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Condominium Plan No. 772 1806 v. Gobeil

The Owners: Condominium Plan No. 772 1806, Applicant and Vincent Gobeil and Monica Gobeil, Respondents

Alberta Master

Master L.A. Smart

Judgment: May 10, 2011  
Docket: Edmonton 1003-15168

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Counsel: Brian Sussman, for Applicant

Vincent Gobeil, Monica Gobeil, for themselves

Subject: Property

Real property.

**Cases considered by *Master L.A. Smart*:**

[934859 Alberta Inc. v. Condominium Corp. No. 0312180 \(2007\), 83 Alta. L.R. \(4th\) 67, 434 A.R. 41, 2007 ABQB 640, 2007 CarswellAlta 1518, \[2008\] 3 W.W.R. 333, 62 R.P.R. \(4th\) 207 \(Alta. Q.B.\)](#) — followed

**Statutes considered:**

*Condominium Property Act*, R.S.A. 2000, c. C-22

Generally — referred to

s. 62 — referred to

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s. 67 — considered

s. 67(1)(a) "improper conduct" (i) — considered

***Master L.A. Smart:***

### **Application**

1 The Owners: Condominium Plan No. 772-1806 commonly known as Knottwood Estates Condo Corporation (the "Condo Corp") apply to have the Respondents Vincent and Monica Gobeil (the "Gobeils") remove a shed they constructed on the maintenance area (their "yard") immediately adjacent to their Unit (No. 42, Condo Plan 772-1806). They also seek access to the Unit to determine if removal has been effected and for a civil enforcement agency to use reasonable force, including breaking open of any door to the said Unit to make the determination and to effect removal should the Gobeils fail to do so. Why the latter relief is requested escapes me. We are dealing with a shed on common property.

### **Facts and Background**

2 The application is made pursuant to Section 67 of the Condominium Property Act, RSA 2000, c. C-22. The section in its entirety reads as follows:

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 an owner,

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

(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;

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(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 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;

(c) 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.

3 The following provisions of the Condo Corp's bylaws are also applicable:

### **Definitions and Application**

1. \* \* \* The following definitions shall apply to all parts of these By-laws:

(j) "Maintenance Areas" means those areas, being part of the common property, which comprise fence enclosed yards and patios immediately adjacent to each unit, ...

### **2. Duties of Owners**

...

An Owner shall:

(d) use and enjoy the common property in such a manner as to not unreasonably to interfere with the use and enjoyment thereof by other owners or their families or visitors;

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...

(j) observe all rules pertaining to the use of the common area and comply strictly with the by-laws;

64. No owner shall erect or plant or cause to be erected or planted any fans, screen, barrier, shade, partition, tree, shrub or flower on or which overhangs any part of the property not exclusively occupied by such owner without the prior written consent of the Board. No owner shall erect or plant or cause to be erected or planted any fence, screen, barrier, awning shade, partition, tree or hedge upon the maintenance areas surrounding his unit without the prior written consent of the Board. The consents required by this by-law may be arbitrarily withheld.

76. ...

(b) no trailer either with or without living, sleeping or eating accommodation and no tent, or shed, or portable building shall be placed, located, or maintained on the common property except with the prior approval of the Board, and if any such chattel or other item has been approved by the Board, that Board may subsequently withdraw such approval in which event the chattel or other item shall be forthwith removed by the owner; ...

4 The Condo Corp has also published a set of Guidelines for Exterior Specifications the relevant portion of which reads as follows:

#### **EXTERIOR SPECIFICATIONS**

When planning a backyard renovation please note the following and submit your request stating these specifications with a detailed diagram for approval. This includes privacy yard changes to include flower beds and patio blocks.

#### **Sheds**

- Maximum height - eight feet from ground to highest point.
- Maximum of eighty square feet (80 sq ft) e.g. 10' by 8'.
- They must be a minimum of 1 foot away from the Unit or the fence.
- Acceptable colors are - oxford brown, sand beige or heritage tan.
- Trim color may be any of the aforementioned, or white.

5 The Gobeils submitted an application to the Board of Directors of the Condo Corp for four

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different things including the installation of a shed in their yard. They were informed that they must submit separate applications for each of the items "and that a revised plan was required showing the shed being located either along the west fence or along the back fence on the west side in order to avoid blocking the sun to the neighboring yard, being legal unit 43 (it is referred to by its mailing address Unit 473 in the Condo Corp's materials)". Notwithstanding, the Gobeils re-submitted their application for approval to install the shed without revising the location that being the northeast corner of their yard as the northwest side of their yard was already occupied with a perennial flower bed. It is common ground that the shed complies with the maximum height, size, and color set out in the guidelines and is properly located more than the minimum of 1 foot away from the fence.

6 Endorsed on the application under the heading *Denial and reason for denial* reads the following "Deemed location will restrict 473 enjoyment of her yard. Locate elsewhere (illegible word). 473 has offered to help." It is signed by Board Officer: Mary Stapleton — unanimous. This decision was communicated by correspondence to the Gobeils on June 30, 2010. Despite being advised that their application was not approved they proceeded to install the shed in the location denied by the Board. On July 12, 2010 a letter was sent by the Condo Corp's solicitor demanding removal of the shed which was not done and hence this application was made.

