COURT OF APPEAL OF
NEW BRUNSWICK

45-11-CA

2012 NBCA 26 (CanLII)

WESTMORLAND COUNTY CONDOMINIUM CORPORATION NO. 29	WESTMORLAND COUNTY CONDOMINIUM CORPORATION NO. 29
APPELLANT	APPELANTE
- and -	- et -
LARRY ESTABROOKS	LARRY ESTABROOKS
RESPONDENT	INTIMÉ
Westmorland County Condominium Corporation No. 29 v. Estabrooks, 2012 NBCA 26	Westmorland County Condominium Corporation No. 29 c. Estabrooks, 2012 NBCA 26
CORAM: The Honourable Chief Justice Drapeau The Honourable Justice Robertson The Honourable Justice Quigg	CORAM : L'honorable juge en chef Drapeau L'honorable juge Robertson L'honorable juge Quigg
Appeal from a decision of the Court of Queen's Bench: February 28, 2011	Appel d'une décision de la Cour du Banc de la Reine : Le 28 février 2011
History of Case:	Historique de la cause :
Decision under appeal: 2011 NBQB 059	Décision frappée d'appel : 2011 NBBR 059
Preliminary or incidental proceedings: N/A	Procédures préliminaires ou accessoires : s.o.
Appeal heard: September 14, 2011	Appel entendu : Le 14 septembre 2011
Judgment rendered: March 8, 2012	Jugement rendu : Le 8 mars 2012
Reasons for judgment by: The Honourable Chief Justice Drapeau and Justice Quigg	Motifs de jugement : L'honorable juge en chef Drapeau et l'honorable juge Quigg
Concurred in by: The Honourable Justice Robertson	Souscrit aux motifs : L'honorable juge Robertson

Counsel at hearing:

For the appellant:
Michel C. Poirier

For the respondent:
Morley Rinzler

THE COURT

The appeal is allowed, in part. The Court declares the appellant condominium corporation is entitled to an order compelling the completion of the condominium building and the respondent's unit, in accordance with the Court's reasons. The issuance and the crafting of that order and any appropriate terms, conditions and ancillary orders, as well as the resolution of any outstanding claims for relief in the Notice of Application are referred to the Court of Queen's Bench for hearing and determination. In addition, the Court orders the respondent to indemnify the appellant for its reasonable legal costs in connection with the application in first instance and the appeal. Any related dispute will be heard and determined by the Registrar.

Avocats à l'audience :

Pour l'appelante :
Michel C. Poirier

Pour l'intimé :
Morley Rinzler

LA COUR

Accueille l'appel en partie. La Cour déclare que l'association condominiale appelante a droit à une ordonnance prescrivant l'achèvement de l'immeuble condominial et de la partie privative de l'intimé, conformément aux motifs de la Cour. La délivrance et la rédaction de cette ordonnance, la formulation des modalités, clauses, conditions et ordonnances accessoires appropriées ainsi que le règlement des demandes de mesures réparatoires encore en litige formulées dans l'avis de requête sont renvoyés à la Cour du Banc de la Reine pour audition et décision. De plus, la Cour ordonne à l'intimé d'indemniser l'appelante des frais de justice raisonnables qu'elle a engagés relativement à la requête en première instance et à l'appel. Tout différend à cet égard sera entendu et tranché par le registraire.

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The judgment of the Court was delivered by

DRAPEAU C.J.N.B. and QUIGG J.A.

