IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Aviawest Resort Club et al v. The Owners, Strata Plan LMS 1863 et al,*** 2005 BCSC 1728

Date: 20051213
Docket: S40601
Registry: Nanaimo

Between:

Aviawest Resort Club, Aviawest Resort Inc. Dorothy Clarkstone, Andrew Shanley Pearson and Susan Lee Pearson

Plaintiffs

And

The Owners, Strata Plan LMS 1863, Chevalier Tower Property Inc., Rosedale on Robson Suite Hotel Inc., C.P. Man, Larry Man, Louis Man, John Logan and Eric Fung

Defendants

Before: The Honourable Mr. Justice Lander

Reasons for Judgment

Counsel for the Plaintiff	P. Behie and S. McPhee
Counsel for Defendant Chevalier Tower Property Inc.	P.A. Williams
Counsel for the Defendants Rosedale on Robson Suite Hotel Inc. and John Logan	B.A. Thompson
Counsel for the Administrator	C. Wilson
Date and Place of Hearing:	September 28, 29, October 5,6,7, 2005 Nanaimo, B.C.

[1] On application of the plaintiff Aviawest, I made an order on June 9, 2004, appointing Mr. Gerry Fanaken, Administrator, under s.174 of the ***Strata Property Act*** SBC 1988 c.43. That order contained two specific orders which read as follows:

> The Court appointed an administrator for a term of one year with liberty to apply for a renewal of the appointment. The formal order contains the following two orders:
>
> (1) An administrator be appointed to exercise the powers and perform the duties of the Strata Council for The Owners, Strata Plan LMS 1863, (the "Rosedale Strata Corporation") pursuant to s.174 of the *Strata Property Act,* S.B.C. 1998, Chapter 43 (the "Act"), with the powers contained in section 174 of the Act, such powers and duties to be held at the exclusion the members of the Rosedale Strata Corporation.
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> (9) Pursuant to s.174(3)(c) of the Act, the Administrator shall have the power to impose a special levy, to approve a special budget and to pass any other resolution normally requiring a majority or 75%, if such resolution is in the best interest of the Rosedale Strata Corporation.

[2] The defendants appealed the order in part, in that they considered that the Administrator was appropriately appointed. However, they took the position that the legislation did not permit the court to make the order because there was no express authority in the *Act* to oust the rights of the owners to vote.

[3] On May 12, 2005, the British Columbia Court of Appeal determined that "the right to vote is an individual right possessed by the owners and nothing in [the statute] would support an order abrogating that right." The appeal being allowed on that basis.

[4] The result of the Court of Appeal's order is that the Administrator may act as the strata council but is subject to the direction by the owner-developer, which owns the majority of votes in the Strata Corporation. Therefore the Strata Corporation may effectively control and limit the acts of the Administrator.

[5] The application before the court presently is that the Administrator's appointment be approved for a further one year and such order is sought, pursuant to s.164 of the ***Strata Property Act*** (supra).

[6] The Strata Corporation held a special general meeting at the instance of the owner-developer on August 25, 2005, and passed the following resolutions:

a. Bylaw 3(8) be adopted to read as follows:

> "The Strata Corporation shall cause the limited common property designated for the exclusive use of strata lots 1-276, 282, 288, and 289, namely the Lobby, to be maintained in a clean, safe, healthful and attractive manner, which shall include, but not exhaustively, the lobby area be restricted to one hotel operator desk or podium, to be operated by the hotel operator that has the most Suite Section strata lots within its control."

b. Bylaw 35 be adopted to read as follows:

> "The Strata Corporation shall not enter into a contract to provide services to the common property with a service provider other than the original hotel operator, Rosedale on Robson Suite Hotel Inc., unless the contract is approved by a resolution passed by a ¾ vote at an Annual or Special General Meeting."

[7] The plaintiff submits that the resolutions passed at that meeting are "significantly unfair to the plaintiffs." Further, I am of the view that the resolutions effectively rendered the Administrator powerless to resolve the problems he saw as existing at the Rosedale on Robson Suite Hotel.

[8] Sections 164 and 165 of the ***Strata Property Act*** (supra) provide as follows:

> 164 (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
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> > (a) action or threatened action by, or decision of, the strata corporation, including the council, in relation to the owner or tenant, or
> > (b) exercise of voting rights by a person who holds 50% or more of the votes, including proxies, at an annual or special general meeting.
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> (2) For the purposes of subsection (1), the court may
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> > (a) direct or prohibit an act of the strata corporation, the council, or the person who holds 50% or more of the votes,
> >
> > (b) vary a transaction or resolution, and
> >
> > (c) regulate the conduct of the strata corporation's future affairs.
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> 165 On application of an owner, tenant, mortgagee of a strata lot or interested person, the Supreme Court may do one or more of the following:
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> > (a) order the strata corporation to perform a duty it is required to perform under this Act, the regulations, the bylaws or the rules;
> >
> > (b) order the strata corporation to stop contravening this Act, the regulations, the bylaws or the rules;
> >
> > (c) make any other orders it considers necessary to give effect to an order under paragraph (a) or (b).

[9] Section 174 of the *Act* provides:

> 174 (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the Strata Corporation.
> (2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the Strata Corporation.

> (3) The court may
>
> (a) appoint the administrator for an indefinite or set period,
>
> (b) set the administrator's remuneration,
>
> (c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and
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> (d) relieve the strata corporation of some or all of its powers and duties.
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> (4) The remuneration and expenses of the administrator must be paid by the Strata Corporation.
>
> (5) The administrator may delegate a power.
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> (6) On application of the administrator or a person referred to in subsection (1), the court may remove or replace the administrator or vary an order under this section.

[10] The defendants object to the extension of the appointment of the Administrator and seek to have the plaintiffs and the Administrator's applications dismissed.

[11] Section 164 of the *Act,* as I read it, is intended to allow injunctive relief to be permitted where the equities between the disputing parties are such that it requires the court to correct significant unfairness that exists.

[12] In order that the reader will understand the complex nature of the development of the contentious issues that exist between the plaintiff, Aviawest, the Administrator and the defendants it is necessary to give a history of what has occurred since this court's order of June 9th, 2004.

