Court of Queen's Bench of Alberta

Citation: Condominium Plan No. 822 2909 v. 837023 Alberta Ltd., 2010 ABQB 111

Date: 20100315
Docket: 0903 03008, 0903 15874
Registry: Edmonton

Between:

The Owners: Condominium Plan No. 822 2909

Applicant

- and -

837023 Alberta Ltd., 346804 Alberta Ltd., and 1139897 Alberta Ltd.

Respondents

Memorandum of Decision of the Honourable Madam Justice J.B. Veit

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Summary

[1] The Owners of the Water's Edge condominium ask the court to evict the owner of the condominium units which are operated as a restaurant known as New Asian Village on the ground floor of the residential condo tower. In the alternative, the owners ask the court to direct that the restaurant owner: obey and adhere to the condominium corporation bylaws; not permit staff and associated individuals to threaten or harass members of the condo corporation Board and others in the complex; not permit water to run unattended and for extended periods of time over frozen meats; make timely payment of all condominium fines; and other similar relief.

[2] In support of their application, the Owners cite improper conduct by the owner of the restaurant which includes infringing the by-laws and rules of the condominium and offending the dignity of the co-owners. The specific conduct invoked includes: cutting a hole through the common exterior wall of the building and the removal and replacement of a common wall within

the restaurant boundaries; late-night construction work in breach of an agreed construction schedule; and the attribution by the restaurant owner of racist motives to the Owners' expression of concerns.

[3] The Owners' application is denied: even accepting for the purposes of this application that the *Condominium Property Act* allows a court to order the eviction of a condo owner where the corporation by-laws do not anticipate eviction, and although the Owners have established that the restaurant owner engaged in improper conduct which, at least in part consisted of serious breaches of the condominium's by-laws, eviction would be a disproportionate remedy in the circumstances here. Without finding that there could not never be such a serious breach of condo by-laws that would justify eviction of an owner, the court concludes that incremental enforcement of by-laws is the norm.

[4] The restaurant owner's misconduct by making apparently groundless accusations of racism against the Owners does not justify giving the Owners a remedy to which they would not otherwise be entitled.

[5] Rather than subjecting the restaurant owner to eviction, the court orders the owner of units 210 and 211:

- to comply with the condominium's by-laws;

- to compensate the condominium corporation for the hole in the exterior wall, either by effecting a repair of the wall or by paying the corporation for the damage done to common property. If the parties are unable, within 30 days of the release of this decision to agree on the appropriate amount of compensation, Water's Edge will be at liberty to set up a hearing before me to set the amount of compensation;

- within 15 days of the release of this decision, to provide the condo board with complete plans of all changes made to the HVAC system and to ask the condo board for approval of those plans;

- within 15 days of the release of this decision, to provide the condo board with proof from the municipal fire service authorities that the restaurant's premises comply with the fire code;

- within 15 days of the release of this decision, to ask the condominium corporation for approval of the removal and replacement of the common property walls inside the restaurant premises.

[6] For his part, the restaurant owner asks the court for a declaration that the Owners have attempted to impose improper sanctions on him and for a declaration that the Owners have improperly denied parking rights to restaurant patrons and staff.

[7] The restaurant owner's application is allowed in part: the condo board had no authority to impose fines on the restaurant owner. However, the restaurant owner has failed to produce the agreement on which it relies to claim a certain number of parking stalls; therefore, the restaurant owner is not entitled to the parking rights declaration it seeks.

Cases and authority cited

[8] **By The Owners:** ***934859 Alberta Inc. v. Condominium Corp. No. 0312180,*** 2007 ABQB 640; ***Gentis v. Strata Plan VR 368*** (2003), 8 R.P.R. (4th) 130 (B.C.S.C.); ***Ram v. Jinnah***, 1982 CarswellAlta 422 (Q.B.); ***Spronken v. Schilger***, 1998 CarswellAlta 43 (Q.B.); ***Condominium Property Act***, R.S.A. 2000, c. C-22; *Judicature Act*, R.S.A. 2000, c. J-1; ***Condominium Plan No. 952 4710 v. Webb*** (1999), 236 A.R. 364 (Q.B.); ***Condominium Corp. No. 811 0264 v. Farkas***, 2009 ABQB 488 (Alta. Q.B.); ***Condominium Plan No. 932 2887 v. Redweik***, [1994] A.J. No. 1020 (Alta. Master); ***Condominium Plan No. 022 1347 v. N.Y.***, 2003 ABQB 790 (Alta. Q.B.); ***Condominium Plan No. 822 2909 v. Li***, 2007 ABQB 693 (Alta. Q.B.).

