. I note that the two other owners of the first floor units received access cards and are not parties to this application.

[60] In my view, the first floor units had unlimited access to the common areas of the foyer and second floor, inclusive of the only public washrooms in the building, at any time during the regular business hours. I note that 934859 was required to install washrooms but these were handicapped washrooms in each of the four units to satisfy the City of Calgary requirements. It had access to washrooms on the second floor as did all the unit owners.

[61] The reasons for the installation of a security service are set out by Darcy Walls, in his Affidavit sworn November 30, 2006, where in para. 10 he deposes:

> The security service for the Condominium Project is required in order to protect the common property, including utilities located in the common property areas (there are alarms associated with the utilities which advise the Condominium Corporation if the utilities are in danger of freeze-up, as well as water meters, etc.). In addition, the security services are necessary in order to prevent unauthorized access to certain common areas of the Condominium Project, including the common vestibule, elevator, equipment storage areas, and second floor corridors and washrooms.

Allocation of expenses for common areas

[62] In determining whether the expenses for the common area are allocated equitably or inequitably reference may be had to the nature of and reason for the expense and who and how much does each unit owner benefit from the services. The second floor unit owners would benefit more from the use of the common areas on the second floor and from the stairs and elevator which provide the only access to the second floor. However the second floor unit owners are not the sole beneficiaries of the security system. The system protects not only the common areas being the foyer and second floor but the building itself from after business hours trespass, vandalism and potential damage as deposed to in para. 10.

[63] Further, in para. 11 of his Affidavit, Darcy Walls outlines other expenses that are allocated to the unit owners on a unit factor basis:

> There are also other services and costs which in general benefit the first floor units more than the second floor units. Most prominently of these are lights/electricity costs, garbage collection and use of the parking lot. The condominium has numerous outdoor lights that every evening are illuminating the names of the first floor retail/warehouse units. The cost of the bulbs, maintenance of the lights and the cost of electricity is paid by all owners on a unit factor basis but in general only benefit the first floor owners. The first floor owners, being more retail/warehouse type of units with delivery bays in the rear of the condominium, generate considerably more garbage than the professional offices on the second floor. The cost of the increased garbage collection is also borne by all owners on a unit factor basis but primarily favours the first floor owners. These large transport trucks, because of their weight, put additional wear and tear on the parking lot. Notwithstanding, the increased cost of maintenance of the parking lot is also borne by all owners on a unit factor basis.

[64] In para. 21 of his judgment, the learned Master reviews the complaint of 934859 and its request that the Board of Directors review its complaint and then determine that some of the expenses were being inequitably charged based on unit factors rather than use and benefit. The learned Master quoted from Board of Directors' response letter dated November 17, 2005 where in it having reviewed 934859's complaint determined to continue to assess the expenses based on unit factors. The Board of Directors' response, in part, was:

> ...We believe this to be the case because it is impossible to allocate specific expenses to specific units. For example, your clients have heavy trucks delivering various items and they cause more damage and wear and tear to the pavement than other units vehicles do, but we do not charge you a larger portion of the reserve fund that will be required to resurface or repair the asphalt. We have to shovel the sidewalks directly in front of your units, but we all pay for snow clearing. We water and care for the landscaping outside the units, but we all pay for the landscaping. You have lights illuminating your signs but we all share in the cost of electricity. Your units may use the garbage containers more, but we all share in the expenses. As you see it is not possible to allocate the expenses other than based on unit factors.

[65] The learned Master, in para. 22, fairly and correctly stated the issue:

> The point being made by the applicant (934859) is reinforced by the comments in the letter of November 17, 2005. Some services, repairs and maintenance benefit some of the unit holder more than others. Acknowledging this fact, the board may attempt to allocate unequally, some expenses of the unit owners, based on their perception of benefit. Alternatively, the board may conclude that sharing based on unit factors is reasonably equitable. Has the board unfairly disregarded the applicant's interest, or acted in an oppressive or prejudicial fashion?