[13] Mr. Fanaken filed an affidavit in these proceedings on September 12, 2005. He deposes in that affidavit that he prepared a report, which he sent to the strata title

holders reporting on his year of administration. He presented the problems that he faced in carrying out the direction of the court. I am reproducing portions of that report dated September 8, 2005, in order that a reader may have a narrative of what, according to Mr. Fanaken, occurred at the hotel Rosedale on Robson Suite Hotel during his year as the court-appointed Administrator:

REPORT TO THE OWNERS OF STRATA PLAN LMS-1863

> Strata Plan LMS-1863 is a 289 unit, strata corporation located at 838 Hamilton Street in downtown Vancouver. Of the 289 strata lots, 276 are residential and 13 are commercial, including one which is a parkade beneath the tower. It is a 21 storey concrete high-rise, built in 1995/96 by the developer, Chevalier Tower Property Inc. The concept by the developer, as outlined in the Disclosure Statement was to create a "hotel strata corporation" - in other words, a condominium, strata corporation with those strata lots being designated as residential suites to be used as "hotel" suites as opposed to "permanent" residential quarters as is the normal condominium concept when strata corporations are built.
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> The hotel suites were to be managed by means of a rental pool, participation in which was stated to be optional. The rental pool is managed by a company related to the developer (by some overlap in directors) Rosedale on Robson Hotel Inc. The strata corporation itself was, in turn, set up to be managed by another related company, Rosedale on Robson Management Inc.
>
> Twelve of the remaining strata lots are commercial units meaning that the sole purpose for their existence is to utilize them for business enterprises (i.e. restaurant, store, office, etc.). One more strata lot is the parkade, which operates on a commercial basis.
>
> The strata corporation was developed in 1995 under the *Condominium Act of B.C.*, which was the governing legislation at that time. That statute did not categorize or define a "hotel" strata corporation. In July 2000, the *Condominium Act* was replaced with the *Strata Property Act of B.C.* and, Strata Corporation LMS-1863 was thereafter governed by

this statute. As was the case under the *Condominium Act*, there is no category or definition in the *Strata Property Act* for a "hotel" strata corporation. This point is significant to note, as the owner-developer which remains as the registered owner of 144 strata lots takes the position that many of its actions and conduct which may seem inconsistent with the general notion of strata corporation administration are, in fact, legitimate, citing the concept of a "hotel strata corporation" having extended latitude and opportunities beyond that which is considerable normal.

Although the developer's Disclosure Statement cannot be ignored in the overall context of the problems besetting this strata corporation, it must be noted that a Disclosure Statement is not a binding document on the strata corporation itself nor does it replace or supersede the applicable legislation. It is essentially a consumer protection mechanism for the benefit of individual strata lot purchasers. Developer Disclosure Statements commonly contain agreements, schedules, bylaws and other commitments which are filed in the Land Title Office at the time of registration of the strata corporation. These filings (not the Disclosure Statement itself) <u>are</u> binding on the strata corporation.

In a remarkable and highly unusual turn of events, the original bylaws created by the owner-developer were inadvertently lost by the Land Title Office even though they were registered. While there is no reason to doubt that what was filed (and lost) was anything except that which was contained in the Disclosure Statement, there is no actual evidence and, as such, those bylaws could not be considered to be bona fide. This topic will be discussed further in this report.

The owner-developer, as stated, intended the residential strata lots (not the commercial strata lots) to be utilized as hotel units, meaning that the occupancy would be transient, in the same fashion as any other hotel. Instead of one person or entity owning all 276 residential strata lots, the plan was to sell some or all of the strata lots to individual persons who would share in the vision of utilizing the strata lots as hotel units. Rather than having each individual investor administer his or her own strata lot, the owner-developer created a vehicle known as the Rental Pool. This is a most efficient mechanism designed to minimize administration and expenses associated with

hotel operations, while maximizing profits for all who participate in the scheme.

The Rental Pool was created and, on behalf of all the participants, the Rosedale on Robson Hotel Inc. carried on its business, as manager of the same, apparently with much success. The owner-developer retained a large number of strata lots and by September, 2005, 144 strata lots, including two commercial strata lots, were still owned by the owner-developer, Chevalier. In addition, at least four other commercial strata lots were then owned by companies that appear to be related to the developer. The Rental Pool collected revenue from hotel patrons, subtracted administrative expenses, and disbursed the profits to the participants. As will be shown further in this report, the managers of the Rental Pool and of the strata corporation did not fully comply with the provisions of the *Condominium Act* or, subsequently, the *Strata Property Act*. Strata Corporation budgets are created in accordance with a variety of provisions of the statutes and these budgets form the basis on which individual strata lot owners pay "strata fees" under the *Strata Property Act*, or "maintenance fees" under the previous *Condominium Act*. In either case the fees are calculated on the basis of unit entitlement. The budgets in effect up until the appointment of the Administrator were not done in the manner prescribed by the statutes; therefore, the fees were assessed incorrectly; however, the net effect, in terms of finances and accounting, was essentially of no apparent consequence because, at the end of the day, the amount of money left over to disburse to the Rental Pool participants was the same whether or not proper accounting and financial protocols had been done pursuant to the governing strata legislation. All 276 residential strata lot owners were of one accord and, as long as 100 percent of the residential strata lot owners belonged to the Rental Pool, harmony existed.

The problem, however, with the Rental Pool arrangement was that there was no provision indentured evidently to force an investor to remain in the pool. At any time an investor could remove him or herself from the agreement but continue ownership of the strata lot with the ability to administer it independently as a hotel unit. This loophole is what eventually led to the administrative disorder of this strata corporation today. Indeed, what happened over a period of time (mostly within the last two years) is that some investor owners pulled out of the rental pool arrangement but continued to own and operate their strata lots independently.

The Rosedale on Robson Hotel is physically situated in a prime downtown Vancouver location and likely, because of that, it has an excellent competitive opportunity to succeed. While no research was done by the Administrator in this regard (since it falls outside the scope of responsibility), the owner-developer did offer comments and advice to the Administrator in respect of the success enjoyed by the hotel. There is no reason to doubt these offerings. In fact, this very success has likely attracted the original investor owners to continue their participation, and new investors to join. The outcome of this fragmented ownership, absent any agreement for mandatory participation in the Rental Pool, is that the traditional but incorrect ways of accounting and financial reporting by the management came under close scrutiny.