[9] **By the restaurant owner:** ***Condominium Corporation No. 8110264 v. Farkas***, 2009 ABQB 488; *Judicature Act*, R.S.A. 2000, c. J-2; ***Saskatchewan River Bungalows v. Maritime Life Assurance Co.***, 1992 CarswellAlta 382, 1994 CarswellAlta 769; ***Mah v. Truscan Realty Ltd.***, 1996 CarswellAlta 570; ***Alwell Mechanical Ltd. v. Royal Bank*** (1985), 41 Alta. L.R. (2d) 8 (C.A.); ***Dovale v. Metropolitan Toronto Housing Authority***, 2001 CarswellOnt 400; ***361488 Alberta Ltd. v. Westwinds Club***, 1989 CarswellAlta 127; ***Shivji v Owners: Condominium Plan No. 012 2336*** 2007 ABQB 572

[10] **By the court:** *On the proper treatment of ownership rights in a condominium setting:* ***York Condominium Corp. No. 136 v Roth*** [2006] O.J. No. 3417 (Sup.Ct.J.); ***York Condominium Corp. No. 382 v Dvorchik*** [1997] O.J. No. 378 (C.A.); ***Sterling Village Condominium, Inc. v Breitenbach*** 1971 Fla.App. LEXIS 6191; Grassnick, D.E., Note: *Minding the Neighbor's Business: Just how far can condominium owners' associations go in deciding who can move into the building?*, 2002 U.Ill.L.Rev. 185; Kim, M.C., Symposium, *Involuntary Sale: Banishing an owner from the condominium community,* (1998) 31 J. Marshall L.Rev. 429.

[11] *On the application of the doctrine of laches:* ***Taylor v Alberta (Registrar, South Alberta Land Registration District)*** 2005 ABCA 200, [2005] A.J. No. 696.

[12] *On the right of the condo corporation to collect from an owner all or a portion of the deductible on coverage which the corporation had covenanted to obtain:* ***Northwestern Metal & Salvage Ltd. v Alltar Roofing Ltd.*** [1994] A.J. No. 432 (C.A.)

1. Background

a) Factual

[13] The Owners: Condominium Plan No. 822 2909 is a condominium corporation created by registration of Condominium Plan No. 822 2909, and is responsible for the maintenance and administration of the condominium known as Water's Edge.

[14] Water's Edge consists of:

a. one high-rise building, containing two commercial units (being Unit 210 and Unit 211) and 209 residential units (collectively, the "Building");

b. ten ground-level residential townhouse units;

c. one four-level parkade, containing 320 parking stalls (the "Parkade"); and

d. one surface parking lot, containing 23 parking stalls at the front of the Building (the "Front Lot").

[15] Approximately 500 people reside at Water's Edge at any given time.

[16] All of the numbered company defendants are corporations registered in Alberta. In particular:

a. 837023 Alberta Ltd. is the registered owner of the units;

b. 346804 Alberta Ltd. rents the units from the owner, and operates under the trade names "New Asian Village Restaurant" and "New Asian Village"; and

c. 1139897 Alberta Ltd. is the successor to 346804 Alberta Ltd., and is in the process of acquiring the business interests of and/or otherwise taking over from that corporation. It also operates under the trade name "New Asian Village".

[17] Harmeet Kapur is a director and shareholder of both the owner and 346804 Alberta Ltd. Mr. Kapur's daughter, Monika Lavelle, is a director and shareholder of 1139897 Alberta Ltd. Mr. Kapur has a Master's degree in economics.

[18] Notwithstanding Ms. Lavelle's position as a director of 1139897 Alberta Ltd., Mr. Kapur stated that he has the authority to bind 1139897 Alberta Ltd. with the responses he provided while being cross-examined on the Kapur Affidavit. He undertook to provide evidence confirming his authority in this regard by means of a Statutory Declaration sworn by Ms. Lavelle; this undertaking remained unfulfilled.

[19] Throughout their evidence, both Mr. Kapur and Ms. Lavelle refer to the respective Respondent corporations collectively and interchangeably as the "NAV".

[20] In Unit 210, the NAV operates a restaurant specializing in Indian cuisine, which is open to serve the public from approximately 11 :00 am to 11 :00 pm, Monday through Sunday. In contravention of the existing development permit which allows the restaurant operating in unit 210 to seat 66 patrons, NAV actually provides seating for 120-130.

[21] Unit 211 has been used by the NAV for a variety of purposes. It currently serves as living quarters for restaurant staff and as additional office space. In addition, the NAV admits to the ongoing use of Unit 211 as a food storage and preparation area for the restaurant, contrary to the direction of a Capital Health inspector.