I. Introduction

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[1] Although significant, the bundle of rights associated with title to a residential condominium unit provides far less freedom of choice than the ownership of a separate, privately owned dwelling. That state of affairs flows from the essential nature of the condominium arrangement and its emphasis upon "communal comfort of the project and congenial occupation thereof by its residents": Alberto Ferrer and Karl Stecher, *Law of Condominium*, Vol. 1, (Oxford, N.H.: Equity Publishing, 1967), at 296. The Legislature has seen fit to adopt a fairly detailed framework for the orderly establishment and management of condominiums in this Province. The chosen vehicle, the *Condominium Property Act*, S.N.B. 2009, c. C-16.05 ("the *Act*"), like its predecessor, specifies rights and duties for all interested parties, including the owners and developers of the condominium property (as declarants or otherwise), the condominium corporation and the unit owners. The latter are statutorily bound to comply not only with the *Act*, but, as well, with the condominium corporation's formative declaration, its by-laws and rules. In addition, where, as here, a unit owner was an owner and co-developer of the property who, in the course of formalizing the initial condominium set-up, made formal representations regarding the state of the building and the condo units, he or she may well bear an even more onerous burden of responsibility toward fellow condo unit owners.

[2] Few would quibble with the proposition that rights and duties remain largely inconsequential in the absence of effective remedies for their breach. It is no doubt that truism which prompted the *Act*'s recognition of the rather extraordinary judicial power to direct "performance" of duties owed by virtue of its provisions, the declaration and the condominium corporation's by-laws. In the present appeal, we are called upon to determine whether, on the particular facts emerging from the record, and contrary to the ruling in the court below, the respondent was duty bound to complete the

condominium building and upgrade his unit from its raw condition to a state of "occupiability" and usability as a private single family residence.

[3] The respondent is one of two original owners and developers of the condominium property, known as McLaughlin Gardens Condominiums, in Moncton, New Brunswick. The townhouse-style building comprises eight units, all of which consist of two floors. The respondent's unit, Unit #8, lies at one end of the building so that three of its outer walls (on both floors) coincide with the building's exterior walls. At the time of the hearing in first instance, Unit #8 was no more than a shell, with uncovered plywood floors, bare ceiling and wall infrastructure and without interior finishing, electrical power, heat, plumbing, appliances or furniture. The other seven condo units were completed several years ago and, as envisaged by all interested parties, including the respondent, each has been occupied and used as a private single family residence.

[4] The owners of the other seven condo units have taken issue with the unfinished state of Unit #8 and have tried to convince the respondent to bring it up to standard. After resisting for quite some time his neighbours' entreaties to bring Unit #8 to a habitable state, the respondent finally relented and confirmed his intention to do so in early 2010. Regrettably, the underlying litigation became necessary when he did not carry out his stated intention and failed to comply with an order of the Fire Marshal directing the completion, in accordance with certain specifications, of Unit #8's side of the common wall with Unit #7.

[5] The appellant applied to the Court of Queen's Bench for, *inter alia*, an order compelling the respondent to comply with the Fire Marshal's order, an order providing for the completion of the condominium building and Unit #8, and an order directing its subsequent occupation as a private single family residence. The judge allowed the application for an order requiring the respondent to comply with the Fire Marshal's order, but refused to grant any other relief, being of the view that neither a completion order nor an occupancy order was available as a remedy under the *Act*, the Declaration or the appellant's by-laws. Moreover, the judge found that, in any event, the

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evidence at his disposal did not establish a state of affairs that might have justified the requested orders. The judge concluded the proceedings by ordering each side to bear its own court costs.

[6] With respect, we are of the view the application judge's assessment of the evidential record is, in one significant respect, the product of palpable and overriding error. Furthermore, having regard to the particular factual and documentary context, we disagree with his conclusion that the respondent was not under a duty to complete the condominium building and his condo unit.

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[7] Accordingly, we would allow the appeal and declare the appellant is entitled to an order compelling the completion of the condominium building and Unit #8 within a reasonable time. We would refer to the Court of Queen's Bench: (1) the issuance of the requisite completion order; (2) the formulation of all appropriate terms, conditions and ancillary orders; and (3) the determination of any of the Notice of Application's unresolved claims for relief, which the appellant may insist upon pursuing. We would also order the respondent to indemnify the appellant for its reasonable legal costs in connection with the application in first instance and the appeal. Any dispute over those costs will be settled by the Registrar.