Two main groups of investors, other than the Chevalier group, emerged as competitors. The smaller group (now owning/controlling 13 residential strata lots) is West Coast Time Share (aka Point To Point Destinations) and the larger group (now owning/controlling 31 residential strata lots) is Aviawest, a member of an international time share organization known as RCI (Resort Condominium International). While the Point To Point group has apparently been comfortable with the manner in which the strata corporation was managed (prior to the appointment of the Administrator, June 2004), the Aviawest organization was anything but content with the management of the strata corporation. Consequently, it was their initiatives that led to the appointment of an Administrator. In doing so, Aviawest cited and alleged a wide variety of improper protocols, principally in respect of financial matters in contravention of the *Strata Property Act*, and also in respect of use of the common property of the strata corporation. Details of these matters are addressed further in this report.

An application was successfully made by Aviawest to have an Administrator appointed to manage the affairs of the strata corporation, pursuant to the *Strata Property Act*. The Court Order (effective June 9, 2004) granted the Administrator (Fanaken) the power to pass majority and ¾ vote resolutions; however in April 2005 the Chevalier organization appealed that Order to the British Columbia Court of Appeal. The Aviawest organization has initiated proceedings to have this decision appealed to the Supreme Court of Canada.

The Court of Appeal decision of April 28, 2005 limited powers of the Administrator to those of council; however, actions taken by the Administrator between June 9, 2004 and April 28, 2005 were not challenged or disputed. These actions included the change of management, the approval of the 2004/2005 operating budget and the passing of bylaws. None of these actions have been contested. The essence of the Court of Appeal decision is that an administrator can only have the powers of a strata council, not the powers of "the owners". (The appointment of an administrator is authorized by Section 174 of the *Strata Property Act*). In other words, when issues arise within a strata corporation that require votes of owners, the owners must retain that power notwithstanding the appointment of an administrator. For example, a budget requires a majority vote of owners; the passing of bylaw amendments requires a ¾ vote of owners; spending money from the Contingency Reserve Fund (except in emergencies) requires a ¾ vote of owners, and so on. The Administrator cannot exercise these votes on behalf of the owners. The owners retain that right.

The Court of Appeal decision resulted in the Administrator for Strata Plan LMS-1863 acting as strata council only since April 28, 2005.

The term of the Administrator was for one year, effective June 9, 2004. In April, 2005, the Supreme Court of British Columbia ordered (with the mutual consent of the litigants) the Administrator's term be extended to October 14, 2005. Not later than that date, any further involvement by the Administrator must receive sanction of the Supreme Court of B.C. It is, of course, uncertain what will occur on October 14, 2005; however, I do not envision this strata corporation being in a sufficiently healthy state to manage its own affairs. The structure of ownership is such that the majority faction will likely revert to exactly what it has done all these years. The restrictions placed on the Administrator by the B.C. Court of Appeal decision have opened the door for the majority faction to easily have their own way and this opportunity was utilized first at the July 12, 2005 Annual General Meeting in respect of the annual operating budget.

Since the AGM, the owner-developer initiated a lawsuit against the strata corporation regarding the podium issue (discussed further in this report) and forced a Special General Meeting of the strata corporation to create bylaws which are for the principal benefit of the owner-

developer. This includes a bylaw to force the strata corporation to utilize Hotel employee services for strata corporation duties and functions. The Administrator had previously challenged the costs of these services and was in the process of seeking competitive contracts for the benefit of the strata corporation. The new bylaw forces the Administrator to continue using the Hotel's employees for strata corporation common property functions.

There is, legally, no such creature as a "hotel strata corporation". That a high-rise building was constructed and stratified to facilitate multiple ownership and participation in a hotel-oriented rental pool enterprise is a concept which is unchallenged. To go beyond, as has done the Chevalier organization, and take the position that provisions and requirements of the *Condominium Act* and the *Strata Property Act* can be ignored or violated is unacceptable. There is nothing in either of these statutes that allows one or more owners of strata lots in Strata Plan LMS-1863 to excuse themselves from abiding by those laws. The Chevalier organization and its related affiliates have repeatedly taken the position that a "hotel strata corporation" is not a conventional strata corporation and, since the purpose of the strata corporation as stated in the Disclosure Statement is to operate it as a business enterprise, its actions and conduct is "in the best interests of the owners". Variations from conventional standards of administration in strata corporations and from requirements of the two governing statues was, and remains in their opinion, acceptable. The Administrator disagrees.

The goals and positions of the Chevalier organization were achieved through various mechanisms as follows:

1. Engaging a management company (at non-arms length) to administer the strata corporation.

2. Engaging a management company (at non-arms length) to administer the Rental Pool.

3. Structuring the annual operating budgets of LMS-1863 to the benefit of the Rental Pool and consequent detriment of the strata

corporation but concurrently retaining sufficient voting power to ensure approval.

4. Retaining control of income derived from common property and limited common property to the exclusion of owners not in the Rental Pool.

5. Conducting strata corporation business without creating and distributing strata council meeting minutes to the owners.

6. Charging the strata corporation for expenses not attributable to the strata corporation.

7. Allocating to the Rental Pool revenue belonging to the strata corporation.

8. Entering into non-arms length contracts (without actual written contracts) between the Hotel and the strata corporation.

9. Creating bylaws to prevent the strata corporation from hiring service contractors for common property other than from the Hotel itself.

10. Resorting to conduct which was, and continues to be, hostile and uncooperative to owners who are not part of the Rental Pool.

I wish to examine these observations in some detail.

MANAGEMENT

The management of the strata corporation was provided by Rosedale on Robson Management Inc., a company related to the owner-developer through overlapping and connected officers and directors. Although the management fee charged by this firm ($54,000 budgeted by them for 2004/2005) was not inappropriate for management of a strata corporation of this size and composition, I was advised that the manager (Mr. Y.K. Pang) essentially worked for the Hotel Rental Pool, not the strata corporation. The Administrator terminated the management contract as of January 31, 2005 and hired Crosby Property Management Ltd. as an independent management company. During this process, Mr. Pang stated that he did very little in respect of the strata management contract and that the only other employee, his accountant, spent only half of his time on strata corporation business. In other words, the fee of $54,000 per annum charged as an expense to the strata corporation, was excessive in the arrangement.