[66] In para. 21 of his judgment the learned Master sets out 934859's complaint as follows:

> The applicant complains that the main floor units do not have access to 2nd floor lobby or elevators and that the 2nd floor unit holders enjoy janitorial and other services not needed by the main floor. In particular, the main floor units have separate utility meters, so they are paying not only their own utilities, but a portion of the utilities used for the second floor and common areas.

The information provided to the learned Master was inaccurate and the learned Master's decision was based on this inaccurate and incorrect information. As I have determined the first floor unit owners had unrestricted access to the foyer and 2nd floor during regular business hours. After normal business hours, to access this common area an access card was required which was available simply by asking for one.

Reallocation of Parking

[67] With respect to parking, 934859 submits that if the Court finds that there is no reason to reallocate the common expenses then it is incumbent upon the Court to distribute and allocate parking in accordance with unit entitlement. In my view the issue is whether there was anything oppressive, inequitable or improper about the allocation of parking stalls by the Condo Corp. Condo Corp submits that the allocation of parking stalls was made by the developer who allocated the parking stalls essentially in accordance with the City of Calgary Land Use Bylaw 2P80 (Land Use Bylaw) which require that office units were to have slightly more than twice as

many parking stalls per square foot as the warehouse units. It is submitted that the units were sold at prices calculated to account for the differing parking stall allocations. Further as owners sold their units, the allocated parking stall privileges were assumed by the new owners. Condo Corp further submits that, in the absence of evidence, which has now been provided, the learned Master directed that the parking spaces be reallocated based on unit factors. The learned Master directed:

> The parking spaces shall be allotted to the unit owners fairly, having regard to the location of the spaces in relation to the owners' units.

Condo Corp submits that this approach does not take into account the Land Use Bylaw, the purchase prices paid by the owners, and the historical allocation accepted by the unit owners.

[68] In paras. 4 to 7, inclusive, of his Affidavit, sworn November 30, 2006, Darcy Walls describes the basis upon which the developer allocated parking stalls to the unit owners and the reasons therefore. The Land Use Bylaw provides, in Section 18, that the minimum number of parking stalls required for office is "1 parking stall per 46 square metres of net floor area", for retail stores "1 parking stall per 46 square metres of net floor area", and for warehouses and wholesale establishments "1 parking stall per 93 square metres of gross floor area up to 1860 square metres, and 1 additional parking stall for each subsequent 465 square metres".

[69] Condo Corp states that 934859 received exactly what it signed up for at the time it purchased the four units and that it has not received any indication from the other owners that the parking plan is unfair or that they think it should be changed. In my view the Board of Directors maintain the authority to reallocate the parking spaces which were allocated by the developer. These parking spaces have not been transferred by the Board of Directors to any of the unit owners nor transferred in perpetuity.

Prior judicial consideration of sections 39 and 67 of the Condominium Property Act

[70] Sections 39 and 67 of the *Condominium Property Act*, as amended, were considered by Master Smart in *Owners: Condominium Plan No. 982-2595 v. Fantasy Homes Ltd.*, 2006 ABQB 325. The learned Master, in para. 13 of his Decision, reproduced paras. 22, 25 and 26 of Master Smart's decision. In para. 25, in part, and in para. 26, Master Smart stated:

> 25. Section 67 deals with Court ordered remedies where there is improper conduct. Presumably Fantasy would fall under Section 67 (1) (a)(ii) and (iii), that is, the conduct of the business affairs of the Corporation or the exercise of the powers of the board is oppressive or unfairly prejudicial to or unfairly disregards the interest of Fantasy as an owner. The Court is given the power under Section 67(2) to summarily deal with abuse by the Condominium Corporation or its board and declare the subject caveat improper together with directing its discharge....Clearly this section brings forward again the concept of fairness. The Court must look to all the facts relevant to its assessment of conduct. In assessing fairness of the situation the Court must examine the purported

improper conduct of the Corporation and its Board in light of the owner/developer's alleged improper conduct. Regardless, it seems that the Court is in a position to grant a number of remedies to deal with circumstances which fall under improper conduct.