II. Background

A. *The background to the application in first instance*

[8] It is apparent from the record and the parties' written submissions on appeal that there is no significant dispute over the primary facts.

[9] The appellant, Westmorland County Condominium Corporation No. 29, was created in 1995. After the statutorily-prescribed Declaration and Survey Plan (entitled "McLaughlin Gardens Condominiums") were registered in the Westmorland County Registry Office, the respondent, Larry Estabrooks, and his co-developer, Thomas

Landry, certified they constituted "all the owners" of the condominium property and passed By-Law Number 1 of the condominium corporation. By-Law Number 1 was registered in March of 1997.

[10] Admittedly, none of the Declaration's provisions imposes upon an owner, at least in explicit terms, a duty to bring his or her unit to a state of "occupiability" and usability as a private single family residence. However, several of its provisions deal with the issue of unit occupation and use, and a host of related topics. Chief among the provisions focused on unit occupation and use is Part IV(1)(a):

> IV. UNITS
>
> (1) Occupation
>
> The occupation and use of the *units* shall be in accordance with the following restrictions and stipulations:
>
> (a) Each *unit* shall be occupied and used only as a private single family residence and for no other purpose, provided, however, that the Declarant shall have the right to complete the building and make improvements to the property, maintain *units* as models for display and sale purposes, and otherwise maintain construction offices, displays and signs until all *units* have been sold by the Declarant.
>
> (b) No *unit* shall be occupied or used by anyone in such a manner as to result in the cancellation, or threat of cancellation, of any policy of insurance referred to in this Declaration or which would in any way increase the rate of fire insurance on the *property* or any part thereof, or on chattels kept within any *unit*.
>
> (c) The *owner* of each *unit* shall comply, and shall require all residents and visitors to his *unit* to comply with the Act, this Declaration and the By-Laws and the rules and regulations passed pursuant thereto.
>
> (d) No *owner* shall make any structural change or alteration in or to his *unit* or make any change to an installation upon the *common elements*, or maintain, decorate, alter or repair

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any part of the *common elements,* without the consent of the Board.

(e) Prior to making any alterations or repair to his *unit,* the owner shall submit his plans to the Board of Directors of the Corporation in accordance with the By-Laws for approval; and the Board shall approve the plans unless the proposed alterations or repairs or the manner of carrying them out is likely to damage or impair the value of any other *unit* or the *common elements.*

(f) The occupation and use of such *unit* shall be subject, in all respects, to the terms and provisions of any mortgage financing on the *property* until such time as such mortgage is paid in full and discharged.

(g) No *unit owner* shall paint or otherwise change the outside appearance of his *unit* without the written consent of 2/3 of the remaining *unit owners* in the building.

(h) Each *unit owner* shall be responsible for the payment of real *property* taxes assessed against his *unit* and for the payment of all electric power, cable television, telephone and other such services chargeable to his *unit.*

(2) Requirements for Leasing:

(a) No *owner* shall lease his *unit* unless he causes the tenant to deliver to the Corporation an agreement signed by the tenant, to the following effect:

"I,____________, covenant and agree that I, the members of my household and my guest from time to [time], will, in using the *unit* rented by me and the *common elements,* comply with the Condominium Property Act, the Declaration, the By-Laws, and all rules and regulations of the Condominium Corporation, during the term of my tenancy".

(b) No tenant shall be liable for the payment of common expenses unless notified by the Corporation that the *owner* is in default of payment of common expenses, in which case the tenant shall deduct, from the rent payable to the *owner,* the *owner's* share of the common expenses, and shall pay the same to the Corporation.

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> (c) Any *owner* leasing his *unit* shall not be relieved thereby from any of his obligations with respect to the *unit,* which shall be joint and severable with his tenant.
>
> [Underlining added.]
> [Italics in original.]

[11] Part V of the Declaration is entitled "By-Laws", and it provides that the condominium corporation may, by a vote of members owning two-thirds of the common elements, make by-laws regulating the maintenance of not only the common elements but, as well, that of the units themselves.