It was very quickly obvious to the Administrator that management of the strata corporation should not be left in the hands of a company related to the owner/developer because of the historic blurring of the lines between the Rental Pool and the strata corporation, and the fact that the strata corporation clearly had been managed in a manner that did not comply with the *Strata Property Act* in many ways. For example, the composition of annual operating fund budgets contained expenses not for the benefit of all the owners. Revenues properly belonging to the strata corporation were not included in the strata corporation budgets but were, instead, channelled to the Hotel Rental Pool. Insurance premiums were assessed to the strata corporation for coverage of personal property belonging to strata lot owners. It had, therefore, been my intention to terminate the contract with this management company earlier in time, and I passed a resolution enabling the strata corporation to do so on two months' notice effective September 30, 2004. Based on advice from lawyers for the litigants (Chevalier/Aviawest) that a resolution of their disagreements was possible, I postponed my decision. Under the circumstances, I felt that decision to have been in the best interests of the strata corporation. Ultimately, it became clear that no such resolution between the litigants was foreseeable; therefore, I terminated the contract effective January 31, 2005. In turn, I caused the strata corporation to enter into a management contract with Crosby Property Management Ltd., effective February 1, 2005, a company well-known in the strata management industry. I selected Crosby after interviewing and receiving proposals from four local strata management companies. A copy of the management contract entered into between the strata corporation and Crosby can be made available to owners on request.

. . .

ANNUAL BUDGET

The fiscal year of the strata corporation starts on February 1st and ends January 31st. When the Administrator was appointed, the annual budget contained expense categories not appropriate for a strata corporation. For example, one line item was called Goodies and Muffins and the original budget prepared by Rosedale on Robson Management Inc. (Y. K. Pang, Manager) for 2004/05 proposed an allowance of $35,400 for this feature. Such "Goodies and Muffins" were available for Rental Pool hotel guests as a promotional feature of good hotel administration. Although all owners contributed by way of strata fees (based on unit entitlement) to this expense category, only Hotel Rental Pool owner guests could avail themselves of the items. Aviawest, who are not part of the Rental Pool, have provided anecdotes about their guests not being afforded the same benefit and recite one incident where a muffin taken inadvertently by one of their guests was actually grabbed from their hands by the Hotel desk clerk. Such has been the pettiness of conduct. In any event "Goodies and Muffins" are not a common expense of any strata corporation, "hotel type" or other.

The (Pang) proposed operating budget for 2004/05 included expenses totalling $28,000 for telephone services. Approximately half was for the Mitel Telus line costs and the other half (approximately) was for the service agreement with Mitel. No provision was included in the (Pang) budget for recovery of these expenses even though the Hotel Rental Pool was the principal user of the system and controls its operation. There is, seemingly, some dark history to this telephone system which was installed at the outset of the development at a cost of several hundreds of thousands of dollars, paid for by the strata corporation. In other words the system is owned by the strata corporation but it has been, and remains, completely controlled by the Hotel Rental Pool. All revenues derived from the telephone system (i.e., long distance and other usage charges) went to the Rental Pool rather than the strata corporation; however, all expenses (Mitel service, Telus line charges and software upgrades) were charged to the strata corporation. The Hotel paid nothing for its use.

The Administrator budget for 2004/05 included a revenue item to recover $28,000 from the Hotel which is an amount equivalent to the operating costs; however, the Hotel Rental Pool has refused to acknowledge this obligation and has categorically stated that it will not pay. During the fiscal year, 2004/05 an urgent upgrade costing $20,000 was required to the telephone system, failing which Mitel advised it could not provide technical support. The Administrator authorized this expenditure and charged it to the Residential Section Contingency Reserve Fund. The net effect of the $28,000 revenue item non-payment is that the Residential Section Operating Fund "took a hit" for $28,000. There has been no resolution to this issue but the matter is not closed and still needs to be addressed.

The Hotel has coin-operated "pop" machines and also laundry equipment for cleaning linens etc. Previous (Pang) budgets included no revenues to the strata corporation for these vending machines and laundry machines. The revenues were factored to the benefit of the Hotel and to the detriment of the strata corporation, even though the strata corporation was charged for most of the operating expenses. As Administrator, I altered the budget to return $4,200 of revenue (for vending machines) and $11,800 of revenue (for laundry equipment) to the strata corporation.

The (Pang) proposed operating budget for 2004/05 provided an amount of $142,000 for "Bellman" – a Hotel function. The bellman would have provided services to the Rental Pool guests but not to other guests, such as those of Point to Point or Aviawest clients or individual owners managing their own suites. This practice, as others outlined above and below, has apparently been followed from the first year of operation. (The Administrator has not conducted audits for fiscal years prior to 2003/04; however, Mr. Pang verified the accuracy of this observation. The Administrator removed this expense item from the strata corporation's budget.

HOTEL EMPLOYEES SERVICES - CHARGEBACKS

The Hotel Rental Pool employs staff to provide various functions and their time is divided between servicing their hotel suites and common property of the strata corporation. No formal written contracts exist for any of these services, which is consistent with the Chevalier

philosophy that the Rosedale on Robson is a “hotel strata corporation” and that there is no real need to maintain arms length contracts or, at a minimum, some identification of responsibility between the Rental Pool and Strata Plan LMS-1863. Counsel for Chevalier reminded the Administrator that verbal contracts are contracts.

The Rental Pool tallied their employee expenses of the relevant budget categories each month and applied a percentage formula to the total as a recovery from the strata corporation. They were as follows:

Maintenance	60%
Security	100%
Janitorial (Houseman)	67%

No explanation has been offered by the Rental Pool as to the rationale for these percentage splits. It would seem that they were developed at “day one” and used year after year without review or re-consideration. (The Administrator did not commission the auditor to research this matter although this task might be beneficial.)

While the strata corporation was managed by the owner-developer’s management company (Y.K. Pang), the monthly charges for these services were processed automatically without any formal invoices. Only the percentage formulas were used as a paper trail. Once the Administrator was appointed, the management company (Y.K. Pang) was required to seek approval from the Administrator for payment of all invoices, including the employee categories referenced above. The “Bellman” category was eliminated as a strata corporation expense. From June 2004 (when the Administrator was appointed) until December 2004, the Administrator conditionally approved the Hotel employee service invoices but requested that the management company provide detailed, back-up support documentation. In other words, the Administrator was not prepared to accept mere percentage formulae in lieu of actual invoices with evidence of the work done and details of the personnel employed and their respective hourly wages.