26. The legislature did not enunciate circumstances where the Corporation By-law could or should allocate financial obligations other than by way of unit factor. It is likely safe to say that this particular fact situation was not one that was brought forward as an example to justify this ability to allocate but that does not make it any the less applicable. In my view what the legislature recognized was that depending on the facts and circumstances having regard to Section 67 there may be an infinite number of circumstances where assessment otherwise than by way of unit factor would be appropriate.

[71] I agree with Master Smart's analysis and conclusions in the two above paras. and I also agree with Master Smart where in para. 23 he states:

23. The basis for an assessment other than by unit factor must be a legitimate assessment having regard to the purpose and objects of the Act. The Act permits the creation of a unique scheme for the ownership of land. It provides some guidelines and rules related to their development along with an element of consumer protection. Finally it provides for a mechanism to manage and administer a complex joint ownership structure having regard to the need for responsible and efficient management of the common elements created by the structure. It includes the ability of a majority to control the administration and management of the property which permits infringement upon property rights otherwise enjoyed by a fee simple owner of real property. Each case must be examined and assessed on the basis of the facts and circumstances within the context of the scheme of the Act.

[72] Section 67 reads as follows:

Court ordered remedy

67 (1) In this section,

(a) "improper conduct" means

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

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

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

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

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

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

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

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

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

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

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

(e) award costs;

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

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

[73] In Section 67 improper conduct is defined as conduct of business affairs or the exercise of the powers by the board in a manner that is oppressive or unfairly prejudicial to or that unfairly

disregards the interest of an interested party. These three criteria have been considered judicially but only in a limited way in the context of Section 67 of the Act. In determining the meaning of "oppressive", "unfairly prejudicial" and "unfairly disregards" a court can have regard to the interpretation placed on the same expressions in Sections 215(1) and 242(2) of the *Business Corporations Act*, RSA 2000 c. B-9, and similar expressions in statutes from other jurisdictions where the provisions are worded similarly to Section 67 of the Act.

[74] In *Diligenti v. RWMD Operations Kelowna Ltd.* (1976) 1 B.C.L.R. 36, Fulton, J. discussed the meaning of oppression and conduct which is unfairly prejudicial in respect to an application for relief under Section 221 of the *Companies Act*, S.B.C. 1973, Ch. 18. This section is not as wide as Section 242 of the *Alberta Business Corporations Act*. In paras. 22 and 23, he stated:

> 22. Turning then to the meaning and effect which have been given and which are retained and that which should to given the new expression, I note that in *Scottish Co-operative Wholesale Society Ltd. v. Meyer,* [1959] A.C. 324...Viscount Simonds said, at p.342, that he adopted "the dictionary definition of the word" (oppressive) as "burdensome, harsh and wrongful". In *Elder v. Elder* (1952) S.C. 49, Lord Keith said a p.60 that "...oppressive involves, I think, at least an element of lack of probity or fair dealing to a member in the matter of his right as a proprietary shareholder."
>
> 23. There has been no interpretation, in this context, of the words "unfairly prejudicial". Turning to the dictionaries for assistance, I find the following definitions in the Shorter Oxford English Dictionary (3rd Ed.):
>
> > Prejudice... 1. Injury, detriment, or damage, caused to a person by judgment or action in which his rights are disregarded; hence, injury to a person or thing likely to be the consequence of some action.
> >
> > Prejudicial... 1. Causing prejudice; detrimental, damaging (to rights, interests, etc.)
> >
> > Unfair... Not fair or equitable; unjust.... Hence, unfairly.
>
> It is significant that the dictionary definitions support the instinctive reactions that what is unjust and inequitable is also unfairly prejudicial.

[75] In *Keho Holdings Ltd. v. Noble* (1987), 52 Alta. L.R. (2d) 195 the Alberta Court of Appeal discussed the origin and meaning of the terms oppressive conduct, unfair prejudice and unfair disregard as they were used in Sections 207 and 234 of the *Business Corporations Act*, S.A. 1981, c. B-15 which was proclaimed in force February 1, 1982. I note that the Sections 207 and 234 of the *Business Corporations Act* are essentially the same as Sections 207 and 234 of the *Canada Business Corporations Act,* S.C. 1974-1975-1976 which was proclaimed in force

December 15, 1975. Each section uses the same three expressions. In the current *Alberta Business Corporations Act*, R.S.A. c. B-9 former Section 207 is now Section 215 and Section 234 in now Section 242. In my view the expressions have the same meaning in each of the sections.