7 The Gobeils attached two photographs of the built shed. Based on these photographs and the other material before me, I note the following:

1. The Gobeils' and the neighbor's yards face northeast.
2. Unit 43 is two stories and is south of Unit 42.
3. The permitted size of a shed under the guidelines is 8' × 10' and it may be 8' high. The shed is 5' 2" × 7' 6" and is 7' 6" at its peak.
4. There is a shrub in Unit 43's yard along the side of the fence next to the shed which is as tall as the shed at its peak.

8 In addition the Gobeils indicated that they selected the site as it was the most suitable site for use in their yard. The site had been used as a general recreation area previously whereas the area suggested by the Condo Corp is currently used as a flower bed. It is the Gobeil's position that the decision of the Board was not reasonable and that they did not consider their own policies, regulations and practices. Further in the course of reaching its decision the Board failed to take into consideration their obligation to provide an opportunity to respond to the evidence received from the adjoining owner, and by failing to give them an opportunity to attend the meeting, consequently denied them the opportunity to confirm adherence to the principles of natural justice, in particular, the Board's obligation to act reasonably and make a fair and objective determination of the matter. Finally in argument they expressed an apprehension of bias by a Board member although they do not have specific evidence to support it.

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## Discussion

9 The *Condominium Property Act* creates 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. It also provides mechanisms 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 permitting infringement upon property rights otherwise enjoyed by a fee simple owner of real property.

10 As with all corporations there must be directors as the controlling minds of the operation of the entity. Noting the very nature of a Condominium Corporation their directors are placed in a very difficult role having to balance the rights of the joint owners (often their neighbors and usually with no compensation). I agree with the argument of counsel for the Condo Corp that elected boards of Condominium Corporations ought to be given considerable deference. This position is supported by the decision of Justice Chrumka in *934859 Alberta Inc. v. Condominium Corp. No. 0312180, 2007 ABQB 640* (Alta. Q.B.) at paragraphs 54 and 55 which read as follows:

[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. 181 and 192;

*Desjardins v. Winnipeg Cond. Corp.* 75 [1991] 2 W.W.R. 193, per Krindle, J. at p. 195;

*York Condominium Corp. No. 382 v. Dvorchik*, [1997] O.J. No. 378 per the Court at para. 5;

*Schaper-Kotter et al v. The Owners, Strata Plan 148*, 2006 BCSC 634 per Brooke, J. 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.

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11 Counsel for the Condo Corp says that the issue of conduct by the Board has not been brought before the court properly and the court should confine itself to the failure of the Gobeils to comply with the bylaws and a decision of the Board. The Gobeils resist the application on the basis that the decision of the Board was not properly made. Having put that in issue in response to the Originating Notice, in my view all relevant subsections of section 62 come into play and must be considered before the remedy sought by the Condo Corp can be granted. Furthermore, bylaws which purport to allow the Board to act arbitrarily cannot usurp the jurisdiction of the court to consider conduct pursuant to section 67. My conclusion in that regard is supported in paragraph 55 of Justice Chrumka's decision set out above. Regardless, on a careful reading of bylaw 64 it is plain it does not govern this situation but rather it is bylaw 78 which specifically refers to placing of sheds on common property and is therefore the applicable bylaw.

12 Construction of the shed by the Gobeils without Board approval *prima facie* constituted improper conduct pursuant to s. 67(1)(a)(i). The question in this case then shifts to whether the exercise of the powers of the Board was in a manner that was oppressively or unfairly prejudicial to or that unfairly disregards the interests of an interested party. Justice Chrumka in [934859 Alberta Inc.](#) also conducted an extensive and thorough review of the meaning of this provision which does not warrant repeating here other than to state his conclusion which reads as follows:

[92] In section 67(s)(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, interest, 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.

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

### **Conclusion**

13 In Edmonton the sun is generally positioned to the south. As the earth rotates each day the sun is said to move from east to west. A shed to the north may block the sun of this neighbor's yard to the south in a trifling way. This is especially so where a shrub of a height equal to that of the shed is planted in that neighbors yard which already obstructs the sun (albeit the shrub is not solid like a shed).

14 The Board has established guidelines, and although they are not binding, having established guidelines, Owners should quite reasonably expect their compliant applications would ordinarily be approved. There may well be valid reasons to vary from the guidelines but in those circumstances an Owner is entitled to receive from the Board, at the very least, a rational explanation for the variation. In this case the Board "deemed location will restrict 473 enjoyment of her yard..." There is reference to blocking the sun in the affidavit filed but nothing more. There is no indication that the Board gave any consideration to the extra expense or inconvenience to the Gobeils if they were to locate the shed elsewhere nor how it might affect the utility of their yard. Nothing indicates that there was any attempt to weigh the consequences to the two parties directly affected. It appears that the Board, without giving the Gobeils an opportunity to respond, simply accepted the complaint of the neighbor and denied the application.

15 I emphasize that I am cognizant that I should give considerable deference to the Board's decision and that the guidelines do not bind them, however, based on the material before me I nonetheless conclude that the Board's decision and the exercise of its power appears to have unfairly disregarded the interests of the Gobeils. On that basis I set aside the decision of the Board. Resisting the temptation to substitute my decision, I direct that the Board reconsider the Gobeils' application and provide their decision after given the matter proper consideration including the opportunity for the Gobeils to respond to other interested parties' submissions.

16 Although the Gobeils have successfully resisted the application, I am of the view that in light of the fact they constructed the shed contrary to the Board's decision that each of the parties will bear their own costs.

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