Such back-up support invoice documentation was not provided despite repeated requests from the Administrator and despite assurances from

legal counsel representing the management company that the required documentation would be presented. Considerable correspondence was exchanged between the Administrator and the management company to no avail. The management company and its legal counsel expressed bafflement at what was being requested by the Administrator and repeatedly advised that they did not know how to generate such invoices. It was even suggested that the Administrator could assist by designing and creating such a document; however, the Administrator declined and concluded that they were perhaps being deliberately obstructionist.

Ultimately, in June 2005, (one year after appointment of the Administrator) the Rental Pool management provided a document (a facsimile invoice of sorts) in respect of the security services. This document contained not only a list of services rendered by the security personnel but also some detail concerning what areas of the property were patrolled each shift. The “invoice” reported that the security personnel were patrolling not only the common property of the entire residential section of the strata corporation but also the parkade of the property, which is not common property but rather an individual strata lot owned/controlled and operated for profit by the developer. This aspect of the billing was challenged by the Administrator and resulted in a credit to all previous paid billings (March 2004 to December 2004) in the amount of approximately $9,000. Unpaid invoices for security services from January 2005 to June 2005 were revised to reflect and remove the improper charges and all have been approved for payment via Crosby Property Management Ltd., the independent management company. The Administrator has taken at face value the evidence provided by the Hotel management that the security services rendered and charged were, in fact, provided. No audit or verification was undertaken by the Administrator. Further in this report, at the 2005/2006 budget approval process, there is additional commentary about the security costs.

The costs (June 2004 to December 2004) for maintenance and janitorial duties performed by the Hotel staff and charged to the strata corporation on the percentage formula basis were reimbursed by the strata corporation in the same fashion as were security billings. Likewise, no requests for reimbursement from January 2005 to July 2005 were authorized by the Administrator. The Hotel management advised that they would prepare invoices similar to the one submitted for security services and this was finally received in July 2005. The Administrator conditionally approved the payment of these

invoices, reserving the right to have the auditor (Reid Hurst Nagy) review the detail.

For the fiscal year-ended February 28, 2005, the audit (prepared by Reid Hurst Nagy CGAs) reported the following in respect of the three salary expense categories:

	Budget	Actual	Overspent
Security	$101,140	$ 87,478*	
Maintenance or 45%	$ 78,000	$113,130	$35,130
Janitorial or 101%	$ 64,200	$129,291	$65,091

("Budget" means budget for fiscal year 2004/2005 as prepared by the Administrator and presented at the August 19, 2004 Annual General Meeting.)

* This is net of the overcharged amount described above.

When questioned by the Administrator why the management company (Y.K. Pang) did not adhere to the budget and why such substantial cost overruns were incurred, Mr. Pang advised that neither he nor his principals accepted the Administrator's budget in the first instance; therefore, they continued to administer the Hotel and charge the strata corporation in a manner consistent with past practice.

The auditor's report for 2004/05 also identified two serious revenue shortfalls as follows:

	Budget	Actual
Meeting Rooms	$70,000	$23,944
Telephone	$28,340	0

The issue of the telephone revenue has already been addressed in this report; however, it is briefly noted here again that the Hotel did not contribute any revenue to the strata corporation despite the fact that it has full control and use of the facility.

The matter of the Meeting Room revenue requires discussion. The strata corporation has three rooms which are used as public meeting rooms and, as is the case with any hotel establishment, these rooms generate revenue. They are limited common property for the use and enjoyment/benefit of the residential strata lots and the revenue, therefore, should belong to all such owners. The rooms are administered (i.e. rented to the public) by the Hotel, which generally makes good sense; however, the Hotel retains fifty (50) percent of all revenue earned as a charge for its services. The Administrator has suggested that such a cut is not fair to the strata corporation. The Rental Pool has not agreed to any discussion or negotiation in this matter. The Administrator, therefore, has asked Crosby Property Management to take over the administration of these facilities. This protocol is not as efficient as the previous arrangement; however, it is not possible to condone the Hotel's previous practice of charging excessively for their services. The Hotel has stated that it retains 50 percent of the revenue; therefore, it is assumed that the total revenue for fiscal 2004/05 would have been $47,888 (i.e. $23,944 x 2). The budget allowance of $70,000 revenue was obtained from the then management company (Y. K. Pang) based on previous years' experience. No explanation has been offered by the Hotel why the actual revenues of $47,888 is significantly short of their suggested $70,000.

As can be seen from the above issues, the Hotel Rental Pool views the strata corporation as a convenient vehicle for offloading expenses and for "scooping" revenues that should flow properly to the strata corporation. Such actions are contrary to both the spirit and letter of the *Strata Property Act* and cannot be condoned under the guise that

the Rosedale is "a hotel strata corporation". Even if all owners got along happily (as they once did) and agreed to the mechanics employed to transfer revenues and expenses as outlined, that process was not in accordance with the *Strata Property Act*. Now that all owners are not living happily together, it is vital and absolute that the strata corporation operate its affairs in a manner consistent with the governing law, i.e. the *Strata Property Act*.

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AUDITS BY REID HURST NAGY

The audits for the two fiscal years ended February 29, 2004 and February 28, 2005 were provided by Reid Hurst Nagy, a Certified General Accounting firm based in Richmond, B.C. The firm has excellent credentials and a solid history of competence and experience in strata corporation accounting and audits. The value received from the firm was substantial. Notwithstanding the financial and accounting practices of the developer related management company, there now exists a very clear picture of where the strata corporation stands financially. In addition, the auditor has been able to sort out the Fund Balances as between the Residential, Commercial and Joint Sections of the strata corporation which had never been done before. Previous audits were conducted by KPMG (Toronto); however, the draft audit prepared by that firm to February 29, 2004 proved to be unsatisfactory and was not approved by the Administrator. The invoice for that audit (approximately $5,500) was not approved and remains unpaid. The Toronto representative of KPMG was "hostile" to the Administrator and refused to co-operate or provide working documents in support of the draft audit. Considering that the audit was for the strata corporation and not for the developer, or the Rental Pool or the management company, the position of KPMG was surprising.