[76] The Alberta Court of Appeal in *Keho Holdings Ltd. v. Noble* discussed the meaning of oppression and unfair prejudice as they are used in Section 207. As the expressions in Sections 207 and 234 of the *Canada Business Act* are essentially the same, the discussion of Section 207 would apply equally to Section 234. At pp. 200-201, Haddad J.A. for the Court stated:

> In preparing proposals for the present legislation both the federal and provincial law reform agencies refer to and were guided by the standards reflected by Lord Cooper's words in *Elder v. Elder & Watson Ltd.,* [1952] S.C. 49 at 55. I quote:
>
> > ...the essence of the matter seems to be that conduct complained of should at the lowest involve a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely.
>
> (See Institute of Law Research and Reform Report No. 36 (1980), vol. 1, "Proposal For A New Alberta Business Corporations Act".)
>
> Lord Keith described oppression with this statement in *Scottish Co-op. Wholesale Soc. Ltd. v. Meyer,* [1959]:
>
> > Oppression under s. 210 may take various forms. It suggests, to my mind, as I said in *Elder v. Elder & Watson*...a lack of probity and fair dealing in the affairs of a company to the prejudice of some portion of its members.
>
> In my view the following extract taken from the reasons for judgment of Brooke J.A. in *Re Ferguson and Imax Systems Corp.* (1983), 43 O.R. (2d) 120...presents a model of the principles to be employed in evaluating fairness:
>
> > The policy of the law to ensure just and equitable treatment of minorities can be traced back to early cases. In *Allen v. Gold Reefs of West Africa Ltd.*, [1990] 1 Ch. 656 at p. 671, Lindley M.R. speaking of the powers of a corporation to amend its articles said"
> >
> > "...it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bona fide for the benefit of the company as a whole, and it must not be exceeded."

> In *Goldex Mines Ltd. v. Revill, et al* (1974) 7 O.R. (2d) 216 at p. 224, 54 D.L.R. (3d) 672 at p. 680, Arnup J.A. for this court, after considering the earlier cases, said:
>
> "The principle that the majority governs in corporate affairs is fundamental to corporation law, but its corollary is also important - that the majority must act fairly and honestly. Fairness is the touchstone of equitable justice and when the test of fairness is not met, the equitable jurisdiction of the court can be invoked to prevent or remedy the injustice which misrepresentation or other dishonesty has caused."
>
> But s. 234 must not be regarded as being simply a codification of the common law. Today one looks to the section when considering the interests of the minority shareholders and the section should be interpreted broadly to carry out its purpose: see the *Interpretation Act*, R.C.S. 1970 C-I-23 s. 11. Accordingly, when dealing with a close corporation, the court must consider the relationship between the shareholders and not simply the legal rights as such. In addition, the court must consider the *bona fides* of the corporate transaction in question to determine whether the act of the corporation or directors effects a result which is oppressive or unfairly prejudicial to the minority shareholder. Counsel has referred us to a number of decision. They primarily establish that each case turns on its own facts. What is oppressive or unfairly prejudicial in one case may not necessarily be so in the slightly different setting of another

[77] Haddad J.A. stated further at p. 201:

> I concur, without hesitation, that these sections ought to be broadly and liberally interpreted. A broad interpretation will reflect the intention of the legislation to ensure settlement of intra corporate disputes on equitable principles as opposed to adherence to legal rights. The equity approach employed by Brooke J.A. was earlier expressed by Lord Wilberforce in *Ebrahimi v. Westbourne Galleries,* [1973] A.C. 360...in his review of the application of the just and equitable rule.

[78] In my view Section 67(1)(a) of the *Condominium Property Act* ought to be broadly and liberally interpreted.