[22] Section 6.3 of the Bylaws provides that prior to commencing any major renovation, an owner must obtain an approval from the Board.

[23] Further to the NAV's request that the Board consent to its major renovation plans, Mr. Kapur met with the Board to present these plans in greater detail. The Board consented to the NAV's plans on the condition that the NAV provide the following information at least three weeks prior to beginning the renovations:

a. a copy of the development and building permits required by the City of Edmonton;

b. detailed renovation plans and specifications;

c. construction schedules and details.

[24] Despite the conditions listed above, the NAV began renovating without the Board's approval, and without the development and building permits that it required from the City of Edmonton.

[25] Moreover, on at least four separate occasions, the NAV represented to Water's Edge that it had obtained the authorization it required from the City of Edmonton when in fact it had failed to do so.

[26] The NAV's decision to proceed with the unauthorized renovations resulted in the removal of a common area wall, and the triggering of the building's fire alarm at approximately 2:00 a.m. on September 4, 2008, which forced all the Water's Edge's residents to evacuate in the middle of the night.

[27] Edmonton Fire Rescue Services attended on the scene and were required to shut off the Building's entire fire alarm system, thereby leaving all owners, occupants and their visitors without a fire warning system until the alarm was repaired the next day.

[28] The Board first learned that the NAV was conducting the unauthorized renovations as a result of the September 2008 Fire Alarm.

[29] Despite the fact that the unauthorized renovations were already underway, the NAV once again sought the Board's consent to commence renovations, and provided the Board with the following assurances:

a. The NAV fully intended to satisfy the terms and conditions set forth in the Board's November 13, 2007 Letter;

b. The renovations would be conducted in phases, starting with the restaurant space, for which the NAV had an existing development permit;

c. It agreed to use the HVAC System for heating and cooling in the Units;

d. With the Board's permission, the NAV intended to install an independent make-up air exchanger for Unit 210; and

e. The NAV would ensure that its contractors adhered to a daily work schedule of 8:00 a.m. until 4:00 p.m. for approximately one month.

[30] Water's Edge reiterated that it did not object to the proposed renovations, provided that the NAV:

a. Satisfy the conditions set forth in the November 13th, 2007 letter, including obtaining all permits required by the City of Edmonton;

b. Restore the common area wall it had removed;

c. Ensure that renovation work be conducted within the times set forth in the construction schedule; and

d. Provide further information with respect to the proposed installation of the independent make-up air exchanger to Unit 210 for the Board's consideration and approval.

[31] The NAV agreed to these conditions and repeatedly assured the Board that it was taking measures to restore the common area wall removed by it. The applicants maintain that NAV has not "restored" the common property walls because it did not exactly duplicate the original common property walls.

[32] On October 22, 2008, the NAV advised the Board that rather than proceeding with the renovation plans proposed in September 2008, it intended to proceed with "cosmetic" changes to Unit 210 instead.

[33] Despite the dramatic shift in its renovation plans, the NAV insisted on commencing the renovations on an expedited basis.

[34] To accommodate this tight time line, the Board agreed to review the NAV's revised renovation proposal on an expedited basis. After doing so, on or about October 29th, 2008, the Board advised the NAV that as long as the proposed "cosmetic" changes would not involve any changes to the plumbing or electrical systems in the Water's Edge, or in any way further affect the common area or structural walls, then the NAV was permitted to proceed without further approval.

[35] Nevertheless, the NAV performed renovations that fell outside the permissible range of activity approved by the Board, demonstrating once again the NAV's ongoing tendency to flout the Bylaws.

[36] The unauthorized renovations performed by the NAV resulted in the following breaches, disturbances, and risks to the safety of Water's Edge residents:

a. A 16 x 16 inch square was cut into the exterior wall of Unit 210 in order to facilitate the installation of an independent make-up air exchanger. Notably, the NAV insisted that it was entitled to complete the installation notwithstanding that doing so resulted affected an exterior wall of Unit 210, contrary to the conditions imposed by the Board;

b. The occupants of a residential unit located above the Units were forced to evacuate at 3:00 am on December 11, 2008 due to toxic smells emanating from the Units;

c. At least three owners and occupants complained of a loud "electric saw" noise at approximately 12:25 am on February 4, 2009;

d. Five further fire alarms were triggered by the NAV's renovation activities between November 14, 2008 and February 9, 2009; and

e. The NAV caused the fire safety equipment from Unit 210 to be removed, in opposition to the Board's request that any such equipment only be removed by and with the approval of the appropriate authorities.

   Although the NAV provided the Board with a number of faxes and drawings from Edmonton Fire Rescue Services, none of these documents provided the necessary approvals. In fact, Edmonton Fire Rescue Services advised the Board that, pursuant to the Alberta Building Code, permission to remove fire safety equipment can only be obtained from a Building Inspector or an architect.