2005 ANNUAL GENERAL MEETING

Under the *Strata Property Act*, the Annual General Meeting must be held within two months of the fiscal year-end and, at that meeting, the annual operating budget must be approved. The AGM should have been held, therefore, by April 30, 2005; however, Reid Hurst Nagy was unable to complete the draft audit in time to achieve this purpose. The

principal reason for the delay was that the management company (Y.K. Pang) to January 31, 2005 had constructed the accounting in a manner inconsistent with the budget format prepared by the Administrator. In fact, the accounting format was consistent with the manner in which previous years' accounting had been done by Rosedale Management Inc. (The accounting for the one remaining month, i.e. February 2005, was done properly by Crosby Management.) The auditor had to re-format the (Pang) accounting entries and this took time. The Administrator very much regrets not meeting the statutory timeline for the budget approval and convening of the Annual General Meeting; however, there was much benefit to be derived in the circumstances of having a proper audit for the AGM.

The Annual General Meeting of Strata Plan LMS-1863 was held on July 12, 2005. Since an election of the strata council was not necessary in view of the appointment of an administrator, the only remaining business to be conducted was the approval of the budget for the fiscal year 2005/06 (year-end February 28, 2006). Last year, at the August 2004 Annual General Meeting the budget was prepared by the Administrator and no vote of the owners was taken since at that time the Administrator, pursuant to the Order of Lander J. which had not then been successfully appealed, had the authority to exercise the powers and duties of the owners. As a consequence of the B.C. Court of Appeal decision, however, with respect to the current budget for 2005/06, the Administrator did not have the same latitude as in the previous year.

Prior to the Annual General Meeting on July 12, 2005, the Administrator convened a meeting of all legal counsel in Nanaimo (on Friday, July 8th) to discuss the proposed budget and to solicit support from all parties to accept the proposals the Administrator had developed. It was the Administrator's hope to bridge the gap between the litigants and possibly bring the Administrator's role to an end if all parties could agree on the financial plan the Administrator had developed.

At the July 12, 2005 Annual General Meeting the 2005/2006 budget was presented to the owners and the Administrator explained the rationale for each category. The net effect was a slight reduction in strata fees payable by the owners.

Using their substantial vote, the Chevalier organization amended the budget in five categories, each of which have been topics in this report (i.e. Telephone and Meeting Room Revenues, and Salary expenses for Maintenance, Janitorial and Security Services). The amendments proposed were to decrease the revenues payable to the strata corporation by Chevalier and to increase the expenses (charge-backs) by Chevalier to the strata corporation. These proposals were each consistent with the historical practices of Chevalier. Using the opportunity of a 10 minute recess, prior to voting on the amendments, the Administrator urged legal counsel for Chevalier to re-consider its position; however, the plea was unsuccessful and Chevalier thereupon used its substantial vote to pass the amendments it had proposed.

The Administrator had suggested at the outset of the AGM, when delivering his verbal report to the owners, that it was very conceivable that the Administrator's term need not be extended beyond October 14, 2005 if the parties could work co-operatively and abide by the *Strata Property Act*. In view of the amendments to the 2005/06 budget now passed by Chevalier, the Administrator suggested to the owners present that the budget allowances for the Administrator ($40,000) and associated legal fees ($25,000) be increased to $60,000 and $50,000 respectively. An owner offered motions to this effect; however, Chevalier again used its substantial vote to defeat these two proposed amendments. The AGM minutes record this event.

The Administrator recognizes that the strata corporation must only spend money approved by the owners at an Annual General Meeting. As it is anticipated that the approved budget for the costs of the Administrator and associated legal services will be exhausted by the end of September 2005, there will be insufficient money for these two categories to continue services to the end of February 2006. Accordingly, the Administrator has called for a Special General Meeting on September 21, 2005 to authorize two special levies to fund these services by ¾ vote resolutions of the owners.

BYLAWS

As stated earlier in this report, the original bylaws prepared and filed by the owner-developer in the Land Title Office were apparently lost by the LTO. On October 28, 2004, a Special General Meeting of the strata corporation was held and a complete new package of bylaws was presented by the Administrator and approved without a vote of the owners. That action preceded the B.C. Court of Appeal decision restricting the exercise of the powers and duties of the strata corporation by the Administrator. The bylaws were filed in the Land Title Office, and became effective on December 20, 2004. It should be noted that, although the Administrator had unilaterally exercised the power to prepare and approve the bylaws, every opportunity was given to all owners to comment on, recommend and otherwise influence the final package. The record is clear that no bylaw was passed by the Administrator that was vigorously objected to by any owner.

On July 29, 2005, the Chevalier organization served the strata corporation with a demand for a Special General Meeting of the Strata Corporation to pass new bylaws. These were all to the benefit of the Hotel Rental Pool and to the detriment of the minority owners and, in the Administrator's opinion, to the strata corporation as a whole. These include the following:

A. BE IT RESOLVED as a ¾ vote of the Owners, Strata Plan LMS-1863 (the "Strata Corporation") that the Bylaws of the Strata Corporation be amended as follows:

1. Bylaw 3(1) (e) be deleted and in its place the following be adopted:

"An owner, tenant, occupant or visitor must not use, or allow to be used, a strata lot, or any common property or common assets in a way that is inconsistent with any purpose other than a commercial hotel purpose". (Further amended at the Special General Meeting to add the words "which commercial hotel purpose shall include the occupancy of suite section strata lots on a timeshare basis":

2. Bylaw 3(7) be adopted to read as follows:

"An owner of a Suite Section strata lot must not use, or allow to be used, a Suite Section strata lot for any purpose other than for the purpose of temporary accommodation as required by the applicable zoning requirements of the City of Vancouver".

3. Bylaw 3(8) be adopted to read as follows:

"The Strata Corporation shall cause the limited common property designated for the exclusive use of strata lots 1 – 276, 282, 288 and 289, namely the Lobby, to be maintained in a clean, safe, healthful and attractive manner, which shall include, but not exhaustively, the lobby area be restricted to one hotel operator desk or podium, to be operated by the hotel operator that has the most Suite Section strata lots within its control".

4. Bylaw 35 be adopted to read as follows:

"The strata corporation shall not enter into a contract to provide services to the common property with a service provider other than the original hotel operator, Rosedale on Robson Suite Hotel Inc., unless the contract is approved by a resolution passed by a ¾ vote at an Annual or Special General Meeting."