[79] In *Re Esteem Investments Ltd. v. Strata Plan No. VR 1513 (Owners) (1987),* 46 D.L.R. (4th) 577, Esteem, an owner of eight strata lots in the residential condominium building called Strata Plan VR 1513, was sued, together with the builder Polygon Properties Ltd., by the Owners alleging severe structural defects to the building. Esteem was the developer. To finance the legal action, the strata Council passed a resolution imposing a special assessment on all the strata lot owners on a unit entitlement basis. The strata council was suing for compensation for defects in the building's common property and common facilities. Esteem refused to pay the special assessment imposed for legal cost of an action wherein it was a defendant. The strata council

filed liens against Esteem's eight strata lots. Esteem petitioned the court for relief pursuant to s. 42 of the *Condominium Act* on the basis that the assessment for legal fees was oppressive and unfairly prejudicial conduct. The question posed was:

> Can the strata council require Esteem to contribute towards the legal costs for an action in which Esteem is a defendant or is this conduct oppressive or unfairly prejudicial within the meaning of s.42 of the *Condominium Act*?

[80] Section 42 of the *Condominium Act* provides:

> 42. An owner may refer to arbitration or may apply to the court to prevent or remedy a matter where he alleges
>
> > (a) the affairs of the strata corporation are bing conducted, or powers of the corporation or strata council are being exercised in a manner oppressive to one or more owners, including himself; or
> >
> > (b) that some act of the strata corporation has been done or is threatened, or that some resolution of the owners or a class of owners had been passed or is proposed that is unfairly prejudicial to one or more owners, including himself.

[81] Esteem argued that the special assessment was both oppressive and unfairly prejudicial in that the strata council was requiring Esteem to contribute to legal costs incurred in suing itself. The Owners argued that the special assessment did not fall within the definition of oppressive and unfairly prejudicial conduct. For a definition of the two terms, the Owner referred to cases interpreting the same terms under s. 224 of the *British Columbia Company Act*, R.S.B.C. 1979, c. 59.

[82] In his judgment, at pp. 579-580, Lander J. stated:

> The respondents cite no case, in which the terms "unfairly prejudicial" and "oppressive" were defined in the context of the *Condominium Act.*
>
> Due to the similarity in the wording between s.224 of the *Company Act* and s. 42 of the *Condominium Act*, I believe that the definitions given to the words "oppressive" and "unfairly prejudicial" under the *Company Act* are relevant to and assist in the interpretation of s. 42 of the *Condominium Act*.
>
> Legg J. of this court in *O'Connor v. Winchester Oil & Gas Inc.*, [1986] 2 WWR. 737 at p. 744... defined oppressive conduct in the context of s. 224 of the *Company Act* to be "conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing". He defined the term unfairly prejudicial to mean "acts that are unjustly or inequitably detrimental".

> The definition of these two terms was expanded upon by McEachern C.J.S.C. of this court was in *Nystad v. Harcrest Apartments Ltd.* (1986) 3 B.C.L.R. (2d) 39....In *Nystad*, the Chief Justice equated oppressive conduct with bad faith. At p. 46, he stated: "[I]t therefore appears that there may be no oppression remedy open to the injured minority shareholder when the directors have acted in good faith."
>
> The Chief Justice then went on to find on the facts that (at p. 46): "There being no suggestion of bad faith I conclude that there is no oppression."
>
> ...The phrase "unfairly prejudicial" was considered in *Diligenti v. RWMD Operations Kelowna Ltd.* (1976), 1 B.C.L.R. 36 (S.C.). In *Diligenti*, Fulton J. referred to the dictionary definitions of the words "prejudicial" and "unfairly" and concluded at p.46: "It is significant that the dictionary definitions support the instinctive reactions that what is unjust and inequitable is also unfairly prejudicial." Mr. Justice Fulton then went on to quote from the House of Lord's decision in *Ebrahimi v. Westbourne Galleries Ltd.*, [1973] 2 All E.R. 492, and stated that the "just and equitable" provision in the *English Act* was equivalent to the "unfairly prejudicial" provision in the *British Columbia Company Act*. At p. 500 All E.R. of the *Ebrahimi* decision, Lord Wilberforce stated with reference to the just and equitable provision that:
>
> > It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