[37] Despite the above catalogue of proscribed conduct, Mr. Kapur has refused to acknowledge that the NAV violated any of the Bylaws.

[38] Indeed, the Unauthorized renovations and the nuisances and risks they caused continued even after the current application was filed. In particular:

a. The Board received complaints of night-time noise disturbance from Water's Edge residents in March, 2009. Upon investigation, the Board discovered that the NAV was once again renovating Unit 210 outside of the agreed upon hours of the construction schedule;

b. Fire Protection Inc. ("Fire Protection") attended at Water's Edge to conduct a standard inspection of the building's fire safety equipment and systems on June 15th, 2009. Fire Protection's inspection revealed that two fire extinguishers and two fire hoses were missing from Unit 210, and access to certain fire equipment in the unit was also blocked;

c. Fire Protection was again required to attend at Water's Edge on June 18th, 2009 to investigate an open circuit trouble signal from Water's Edge's fire alarm control panel. The trouble signal resulted from the NAV's decision to remove two fire bells so that it could install a cabinet;

d. On July 28, 2009, the Board discovered that the NAV had removed waterproofing and shingles around the "stack area" on the roof of Unit 210, which is common property. Not only did this conduct violate the condition that the NAV's renovations would not affect the common areas, but it also resulted in water leakage in Unit 210;

e. The Board discovered that the NAV had removed a door and doorframe from a part of the common property on or about August 26th, 2009. The door in question formed part of an exterior common area wall, and its removal is a further indication of the NAV's failure to honour its promise that the renovations would not affect the common areas.

[39] Mr. Kapur was asked in cross-examination why the NAV carried out the unauthorized renovations despite failing to obtain the permits it required from the City of Edmonton and in a manner that repeatedly contravened the Bylaws. Mr. Kapur admitted to the violations and generally relied on three justifications for the NAV's proscribed conduct:

a. As a commercial unit, the NAV should only have to comply with the Bylaws to the extent that doing so did not interfere with running a business. Moreover, if compliance with the Bylaws conflicted with the NAV's business interests, then the latter was of paramount importance;

b. It is not the NAV's conduct that is the problem, but rather the Board's response to it, which Mr. Kapur claims acted unreasonably and in a discriminatory fashion by asking too many questions, imposing too many restrictions, and, in general, making the unauthorized renovations a "big issue". Mr. Kapur's believes that knocking down a common wall was a permissible step that needed to be taken in order to be tenable to customers to access to his restaurant;

c. Finally, Mr. Kapur baldly asserted that the unauthorized renovations were necessary to ensure compliance with directions from the health and/or safety officials. Under cross-examination Mr. Kapur gave undertakings to substantiate these claims, however, the NAV has failed to provide any such evidence.

[40] On December 11, 2008, Mr. Kapur forwarded via e-mail a letter to a group of people including the president of The Owners, and to various media outlets. The letter, shown in its original format, read in part:

> Looking at the above matter and the thick file from the lawyers I feel that some members are on an ego trip. This ego trip is affecting the business in hence 25 employees and their family and children. The process from the board to get approval is unreasonable we require an expedient response because we have contractors and people waiting doing other jobs such as moving the fire hose. My understanding is since there is no commercial representation certain members are discriminating not only to being a commercial condo but my color. I hope we can come to some understanding since you have left me with no other choice but to go to the media and public and to let them know that you are being discriminatory and are treating me unfairly.

[41] In the letter itself, the following are shown as being copied:

> Edmonton Journal (Nick Leese)
> Edmonton Sun (Graham Hicks)
> CFRN (Trouble Shooters)
> Ministry of Corporate Services (Heather Klimchuk)
> Commissioner for Human Right

(Emphasis added in above extracts)

[42] Mr. Kapur's e-mail indicates in its body that the e-mail, with the letter attachment, was being sent to the President of The Owners, to the Water's Edge condo itself, to Mr. Kapur's own lawyer and to the lawyer for the condo association and to Messrs Lees and Hicks. The e-mail does not show that the following were e-mail addressees: CFRN, to the Minister of Corporate Services and to the Commissioner for Human Rights. It is not clear, therefore, whether the letter was actually ever sent to the latter group of organizations.

[43] It appears that Mr. Kapur's evidence in support of his claim that steps were taken against him because of his colour consists entirely of a comment made by the residents of the second and third floors of the Water's Edge, who indicated that they are bothered by the smell of curry that emanates from the food served at the NAV. However, Mr. Kapur has refused respond to the Board's demand that he retract or apologize for his defamatory publication of this allegation.