B. BE IT RESOLVED as a ¾ vote of The Owners, Strata Plan LMS-1863, that an additional podium or desk in the lobby that is the limited common property for exclusive use by the owners of strata lots 1 – 276, 282, 288 and 289 be installed for the use of Aviawest Resort Club and its affiliates.

At the August 25, 2005 Special General Meeting, these bylaws were voted on by the owners present and passed. Chevalier utilized its substantial voting strength to achieve this purpose, (i.e. Commercial Section 21.66 votes and Residential Section 188 votes including proxies). In accordance with provisions of the *Strata Property Act*,

bylaw amendments must be filed with 60 days of being ratified by the owners. The Administrator took steps to file these bylaws on September 8, 2005.

Bylaw amendments 1. 2. and 3. are designed ostensibly with respect to the ongoing dispute between Chevalier and Aviawest. Bylaw amendment 4. was designed ostensibly to prevent the Administrator on behalf of the strata corporation, from seeking and committing to competitive contracts for services presently provided by the Hotel to the strata corporation.

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OTHER ISSUES

In the original pleadings giving rise to the appointment of an Administrator, the Plaintiffs Aviawest cited their concerns about being denied the opportunity to place signage in the lobby of the Rosedale Hotel to identify their organization. They also cited a variety of other grievances pertaining to the use and misuse of meeting rooms managed by Chevalier, the availability of housekeeping rooms for maids, etc. While some attention was paid to these issues by the Administrator, regrettably they were overshadowed by the much larger issues as outlined in this report. The Aviawest concerns and grievances must still be investigated and resolved.

One of the key issues within the Aviawest's pleadings has to do with the installation of a podium in the lobby of the Rosedale on Robson Hotel. A podium is a small piece of furniture at which an Aviawest staff employee would stand and be available to meet, greet and direct arriving Aviawest guests staying at the hotel. The lobby is designated on the strata plan as Limited Common Property (LCP) appurtenant to all of the residential strata lots and three named commercial strata lots which are integral to the Hotel's operations (the restaurant and check in/front desk areas and the second floor "Michiko" Room) – meaning that all residential suite strata lots have an exclusive entitlement to this area. Of course, that is not as simple as it sounds. In strata corporations there are many areas designated as common property, such as electric and mechanical rooms. Just because they are common property does not mean that every owner has unfettered access to and use of such rooms. Normally LCP is appurtenant to one particular strata lot and a common example in strata corporations

would be a parking stall or a balcony or deck adjacent to a strata lot. Such an area, although called LCP, is essentially common property but by designating it as "limited" it means that it is still common property but the owner whose strata lot is linked to it by the legal term has full and exclusive use of that area. In the case of LMS-1863, the lobby is LCP to all of the strata lots comprising the residential section and three commercial strata lots. This unusual structure poses some dilemmas. Does it mean that the owner of each of those individual strata lots can claim use of some or all of the space? Does it mean that one owner holding a majority of voting power can claim that space as its own territory?

Since the beginning of this strata corporation, this area has been used primarily for the benefit of strata lots that were part of the Rental Pool. Another way of looking at it would be to say that it was primarily used for the benefit of strata lot 288, the Hotel front desk and office area, which is owned by a company related to Chevalier, and used as the main lobby for the Rosedale on Robson Hotel. As stated elsewhere in this report, when one hundred percent of the owners belonged (harmoniously) to the Rental Pool, there were no issues about who had territorial claim to the lobby area. Now that that state of affairs no longer exists, the issue is a matter of strenuous legal dispute. Chevalier has initiated new litigation against the strata corporation to prevent use of the main lobby by Aviawest, citing that to do so would be "significantly unfair" and that it represents a significant change in use or appearance of that area. The Administrator disagrees; however, it is a matter for the Court to decide.

Aviawest owns/controls 31 strata lots within the strata plan, roughly equivalent to 10%. The organization has its own office at 868 Hamilton Street (a commercial strata lot within the strata plan) and from that location it administers its hotel operation. The problem that faces Aviawest is that, when its guests arrive to stay at the hotel, they invariably and understandably end up in the main lobby (838 Hamilton) not at Aviawest's office at 868 Hamilton. Confusion arises and, given the hostile atmosphere and other litigation between Chevalier and Aviawest, it is not surprising that innocent guests are often treated discourteously and/or offhandedly by the main lobby Hotel desk staff. Aviawest has, therefore, asked to have a small space in the lobby to place a podium at which an Aviawest staff member would meet, greet and direct its own guests. One of the concerns raised by Chevalier is that Aviawest would, if allowed to park in the lobby, use the opportunity to market its services to guests belonging to the Rental Pool. This

aspect of the debate falls outside the realm of the Administrator; however, the strata corporation (i.e. the Administrator) does have an obligation to adjudicate whether or not Aviawest has the right to install a podium in this LCP area. Aviawest has given the Administrator absolute assurances that it will use the podium only to meet, greet and direct its guests and that no sales or marketing activities would be engaged.

At the Annual General Meeting on July 12, 2005, lawyers for Chevalier et al stated that permitting a podium is the "thin edge of the wedge"; that if one owner (other than its client or a company hired by it to manage the hotel) is permitted to use the LCP area, it is conceivable that 200 podium spaces would be required to equitably accommodate all owners; that use of the LCP should be "based on need not entitlement"; that permitting a podium for Aviawest constitutes a significant change in the use or appearance of the lobby and therefore, requires a ¾ vote of the owners. The subsequent lawsuit addresses this concern, as does the bylaw amendment of August 25, 2005.

Subsequent to the Annual General Meeting, the Administrator discussed the matter with the Assistant General Manager of the Hotel, Jim Miller, and it was agreed that Aviawest could have a space in the lobby. The Administrator met on site with Mr. Miller and a space in the lobby was designated as suitable for the Aviawest podium. Concurrent to these cordial and co-operative actions by Mr. Miller, Chevalier Tower Property Inc. filed a lawsuit in the Supreme Court of B.C. to prevent the podium installation. Chevalier alleges that the strata corporation has conducted itself in a manner that is "significantly unfair" to Chevalier. The Administrator (i.e. the strata corporation) has taken the appropriate steps to defend the strata corporation.