[83] At p.581, Lander J. found that Lord Wilberforce's statement was applicable to the case at bar and he held:

> In conclusion, I find that the special assessment levied by the strata council cannot amount to oppressive conduct, within the meaning of s. 42(a) of the *Condominium Act* because there is no evidence of bad faith. However, the assessment is unfairly prejudicial in that it is unjust and inequitable to require an owner to bear costs of suing itself. Esteem is therefore entitled to relief against the assessment and to the discharge of the liens filed against its eight strata lots pursuant to s. 42(b) of the *Condominium Act*.

[84] In *Deluce Holdings Inc. v. Air Canada* (1992) 12 O.R. (3d) 131, Blair, J., in an application made under s. 241 of *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 considered the "oppression remedy" provided in s. 241(2). The section reads as follows:

> 241(2) If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates
>
> > (a) any act or omission of the corporation or any of its affiliates effects a result,

> (b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or
>
> (c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.

Blair J., at p.9, said:

> In my view the conduct of Air Canada and its nominee directors, as outlined above, could be found, after trial, to constitute "oppression" of Deluceco's interests as a minority shareholder in Air Canada. While the conduct may not constitute "oppression" in the classic sense of conduct which is "lacking probity" or "burdensome, harsh and wrongful", it may none the less be conduct which is "unfairly prejudicial" to or which "unfairly disregards" the interests of Deluceco as a minority shareholder, contrary to s.241 of the CBCA. The authorities make it clear that this distinction exists and that the latter sort of conduct constitutes grounds which are "less rigorous" than oppression: see *Mason v. Intercity Properties Ltd.* (1987), 59 O.R. (2d) 631, 38 D.L.R. (4th) 681 (C.A.), per Blair J.A. at p.635 O.R., p.685 D.L.R.; Re Jermyn Street Turkish Baths Ltd., [1971] 3 All E.R. 184 (C.A.).

[85] In addition to the cases referenced above there are a number of cases in which the courts of British Columbia have considered similar wording used and remedies available to those in Section 67 of the *Condominium Property Act*.

[86] Pursuant to the *Condominium Act*, R.S.B.C. 1996, c. 64, s. 42 the remedies available were based on oppressive conduct and unfairly prejudicial conduct. This statute was repealed and replaced by the *Strata Property Act*, S.B.C. 1998 which came into force on July 1, 2000. The remedies available under the *Strata Property Act* are based on significant unfairness. Section 164(1) thereof provides:

> (1) On application of an owner or tenant, the Supreme Court may make any interim or final order it considers necessary to prevent or remedy a significantly unfair
>
> (a) action or threatened action, by, or decision of the strata corporation, including the council, in relation to the owner or tenant, or....

[87] One of the initial cases in which the meaning of the words "significantly unfair" were considered was *Reid v. Strata Plan LMS 2503* [2001] B.C.J. No. 2377. A hearing was held before a Chambers judge as a result of a dispute between the owners of three neighbouring units in a condominium building. The issue was whether a resolution passed by the strata council

concerning the common property entry was significantly unfair to Mr. Reid, one of the three unit owners. Mr. Reid had argued that the temporary permission to place various items on the common entry given to the two other condominium holders affected his view and the marketability of his unit. Sinclair Prowse J. heard the application and noted that the term "significantly unfair" in s.164 of the *Strata Property Act* had not been previously judicially considered. Sinclair Prowse J. referred to s.42 of the former *Condominium Act* and noted that under the Act "...an owner could apply to the court to remedy behaviour of the strata corporation that was 'oppressive' or acts or resolution that were 'unfairly prejudicial' to the owner." These two terms had been defined by the courts and in the case of *Blue-Red Holdings Ltd. v. Strata Plan VR 857* (1994), 42 R.P.R. (2d) 49 (B.C.S.C.) the Court decided that oppressive conduct was conduct that was burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. Unfairly prejudicial conduct was defined as conduct that is unjust or inequitable. Sinclair Prowse J. agreed with counsel for both parties that the meaning of significantly unfair would encompass, at the very least, oppressive and unfairly prejudicial conduct.