[44] Past examples of the NAV's proclivity to flout the Board's authority, disregard its Bylaws, and disturb the right to quiet and peaceful enjoyment of the Water's Edge residents are described in detail in Mr. Messner's two-volume Affidavit, which, *inter alia* deposes:

a. Other unauthorized alterations to the Units & common property, between March 1999 and October 2007;

b. Unauthorized use of the parking stalls at Water's Edge, including frequent parking in emergency access zones;

c. Erection and placement of parking and advertising signs on common property;

d. Repeated failure to pay condominium fees in a timely manner;

e. Issues of ongoing flooding relating to, among other things, the NAV's regular disposal of grease directly into the sewer line;

f. Issues regarding mice infestation in the Units, leading to infestations in other units directly abutting the NAV;

g. The unkempt appearance of the Units and common property;

h. Responsibility for utilities usage;

i. Failure to follow agreements relating to use of the Building;

j. Deliveries to the NAV that block access to the front entrance and disrupt traffic flow in front of the Building;

k. Refusal to notify the Board of the identities of the individuals who reside in Unit 211;

l. Use of Unit 211 as a food preparation and storage area; and

m. Instances of abusive behaviour towards the Board and Water's Edge staff.

[45] The constant difficulties the Board has encountered in its dealings with the NAV have occupied the majority of the its time over the past several years, and consequently, the Board's capacity to address other matters that arise in managing the affairs of a large, upscale condominium complex like Water's Edge has been significantly reduced.

[46] Indeed, the Board has issued an invoice to the NAV for an amount totalling $17,646.36 in order to recover the costs it has been forced to incur in order to repair the damage arising from the Unauthorized renovations performed by the NAV. This amount remains outstanding.

[47] In addition, from 2007 until February 27th, 2009, the Board has incurred legal costs of at least $22,998.50. This amount does not include the costs associated with the within Application.

b) Legislative

[48] Alberta's *Condominium Property Act* includes the following, broad, power to grant remedies:

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 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;

(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;

(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.

(Emphasis added)

2. How should breaches by condominium owners be treated? Is a condo owner more like a bee in a hive or a queen in a castle?

[49] Condominium owners are real real property owners; they are not some kind of second or inferior type of real property owners. The common law of England has always demonstrated respect for real property owners, especially where the real property consists of residences. This is partly because of the unique nature of real property: its location is not reproducible. Although recent developments in the law of specific performance have made some inroads into the traditional approach to real property, clearly the law treats, for example, tenants, differently than owners of real property.

[50] In ***Webb***, Murray J. referred with approval to ***Sterling Village***, a Florida Court of Appeals decision from which the following sentence has since been extensively quoted:

> . . . an individual ought not to be permitted to disrupt the integrity of the common scheme.

[51] It might be noted, first, that ***Sterling Village*** was not an eviction case, but was one where the issue was whether glass jalousies should be returned to their original screened condition. Compliance with a cosmetic feature of a condominium constitution would naturally be treated differently from an application for eviction of an owner from his own property.

[52] Nevertheless, it must be acknowledged that ***Sterling Village*** appears to have been followed not only in Florida courts, as might be expected, but in certain other American courts. However, as the articles cited above point out, the ***Sterling Village*** approach to the assessment of the rights of condo owners is not the only line of American jurisprudence on the topic.

[53] It might also be noted that, in at least some of the American cases where eviction has been ordered in reliance on a ***Sterling Village*** type of analysis, the condo association had passed by-laws which specifically authorized the eviction of an owner who was in breach of the condo association by-laws. I agree with the comment made by Burrows J. in ***Farkas*** to the effect that a court which is asked to evict an owner will, at least in the first instance and before going on to a consideration of the court's statutory powers, be concerned about whether eviction is anticipated in the corporation by-laws. On the issue of statutory powers, Lee J. mentions at para. 65 of ***N.Y.*** that a decision to evict an owner is "expressly granted to the Court" in s. 67 of the *Condominium Property Act*. However, Justice Lee's intention when he used the word "expressly" in para. 65 of his decision is made more clear in para. 67 of the same decision where he states:

> The C.P.A. does not state that the remedy of eviction of an owner is unavailable. If an act is silent as to a specific remedy, it does not mean that remedy cannot be granted.

With respect to those who have a different view, I have concluded that, while the *CPA* does use very broad language - "any other directions or make any other order" - so that eviction may possibly come within the language of the statute, it is at the least very clear that the *CPA* itself outlines a framework of incrementation. That incremental approach must be respected by condo associations, condo owners, and the courts.