[12] Part VI obligates a unit owner to maintain and, where necessary, repair his or her unit to a state "at least equivalent to its condition at the time it was originally completed for sale":

> VI. MAINTENANCE AND REPAIRS
>
> (1) Maintenance and Repairs of Units by the Owner:
>
> (a) Subject to the provisions of this Declaration, each *owner* shall maintain his *unit* and shall also repair his *unit* after damage to the intent that such *owner* will restore his *unit* to a state of repair at least equivalent to its condition at the time it was originally completed for sale by the Declarant.
>
> (b) Each *owner* shall be responsible for all damages to any and all other *units* and to the *common elements* which are caused by the failure of the *owner* to so maintain and repair his *unit,* save and except for such damages to the *common elements* for which the cost of repairing same may be recovered under any policy or policies of insurance held by the Corporation.
>
> The Corporation shall make any repairs that an *owner* is obligated to make and which are not made within a reasonable time, and in such an event, an *owner* shall be deemed to have consented to having such repairs made by the Corporation; and such *owne*r shall reimburse the Corporation in full for the cost of such repairs, including any legal or collection costs incurred by the Corporation in order to collect the costs of such repairs, taxed as between

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> solicitor and client, and all sums of money shall bear interest at such rate as the Board of Directors of the Corporation shall decide upon, which installments shall be added to the monthly contribution towards the common expenses of such *owner*, after receipt of a notice from the Corporation thereof. All such payments are deemed to be additional contributions towards the common expenses and recoverable as such.
>
> [Italics in original.]

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[13] The topic of insurance is addressed in Part VIII:

> VIII. INSURANCE
>
> [...]
>
> (3) By the Owner:
>
> It is acknowledged that the foregoing insurance is the only insurance required to be obtained and maintained by the Corporation and that the following insurance, or any other insurance, if deemed necessary or desirable by any *owner*, may be obtained and maintained by such *owner*.
>
> (a) Insurance on any additions or improvement made by the *owner* to his *unit* and for furnishings, fixtures, equipment, decorating and personal *property* and chattels of the owner contained within his *unit*, and his personal *property* and chattels stored elsewhere on the *property*, including his automobile or automobiles, and for loss of use and occupancy of his *unit* in the event of damage, which policy or policies of insurance shall contain waiver of subrogation against the Corporation, its manager, agents, employees and servants, and against the other *owners* and any members of their household, except for vehicle impact, arson or fraud.
>
> (b) Public liability insurance covering any liability of any *owner* to the extent not covered by any public liability and *property* damage insurance obtained and maintained by the Corporation.
>
> [Italics in original.]

[14] Part IX will come into play on the issue of costs. It reads as follows:

IX. INDEMNIFICATION

> Each *owner* shall indemnify and save harmless the Corporation and each of the other *owners* from and against any loss, costs, damage, injury or liability whatsoever which the Corporation or any other *owner* may suffer or incur resulting from or caused by an act or omission of an *owner*, his family or any member thereof, any other resident of his *unit* or any guests, invitees or licensees of such *owner* or resident to or with respect to the *common elements* and/or all other *units*, except for any loss, costs, damages, injury or liability caused by an insured (as defined in any policy or policies of insurance) and insured against by the Corporation. All payments pursuant to this Clause are deemed to be additional contributions toward the common expenses and recoverable as such.
>
> [Italics in original.]