[88] A number of decisions thereafter from the British Columbia Supreme Court cited Sinclair Prowse J's definition of "significantly unfair" with approval. In *Gentis v. The Owners, Strata Plan VR 368*, [2003] B.C.J. No. 140, Masuhara J. referred to Sinclair Prowse J's decision as authority for the definition of significantly unfair and added the following comment:

> [28] I would add to this definition only by noting that I understand the use of the word 'significantly' to modify unfair in the following manner. Strata Corporations must often utilize discretion in making decisions which may affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that a court should only interfere with the use of this discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.
>
> [29] I am supported in this interpretation by the common usage of the word significant, which is defined as "of great importance or consequence": The Canadian Oxford Dictionary (Toronto: Oxford University Press 1988) at 1349.

[89] In *Reid v. Strata Plan LMS 2503* [2003] B.C.J. No. 417 the British Columbia Court of Appeal dismissed the appeal from Sinclair Prowse J's judgment and in para. 27 Ryan J.A., for herself and Levine J.A. stated:

> I agree with Masuhara J. that the common usage of the word "significant" indicates that a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness. This analysis accords with one of the goals of the Legislature in rewriting the *Condominium Act*, which was to put the legislation in "plain language" and make it easier to use (British Columbia, Official Report of Debates of the Legislative Assembly, Vol. 12 (1998) at 10379). I also note that

> the term "unfair" is defined in the Canadian Oxford Dictionary as "not just, reasonable or objective". It may be that this definition of "unfair" connotes conduct that is not as severe as the conduct envisaged by the definitions of oppressive or unfairly prejudicial. However, counsel argued this appeal on the basis that "significantly unfair" has essentially the same meaning as "oppressive and unfairly prejudicial". For the purposes of this appeal the distinction between the definitions makes no difference. On either definition, the resolution passed by the strata council cannot be said to be significantly unfair to Mr. Reid.

[90] Prior to the British Columbia Court of Appeal rendering judgment in the appeal of *Reid v. Strata Plan LMS 2503*, Martinson J. heard an application by the Owners of strata lots in a condominium complex to compel the owner of the parking lot underneath the building envelope to pay a portion of special levies to cover the cost of repairs to the building envelope. Martinson J. cited, with approval, Sinclair Prowse J's definition of "significantly unfair" stating in para. 47

> The meaning of the words "significantly unfair" would at the very least encompass oppressive conduct and unfairly prejudicial conduct or resolutions. Oppressive conduct has been interpreted to mean conduct that is burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith. "Unfairly prejudicial" has been interpreted to mean conduct that is unjust and inequitable: *Reid v. Strata Plan LMS 2503*, [2001] B.C.J. No. 2377.

[91] In *Chow v. The Owners, Strata Plan LMS 1277*, 2006 BCSC 335, Taylor J., in discussing the term "significant unfairness" quoted paras. 27-29 (set out above) from the judgment of Ryan J.A. in *Reid v. Strata Plan LMS 2503* and additionally at para. 74 stated:

> The concept of unfairness was considered in *Ernest & Twin Venture (PP) Ltd. v. Strata Plan LMS 3259*, 2004 BCCA 597..., where Lowry J.A. at paras. 23-25 observed:
>
> It must be accepted that some actions of a strata corporation will be unfair to one or more strata lot owners in that the will of the majority may often serve the interest of the majority to the detriment of the minority. Thus, to obtain relief, an owner must establish significant unfairness.
>
> What amounts to significant unfairness was addressed by this Court in *Reid v. Strata Plan LMS 2503*....There, at paras. 26-27, it was accepted that while it might relate to conduct that was less sever, at least for the purposes of that case, "significantly unfair" was equated with that which is oppressive and unfairly prejudicial.

[92] In section 67 (1)(a) of the *Condominium Property Act* "improper conduct" means the conduct of the business affairs of the corporation or the exercise of powers of the board in a manner that is oppressive or unfairly prejudicial or that unfairly disregards the interests of an interested party. The interested party in this case is the owner 934859.