[54] In Canadian law, we are accustomed to dealing with restrictions or limitations on the right of owners of real property to do what they please on their property: zoning and other by-laws are perhaps the most usual format for such restrictions. I do not see the necessity of treating condo owners differently from the way that the law deals with other real property owners relative to municipal regulation. In both cases, the owners of real property are subject to appropriate restriction but in neither case is the integrity of the common scheme paramount.

[55] In summary, I am of the view that it is not helpful for Canadian courts to rely on American case law without the usual safeguards that apply to the introduction of foreign law into a Canadian proceeding. There is nothing in condominium law that is particularly American; it is not one of the traditional areas of law, like insurance law, where Canadian courts look to American jurisprudence for guidance.

[56] In the result, I am of the view that caution should be exercised before coming to the conclusion reached in ***N.Y.*** to the effect that owners and tenants can be treated similarly.

3. What breaches of by-laws and regulations did New Asian Village commit here?

a) Serious breaches

[57] New Asian Village committed some egregious breaches of the condo by-laws: by any standard, cutting a hole in the common property outside wall of the building is such a breach even if the alteration of the outside wall was not a structural alteration but only a mere cosmetic alteration of the outside wall. These breaches constitute "improper conduct" as that term is defined in the applicable statute.

[58] The restaurant's changes to the HVAC system without prior consent was, at the least, a potentially serious breach of the by-laws. It is not clear from the material on this special chambers application whether the actual modifications to the system caused a problem; if NAV caused a problem, that is a serious problem. If the modifications, although they had not received the board's prior consent, were consistent with generally accepted practices both as to engineering and as to execution, then there is a breach, but it will only be a technical breach.

b) Minor breaches

[59] The restaurant's breaches of many of the condo by-laws are minor in nature. For example, the occasional placing of a bag of food in a common hallway is a minor breach, as is the occasional failure to appropriately dispose of garbage.

[60] Some of the alleged breaches have not been proven. For example, although the restaurant currently has seating for a larger number of patrons than the original zoning allows, it is not clear when the restaurant was enlarged, or by whom.

[61] Some of the restaurant's breaches appear to have occurred through a potentially legitimate misunderstanding. For example, the incident involving the fire hose illustrates the way in which a statement from a municipal authority can be equivocal or ambiguous.

[62] Some of the restaurant's breaches are real breaches, but are not objectively serious. For example, Water's Edge invokes the "mice infestation" of the restaurant. It cannot be unusual for places that sell and store food to have rodents; the restaurant owner will be in serious breach of the condo by-laws if he fails to take adequate steps to deal with the rodents. The fact that the restaurant was not shut down by the health authorities even though it was subject to regular inspections is some independent evidence that the restaurant owner was acting responsibly to eliminate the rodent problem.

[63] There is no doubt that noise emanating from the restaurant in the early morning hours must have been disturbing to some of the other owners or tenants. However, given that the restaurant is open until nearly midnight, and that patrons would be leaving at closing and that the restaurant staff would be cleaning up every night after closing, noise at 12:30 or at 2:00 a.m. cannot be seen as a serious breach in all the circumstances.

[64] Some of the restaurant's breaches sound worse than they are. For example, the removal of a common property wall sounds like a very serious breach. However, the evidence on this application establishes that the common property walls were in fact located within the walls of the restaurant and even Water's Edge did not at first realize that these walls were common property walls. Also, although NAV demolished the common property walls and replaced them, it replaced them with walls that were partly made of glass, rather than walls that were exactly the same as the walls demolished. These common walls, which are entirely within the perimeter of the restaurant, may or may not be a real problem; there is no evidence that they were structural or bearing walls or that the way in which the walls were replaced has in any way negatively affected the common property. In those circumstances, what appears to be egregious error diminishes in seriousness to mere error.

[65] Some of what Water's Edge points to as serious breaches do not objectively fit into that category. For example, even Water's Edge acknowledges that, in the second round proposal, NAV was not undertaking major renovations. It is not impossible that even when undertaking minor renovations there could be an unfortunate incident that would result in the cutting of the building's wires. There may have been negligence on the part of the workers who were carrying out the minor renovations, but that negligence does not necessarily mean that the restaurant owner is engaged in egregious wrongdoing.

[66] Finally, much of the conduct of which Water's Edge complains relates not so much to what the restaurant owner does, but how he does it. He appears to be a difficult person to deal with; although he is a well educated person, he constantly purports to misunderstand the directions issued by the condo board. He makes allegations, for example about the black mold, which are intended to be taken seriously but which he never backs up. He has also been discourteous to members of the condo board. However, the use of bluster, profanity and even threats (which in the event did not escalate but appear to have either diminished or at least attenuated over time) does not itself constitute a breach of the by-laws.