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[15] Under Part XI, provision is made for the corporation's right of entry into a unit in defined circumstances. In addition, the duty of unit owners to comply with the Declaration and the by-laws is explicitly recognized:

XI. GENERAL MATTERS AND ADMINISTRATION

(1) Right of Entry:

> (a) The Corporation, or any insurer of the *property* or any part thereof, their respective agents, or any other person authorized by the Board, shall be entitled to enter any *unit* at all reasonable times and upon giving reasonable notice for the purposes of making inspections, adjusting losses, making repairs, correcting any condition which violates the provisions of any insurance policy or policies, remedying any condition which might result in damage to the *property,* or carrying out any duty imposed upon the Corporation.
>
> (b) In case of any emergency, an agent of the Corporation may enter a *unit* at any time and without notice, for the purpose of repairing the *unit* or the *common elements* or for the purpose of correcting any condition which might result in damage or loss to the *property*. The Corporation or any

one authorized by it may determine whether an emergency exists.

(c) If an *owner* shall not be personally present to grant entry to his *unit*, the Corporation, or its agents, may enter upon such *unit* without rendering it, or them, liable to any claim or cause of action for damages by reason thereof, provided that they exercise reasonable care.

[...]

(2) Units Subject to Declaration, By-Laws, Common Element Rules and Rules and Regulations:

All present and future *owners*, tenants and residents of *units,* their families, guests, invitees or licensees, shall be subject to and shall comply with the provisions of this Declaration, the By-Laws and any other rules and regulations of the Corporation.

The acceptance of a deed or transfer, or the entering into a lease, or the entering into occupancy of any *unit*, shall constitute an agreement that the provisions of this Declaration, the By-Laws and any other rules and regulations, as they may be amended from time to time, are accepted and ratified by such *owner*, tenant or resident and all of such provisions shall be deemed and taken to be covenants running with the *unit* and shall bind any person having, at any time, any interest or estate in such unit as though such provisions were recited and stipulated in full in each and every such deed or transfer or lease or occupancy agreement.

[Italics in original.]

[16] Finally, the boundaries of the units are specified in Schedule "C" to the Declaration:

SCHEDULE "C"

Boundaries of Units

Horizontally by the exterior surface of the gypsum sheathing and the extensions of the planes of such surfaces across openings for doors and windows leading out of the unit area.

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> Vertically from the top of the concrete slab on the first floor to the exterior surface of the gypsum sheathing in the ceiling on the second floor.
>
> The unit boundaries are shown are the Plan of Survey - Level 1 and Level 2 McLAUGHLIN GARDENS prepared by Kenneth F. MacDonald N.B.L.S. on December 22, 1995 and approved by the Development officer Kenneth D. Stevens on the 22nd day of December 1995, and approved by the Director of Surveys Roger J. Gaudet on the 22nd day of December 1995, and included in the Description.

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[17] As for the accompanying Survey Plan, it depicts the outside and the interior of the condominium building and its 8 units. It shows: the partitions on both floors of each unit; the entry; the steps leading from the first floor to the second; the kitchen (including the stove, refrigerator and sink); the closets; the laundry/storage room (including the washer and dryer); the dining room; the living room; the bedrooms (3), the bathrooms (2) (including the vanity, bath and toilets). It also specifies: (1) the exterior walls of the units were to feature, *inter alia,* ½" interior gypsum sheathing, UV Poly Vapour Barrier and 3½" (R-12) Batt insulation; (2) the walls separating units would include ½" gypsum sheathing, Poly Vapour Barrier and Batt insulation; and (3) the ceiling would feature ½" gypsum sheathing, UV Poly Vapour Barrier and R-50 blown-in cellulose insulation. The surveyor certifies "the building shown on this plan is in existence and that the units designated on this plan of survey substantially represent the units within the structure".

[18] By-Law Number 1 included the following rules relating to the use and occupation of the units:

> <u>ARTICLE IX:</u>
<u>RULES GOVERNING</u>
<u>THE USE AND OCCUPATION OF UNITS</u>
>
> In addition to the provisions of the Declaration, the use and occupation of the units shall be in accordance with the following restrictions and stipulations:

1. Animals

No animal or pet which is deemed by the Board in its sole discretion to be a nuisance shall be kept by any Member or on any other part of the property; any Member who keeps any animal or any pet in his unit or any part of the property shall, at the request of the Board remove such animal or pet therefrom forthwith on receipt of a written notice from the Board requesting such removal.