[93] Oppression or oppressive conduct has been defined and discussed in a number of the cases cited above. It has been defined to be conduct that is burdensome, harsh or wrongful or which lacks probity or fair dealing.

[94] The term "unfairly prejudicial" has been defined to mean acts that are unjustly or inequitably detrimental.

[95] The term "unfairly disregards" may be defined as unjust and inequitable. Unfairly itself has been defined as "in an unfair manner, inequitably, unjustly". Fair has been defined as "just, equitable, free of bias or prejudice, impartial". Prejudice means " injury, detriment or damage caused to a person by judgment or action in which the person's rights are disregarded: hence injury, detriment or damage to a person or a thing likely to be the consequence of some action". Prejudicial means "causing prejudice; detrimental damaging "to rights, interests, etc."

[96] Section 164 (1)(a) of the *British Columbia Strata Property Act* has been equated with that which is oppressive and unfairly prejudicial. When interpreting unfairly prejudicial conduct, regards should also be had to the comments of Masuhara J. in para. 28 of *Gentis v. Strata Plan VR 368*, supra.

[97] The term 'significantly unfair' encompasses conduct that is oppressive, unfairly prejudicial or which unfairly disregards the interests of an interested party.

[98] I note that the hearing before me is a *de novo* hearing. The evidence on which the learned Master relied for his decision was, in my view, incomplete and in respect of some material and important aspects incorrect. Substantially more information and evidence has been placed before me. As well, the submissions of Condo Corp. were more expansive and not substantially limited to a jurisdictional question.

[99] I made numerous findings as stated above. In the result, in summary, I conclude that:

(1) 934859 always had equal access to all common areas during normal business hours. The installation of the security system affected only the after business hours access. In order to access the secured common areas after business hours an access card was required. 934859 was not denied access to the secured common area or an access card. All that was required was for 934859 to indicate that it wanted an access card and one would have been provided.

(2) Condo Corp did not change the historic method of assessing common expenses.

(3) Condo corp. is not controlled by the second floor owners. The first floor units have more than 57% of the unit factors and votes. The elected Board of Directors are persons from the second floor even though the first floor unit owners had a majority of the votes.

(4) It has been conceded by 934859 that unit owners pay utility costs for their own units and only common property costs are bourne by Condo Corp.

(5) The parking allocation was put in place by the developer on the basis described above and the parking stalls or spaces have not been allocated in perpetuity. The allocation in my view was just and equitable and what was agreed to at the time by the purchaser of the unit.

[100] 934859 was the sole applicant in the application before the learned Master. None of the other owners were parties to that application. On this appeal there were no complaints or submissions from the two other first floor unit owners and in particular no submissions with respect to the reallocating of the parking stalls.

[101] Having considered each of the submissions, complaints and the materials filed I conclude that the evidence does not establish or demonstrate that there has been any improper conduct on the part of Condo Corp or the Board of Directors. In my view neither the Condo Corp nor the Board of Directors have unfairly disregarded the interests of 934859. Nor have they conducted the business affairs or exercised powers in a manner that was oppressive or unfairly prejudicial to 934859 or to the other first floor owners. In the result, the application of Condo Corp is granted and the Order of the learned Master is set aside. Condo Corp is granted party and party costs against the Respondent, 934859.

Heard on the 16th day of April, 2007.
Dated at the City of Calgary, Alberta this 24th day of October, 2007.

P. Chrumka
J.C.Q.B.A.

Appearances:

Richard L. John of Laurich John
for the Applicant

John M. McDougall of Scott Hall LLP
for the Respondent

Corrigendum of the Memorandum of Decision
of
The Honourable Mr. Justice P. Chrumka

Change of Counsel from John M. McDougall of Scott Hall for the Respondent to **Blair C. Yorke-Slader of Bennett Jones LLP for the Respondent.**

Corrigendum of the Memorandum of Decision
of
The Honourable Mr. Justice P. Chrumka

The date this matter was heard on the last page has been changed from April 12, 2007 to April 16, 2007, to reflect the actual date heard.