4. What is the appropriate sanction for the breaches?

a) Serious breaches

[67] Even though NAV has committed some serious breaches of the condo by-laws, I am of the view that it would be unfair to evict the owner from its property.

[68] As indicated above, I am of the view that the *Condominium Property Act* proposes an incremental approach to improper conduct. Eviction, as proposed by the applicants, is not an incremental remedy. Some opportunity should be given to the restaurant owner to remedy the breaches before the most serious relief possible should be invoked.

[69] Incidentally, on the issue of eviction, I agree with Water's Edge that eviction of the tenants would not be an effective remedy here. Water's Edge did not serve the statutorily required eviction notices. Water's Edge explains that it was unable to do so because the restaurant owner breached his obligation to inform the condo board of any tenant the owner was placing in the units. Ultimately, however, eviction of one tenant would be impractical because the restaurant owner could immediately incorporate a new entity to take over the business of the current tenant. The evidence establishes that the restaurant owner did not treat the various corporate entities as truly separate persons; rather, he called all of the corporate entities the New Asian Village. So will I. The real issue on this application is therefore whether the owner should be evicted from the 2 units which he owns rather than whether a tenant should be evicted from the two units.

[70] When addressing the issue of sanction, it should also be noted that eviction is not a remedy which is specifically authorized in this condominium's by-laws.

[71] Water's Edge asks, if this owner can't be evicted, what circumstances would ever justify eviction?

[72] One answer to that question is that it is, in fact, extremely rare for a commercial condo owner to be evicted from ownership: ***Roth*** at para. 20. (I have been unable to find an electronic version of the decisions in either *Redican* or *Patrick*.)

[73] Even though this condominium's by-laws do not anticipate the eviction of owners, and even though the legislation does not expressly authorize the eviction of owners, there may well be situations in which the extreme sanction of eviction would be appropriate. For example, if, an

owner allowed dangerous substances to escape from his unit and, after an appropriate warning, refused to stop the offending conduct, eviction may the only safe and reasonable option. A breach of a by-law that caused structural damage to condominium property may justify eviction. Indeed, even a serious breach that was not dangerous might, if repeated despite warnings were unavailing, justify eviction. This restaurant owner has been a nuisance to the other owners, but there is no evidence that his breaches were dangerous either to the other owners or to their tenants or to the structure of the condominium itself. Just as, in criminal law, the most serious sentence available is not reserved only for the most serious offence committed by the most serious offender, it is not necessary to reserve eviction for the most serious breach by the most culpable condo owner.

[74] In general terms, the restaurant owner must be given the opportunity of correcting his serious breaches of the condo by-laws. In particular, the restaurant owner must:

> - compensate the condominium corporation for the hole in the exterior wall, either by effecting a repair of the wall or by paying the corporation for the damage done to common property. If the parties are unable, within 30 days of the release of this decision to agree on the appropriate amount of compensation, Water's Edge will be at liberty to set up a hearing before me to set the amount of compensation;
>
> - within 15 days of the release of this decision, provide the condo board with complete plans of all changes made to the HVAC system and to ask the condo board for approval of those plans;
>
> - within 15 days of the release of this decision, provide the condo board with proof from the municipal fire service authorities that the restaurant's premises comply with the fire code;
>
> - within 15 days of the release of this decision, ask the condominium corporation for approval of the removal and replacement of the common property walls inside the restaurant premises.

b) Minor breaches

[75] Water's Edge has established that it is entitled to a declaration that the restaurant owner must comply with the condominium by-laws.

[76] However, a series of minor breaches remains a series of minor breaches. A fine would be an appropriate way to deal with such breaches. There is no evidence that Water's Edge has been unable to pass a by-law imposing fines for such breaches; indeed, the condominium legislation appears to anticipate the problems that large condos might have in making amendments to the by-laws to incorporate fines into the by-laws. An analogy might be drawn between a municipal by-law requiring a home owner to clear the snow from the sidewalk in front of the property; it is surely inconceivable that a municipality could evict an owner for failure to clear the snow. It is reasonable, however, for the municipality to clear the snow, to charge the owner for the clearance, and to add the charges to the owner's tax roll. If the owner cannot, in the end, pay the tax roll, the

municipality could sell the property to recover its taxes, but that is the only way in which a minor breach can become so serious as to attract eviction from the property.

[77] Also, many of the breaches invoked by Water's Edge on this application are old breaches, some going back as far as 1989. The doctrine of laches applies to such breaches. The doctrine was described relatively recently by our Court of Appeal in ***Taylor***, a case which involved a different type of condominium problem, where it cited the following with approval:

> 64 In M.(K.) v. M.(H.) (1992), 96 D.L.R. (4th) 289, the Supreme Court of Canada adopted (at para. 97) the principle stated in Lindsay Petroleum Co. v. Hurd (1874), L.R. 5 P.C. 221 concerning the doctrine of laches:
>
> > ...the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.