2. Plumbing and Electrical Repairs

No plumbing or electrical repairs or alterations within any unit or within any partition, bearing or party wall, shall be made without the prior written consent of the Board.

3. Professional and Commercial Use

Other than the Declarant, no unit shall be used for professional or commercial purposes such as an office for a doctor, dentist, chiropractor or lawyer.

4. Signs, Billboard, etc.

Other than the Declarant, no signs, billboards, notices or other advertising matter of any kind shall be placed on any part of a unit, without the written consent of the board first being obtained.

5. Municipal By-laws

No member shall do anything or permit anything to be done that is contrary to any statute or municipal By-law.

6. Garbage

All garbage shall be tightly wrapped and tied in accordance with the instructions from the Board from time to time, and shall be disposed of in the approved garbage receptacle provided for garbage collection.

7. Fuel Burning Appliances

No fuel burning appliances, fireplaces, stoves of any nature, nor fuel for same, shall be used or stored within a unit.

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[19] In time, all of the condo units were completed and sold to third parties, except for Unit #8. Although Mr. Estabrooks only became the sole registered owner of that unit in late 2010, he had been exercising ownership rights (e.g. attendance and voting at meetings of condo unit owners) since at least 2001.

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[20] At a meeting of unit owners on March 16, 2010, Mr. Estabrooks undertook to promptly provide the appellant a timeline for the completion of his unit. In an e-mail dated April 19, 2010, he advised it was his "intention to finish unit number eight by October and rent it". The appellant's follow-up demand, on September 13, 2010, that Mr. Estabrooks finish Unit #8 and cause it to be occupied in accordance with his previously stated intention, went unanswered.

[21] On September 28, 2010, the Fire Marshal inspected Unit #8 and, as a result, concluded its side of the common wall with Unit #7 had to be completed to meet acceptable fire resistance and noise transmission standards. On October 17, 2010, the appellant wrote Mr. Estabrooks to request that he complete "the fire wall [...] as per the standards of the building code". Mr. Estabrooks did not respond.

[22] On December 6, 2010, the Fire Marshal issued a formal order providing that the "vertical fire separation between condo unit 7 and 8 is required to have a minimum 1 hour fire resistance rating and a minimum STC (sound transmission class) rating of 50" and that, for those requirements to be met, "the party wall needs to be completed on unit 8 side". The order set a 60-day deadline for completion.

[23] Mr. Estabrooks did not comply with the Fire Marshal's order. Nor did he respond to the appellant's repeated requests that he do so. On December 21, 2010, the appellant's president met with Mr. Estabrooks in a last-ditch, ultimately futile, effort at ensuring voluntary compliance on his part.

[24] On January 23, 2011, at a special meeting of the appellant's unit owners, which Mr. Estabrooks chose to not attend, it was unanimously resolved the appellant make application for relief to the Court of Queen's Bench.

B. *The Notice of Application*

(1) Relief sought

[25] In its Notice of Application, the appellant sought relief pursuant to the combined operation of ss. 23(1), 23(2), 23(3) and 60(1), of the *Act*. Section 23(1) states that an owner is bound by and must comply with the *Act*, the declaration, the by-laws and the rules of the condominium corporation. Section 23(2) confers on a condo unit owner a right to compliance by his or her fellow owners with the duties set out in those instruments. Section 23(3) accords the condominium corporation the same right. Finally, s. 60(1) allows the condominium corporation to apply to the court for an order that any unfulfilled duty be performed.

[26] With respect to the Fire Marshal's Order of December 6, 2010, the appellant sought an order permitting it to complete the common wall between Unit #8 and Unit #7 "in accordance with the directions of the Fire Marshal".