CONCLUSION

During the course of this administration over the past year, I stated in one of my bulletins that Strata Plan LMS-1863 is a "troubled" strata corporation. The lawyer for Chevalier took exception to that designation; however, as I come to the end of my appointment, I not only repeat that categorization but suggest that that is "putting it mildly". The conduct of the majority owner, Chevalier and related parties and interests, has been to enhance the Hotel Rental Pool at the

> expense of the strata corporation. There has been no effort to accommodate minority interests among residential strata lot owners. There has been blatant disregard of compliance with the governing statutes. There has been, and continues, total unwillingness and wilful blindness by Chevalier and related parties to administer the strata corporation in anything but a self-serving manner. There has been no effort to develop a roadmap to restore the strata corporation to an entity in which it would be compliant with the *Strata Property Act*. The actions taken at the July 12, 2005 Annual General Meeting and August 25, 2005 Special General Meeting by Chevalier and related parties and respective legal counsel clearly indicate that their intent is to continue to dominate and bully any person who is not part of their Rental Pool notwithstanding the fact that such persons are owners and have every right to be accommodated in a manner that they are entitled to by the *Strata Property Act.*
>
> I cannot envision removing the Administrator from this strata plan in the near future, as to do so will simply mean that nothing substantive will change from the way the strata corporation had been administered for all the years prior to June 9, 2004. Notwithstanding the severe restrictions placed on the Administrator as a consequence of the B.C. Court of Appeal decision, the only hope for the minority stakeholders of this strata corporation is to have an independent person stand between them and Chevalier and its related parties. The Administrator will apply to the B.C. Supreme Court for an extension of the mandate for at least one further year.

[14] The specific objections of the respective defendants are as follows: Mr. Thompson on behalf of Rosedale on Robson Suite Hotel and John Logan state that what is required in the operation of this private property is as follows:

(a) Effective case management not an extension of the term of the Administrator;

(b) It is for the Court to decide, on an interim and permanent basis, the issues in dispute between the parties. It is for the Court to make such

interim Orders upon such ancillary terms and conditions as the Court thinks just to ameliorate these disputes with a view to their ultimate adjudication at trial;

(c) In the Defendants' submission the role of an Administrator is not to adjudicate on the dispute between the parties. Save for such limited actions as may be properly necessary to run the day to day operations of the building fairly (which does not include issues requiring a majority or ¾ vote), the Administrator must not tread on the issues in dispute without Court approval;

(d) The Administrator must come to Court and make a case for his point of view. All parties must have an opportunity to be heard. The Court and not the Administrator must make the decisions;

(e) The Administrator is exercising an administrative function and must be supervised properly by the Court;

(f) In this case the Administrator was appointed to run the day to day operations of a building fairly to all whether inside or outside of the rental pool.

[15] The appointment of an independent common property manager is such that the day-to-day operations of the building are being run fairly.

[16] That the costs of an Administrator are excessive and unnecessary for the proper functioning of this hotel.

[17] I have considered the facts in the affidavits of Mr. Miller, Assistant General Manager and Director of Operations of the defendant, Rosedale on Robson Suite Hotel Inc. and Mr. Yin Kau Pang, the Comptroller of the defendant, Rosedale on Robson Suite Hotel Inc. Notwithstanding what those individuals depose, there still exists matters unsettled as to the apportionment of costs between the rental pool and the Strata Corporation.

[18] While as noted in Mr. Fanaken's affidavit the audit was done by a new auditor, Mr. Fanaken is not yet satisfied that the budget apportionments of the relative costs between the hotel operation and the strata council have been properly determined.

[19] There is one other issue which may seem to some a small matter however this deals with the podium that Aviawest has been desirous of placing in the lobby, which is limited common property. This podium was removed by way of resolution at the Special General Meeting. A new action was commenced in the Vancouver Registry in order for this court to determine whether such a podium should be permitted to be placed on the limited common property of the Rosedale on Robson Suite Hotel. This action is still extant. This matter may now be resolved by the Administrator on application.

[20] The Administrator's counsel, Ms. C.D. Wilson joins with the plaintiffs' counsel, Mr. Behie's submissions, for Aviawest Resort Club, the Owners, Strata Plan No. LMS 1863 and seeks the further appointment of Mr. Fanaken for one further year.

[21] Mr. Williams, in his submission to me, states in his written brief that his conclusion is as follows:

> The thrust of the Statement of Claim of Aviawest are declarations pursuant to sections 164 and 165 of the SPA. It is submitted that granting the relief requested by Aviawest would result in a remedy that should only be available after full examinations and a full trial; and an opportunity for the trial judge to observe the demeanour of witnesses, especially in view of the heated dispute with respect to the facts and conduct of parties.

[22] I am satisfied, notwithstanding the voluminous documentation advanced, particularly by the defendants in this application that there is a "significant unfairness" that still exists between Aviawest et al as plaintiffs and the defendant, Chevalier Tower Property Inc. and Rosedale on Robson Suite Hotel Inc., as deposed to in the Administrator's report to the strata owners. I find that these matters must be resolved on the basis of documentation that must exist and should be placed in the hands of the Administrator. Once the Administrator has determined a proper budget based on the relative equities between the parties only then can it be said that this hotel is being operated in a transparent manner.

[23] Once that has occurred the need for the Administrator will have been satisfied.

[24] There is nothing contained in the affidavit materials presented by the defendants that in any way provide concrete methods for the resolving of the problems that Mr. Fanaken has determined that exist in the operation of the Rosedale on Robson Suite Hotel.

[25] Therefore I am satisfied that the significant unfairness as defined in s. 164 of the ***Strata Property Act*** still exist as between the parties at the Rosedale on Robson Suite Hotel Inc. and it is therefore necessary that these issues be resolved and that can only be done by an Administrator on site

[26] Upon the appointment of Mr. Fanaken he will require the assistance of the Court, I believe, to remedy the significant unfairness that now exists between the litigants. I consider that the order the Court now makes, is a mandatory injunction. Therefore, the court will consider such applications on behalf of the Administrator so that he will obtain such documentation and directions that will be required to remedy the unfair matters cited by him that still exist at the Rosedale on Robson Hotel.

[27] Mr. Fanaken is appointed Administrator of Strata Plan 1863 for a further period commencing the 1st day of December 2005 to December 31, 2006.

[28] Costs will be in the cause on Scale 3.

"C.R. Lander, J."
The Honourable Mr. Justice C.R. Lander