[78] It would be unfair, two decades after an alleged breach has occurred to ask for relief based on the breach. In this context, it will be recalled that if a person who is involved in a motor vehicle accident doesn't file a statement of claim within 2 years of the accident, that person loses their cause of action. It would be inconceivable that such a different rule would apply to alleged breaches of condominium by-laws. Among other injustices, in the circumstances here, the restaurant owner is essentially unable to adequately respond to such ancient accusations. At this date, he certainly can't remedy the breach.

[79] It would also be unfair to impose the extreme sanction of eviction for minor breaches in circumstances where the condo board has not done all that it could do, and might perhaps have promised to do, to cure some of the friction between NAV and the residential owners of the condo. For example, the by-laws still do not recognize that there is some legitimate commercial use by one of the owners; nor has the condo board provided a dedicated sewer line that would help ease the tension between NAV and the residential owners.

[80] As to some of the breaches for which the condo corporation has had to pay certain fees, it is of course appropriate that the restaurant owner should pay those amounts. If the amounts set out in para. 78 a, b, e, g, h, i, j, and l are not paid within 30 days of the release of this decision, Water's Edge can collect them as if they were condo fees.

5. Does the allegation of racism affect the sanction?

[81] Although the restaurant owner's allegation of racism will, understandably, make relations between himself and the condo board strained, those allegations themselves do not justify imposing a more severe sanction on the restaurant owner than his actions would otherwise justify.

[82] It is a serious matter to make a reckless allegation of racism; any person correctly labelled a racist should be, and feel, stigmatized. The members of the condo board who were themselves so labelled may have a recourse against the restaurant owner pursuant to the *Human Rights, Citizenship and Multiculturalism Act*, R.S.A. 2000, c. H-14. However, even if a complaint of racism were made out against the restaurant owner, the condo board acknowledges that that finding would not, on its own, justify the eviction of an owner any more than would a finding of racism by the Human Rights and Citizenship Commission authorize the City of Edmonton to evict the owner of a single family dwelling from his residence.

[83] The adding of a reckless allegation of racism to serious breaches of condominium by-laws, still does not make the combined conduct so egregious that it justifies the sanction of eviction.

6. Did the condo corporation attempt to impose unlawful penalties on New Asian Village?

[84] The condo corporation acknowledges that it did not have the required authority to impose fines on the restaurant owner.

[85] The condo corporation does, however, have the required authority to pass along to the restaurant owner specific disbursements that were caused by the restaurant owner. With respect, the reasons in ***Shivji***, on which the restaurant owner relies to claim that he should not have to pay for any of these disbursements, did not consider our Court of Appeal's decision in ***Northwestern Metal & Salvage Ltd.*** where the majority of the court expressly excepts deductibles from the general provision that a landlord cannot sue a tenant for damages caused by the tenant which the landlord had covenanted to insure against:

> 6 Therefore, it seems to me that in substance the defendant was right, and in substance the order given in Queen's Bench about the preliminary issue was right here is one qualification however. If there is any part of this loss which is not covered by the fire insurance, because there is an exception or deduction which is standard in insurance policies, then the defendant should not have the benefit of that, For example, some fire insurance policies will have a deductible of $100.00. If there were anything like that here, and it was standard, then to that very limited extent, the defendant would be liable.

[86] So far as I am aware, although the Court of Appeal has not resiled from the position it took in 1994.

[87] There was no evidence led on this special chambers application of the deductibles that applied for each of the insured perils. However, given the relatively small amounts claimed by

Water's Edge, I assume that these amounts are within the applicable deductible. Those amounts are therefore recoverable against the restaurant owner.

7. Did the condo corporation attempt to impose inappropriate parking restrictions on New Asian Village?

[88] NAV has not proved its entitlement to a parking direction; NAV has failed to produce the written agreement between itself and the condo corporation which it alleges sets out a specific parking entitlement for the restaurant.

8. Costs

[89] If the parties are not agreed on costs, I may be spoken to within 30 days of the release of this decision.

Heard on the 9th and 10th days of February, 2010.
Dated at the City of Edmonton, Alberta this 12th day of March, 2010.

J.B. Veit
J.C.Q.B.A.

Appearances:

Sandeep K. Dhir, Christopher W. Spasoff, Field LLP
for the Condominium Board

Jerritt R. Pawlyk, Bishop & McKenzie LLP
for the owner of the New Asian Village