[27] The Notice of Application went on to formulate a request for an order enjoining the respondent to "fully perform the following duties within 60 days":

> (i) Complete and finish all of the walls, floors, utilities, plumbing, electrical, heating, flooring, lighting and interior of Unit 8 in accordance with the Design and Survey Plan of Westmorland County Condominium Corporation No. 29 as Plan number 201088, in compliance with all City of Moncton building By-Laws, and the prescribed National Building Code Standards, so that it can be occupied;
>
> (ii) Comply with the duty to have the Unit 8 occupied;

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> (iii) Obtain liability and fire Insurance for Unit 8, and provide proof of said insurance to the Applicant; and
>
> (iv) Have electricity fully operating in Unit 8, with the Unit heated with functioning fire detectors installed and operating.

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[28] The appellant also sought the following incidental orders and declarations:

> [It be] permitted to perform any of the duties of the Respondent, which the Respondent fails to perform within the aforesaid 60 day period, anytime after the 61st day of this Order.
>
> [That] the Respondent not hinder or interfere with the efforts of the Applicant and its agents and contractors in carrying out the said construction work.
>
> [That] all expenses of the Applicant in carrying out the said construction work, including all legal costs of the Applicant on this Application and going forward, shall form a charge on Unit 8, for which the Respondent must reimburse the Applicant, and the Applicant may file a lien against Unit 8 for all such sums in accordance with ss. 46(1) - 46-(14) of the *Condominium Property* Act.
>
> [That] if the Respondent fails to pay and satisfy the said charge and lien within 30 days of registration of said lien, then the Applicant may proceed to exercise the Power of Sale provisions of the *Property Act*, including s. 44(1), in accordance with s. 46(10) of the *Condominium Property* Act and sell Unit 8 to satisfy the said charge and lien.

[29] As indicated, we would grant the following declaratory relief: the appellant is entitled to an order compelling the completion of the condominium building and the respondent's unit, in accordance with the details fleshed out in these reasons for decision. In addition, we would order the respondent to indemnify the appellant for its reasonable legal costs in connection with the application in first instance and the appeal, and refer to the Registrar the determination of any dispute on point. That leaves undetermined a number of claims for relief. In our view, it is just and convenient to refer to the Court of Queen's Bench the resolution of those claims.

(2) Grounds for relief

[30] The appellant relied upon the following grounds for the relief pursued in its Notice of Application:

> The Applicant, Westmorland County Condominium Corporation No. 29, is a condominium created in 1995. There are 8 Units in the Condominium.
>
> The Respondent, Larry Estabrooks along with Thomas Landry, were the original developers of the Condominium.
>
> The Respondent is the sole owner of Unit 8 in the Condominium. The Unit was in the name of both the Respondent Larry Estabrooks and Thomas Landry, however on October 28th, 2010, Thomas Landry conveyed his interest in Unit 8 to the Respondent.
>
> The Respondent has had a sold sign in the window of Unit 8 since at least [2001].
>
> The Respondent has attended meetings of the Unit owners, exercised his voting rights and spoke at general meetings as a Unit owner of the Condominium, and paid Common Element dues to the Applicant since at least [2001].
>
> Contrary to the *Condominium Property Act,* Declaration and By-Laws of Westmorland County Condominium Corporation No. 29, the Respondent has failed to perform his duties as the owner of Unit 8, in that his Unit is unheated, unsecure, unfinished, unsightly and unoccupied, with no fire detectors. Further, the Respondent has failed to provide proof of insurance for his Unit to the Applicant as requested on many occasions.
>
> On or about December 6th, 2010, the Office of the Fire Marshal. Department of Public Safety, Province of New Brunswick did issue an Order to the Respondent and the Applicant ordering that the wall between Unit 8 and Unit 7 be constructed and completed within 60 days, as its unfinished state presents an immediate fire hazard.
>
> Neither the Applicant nor any of the other Unit owners in the Condominium were aware of this state of affairs, nor

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were these risks and deficiencies disclosed by the Respondent to the Applicant or any of the other Unit owners.

The Respondent has failed to take any steps to comply with the aforesaid Order of the Office of the Fire Marshal.

The Respondent has failed to reply to several written requests that he advise the Applicant of his intentions with respect to the aforesaid Order of the Office of the Fire Marshal.

The actions of the Respondent [are] placing ongoing strain and increased risk to the long term structural integrity of the Condominium, having an end Unit unheated, unsecure, unfinished, unsightly and unoccupied, with no fire detectors.

The actions of the Respondent if left unaddressed, will continue to devalue the Units of all other Unit holders in the Condominium. Further, the requirement to disclose this serious unresolved situation to prospective buyers of Units through the required Estoppel Certificate will be a serious disincentive for prospective purchasers. Unit 5 is on the market at this time, and has been for sale for over 14 months, without a sale.

The Respondent's actions are placing great strain and creating ongoing and increasing uncertainty for the other Unit holders of the Condominium, six of whom are retirees. The Applicant and all other Unit holders of the Condominium require the remedies requested from this Honourable Court in order to deal with this most unusual and untenable situation which requires immediate action.

The Applicant relies on the *Rules of Court* of New Brunswick including Rules 2.01, 3.02(1) and 38.

The Applicant relies on the *Condominium Property Act,* including ss. 15(3), 15(4), 15(5), 23(1), 23(2), 23(3), 37(5), 46(1) - 46(14), 48(6), 60(1), and 66;

The Applicant relies on Power of Sale provisions of the *Property Act,* including *s.* 44(1);

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> The Applicant relies on Declaration and By-Laws of Westmorland County Condominium Corporation No. 29.

(3) The affidavits in support of the application

[31] The application was supported by an affidavit of the appellant's president, Jean-Louis Guérette, and an affidavit of Lucie Patterson, the owner of Unit #7. The salient parts of Mr. Guérette's affidavit read as follows:

> [...] I am the President, of [...] Westmorland County Condominium Corporation No. 29 [...] and have a true, personal and correct knowledge of the facts herein deposed to, except where based on information and belief.
>
> [...] I reside at 272 McLaughlin Dr., Unit 1, Moncton, in the Province of New Brunswick.
>
> [...] the Applicant, Westmorland County Condominium Corporation No. 29, is a condominium created in 1995. There are 8 Units in the Condominium.
>
> [...]
>
> THAT the Respondent, Larry Estabrooks along with Thomas Landry, were the original developers of the Condominium.
>
> [...] the Respondent is the sole owner of Unit 8 in the Condominium. The Unit was in the name of both the Respondent Larry Estabrooks and Thomas Landry, however on October 28th, 2010, Thomas Landry conveyed his interest in Unit 8 to the Respondent.
>
> [...]
>
> [...] the Respondent has had a sold sign in the kitchen window of Unit 8 since I purchased my condominium Unit 1 on or about August 31, 2001.
>
> [...] the Respondent has attended meetings of the Unit owners, exercised his voting rights and spoke at general meetings as a Unit owner of the Condominium, and paid

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Common Element dues to the Applicant since at least [2001].

[...] the Respondent has failed to perform his duties as the owner of Unit 8, in that his Unit is unheated, unsecure, unfinished, unsightly and unoccupied, with no fire detectors. Further, the Respondent has failed to provide proof of insurance for his Unit to the Applicant as requested on many occasions.

[...]

[...] on or about December 6th, 2010, the Office of the Fire Marshall, Department of Public Safety, Province of New Brunswick did issue an Order to the Respondent and the Applicant Ordering that the wall between Unit 8 and Unit 7 be constructed and completed within 60 days, as its unfinished state presents an immediate fire hazard. [...]

[...] these risks and deficiencies pointed out by the Fire Marshall were not disclosed by the Respondent to the Applicant nor myself.

[...] the Respondent has failed to take any steps to comply with the aforesaid Order of the Office of the Fire Marshall.

[...]

[...] the actions of the Respondent is placing ongoing strain and increased risk to the long term structural integrity of the Condominium, having an end Unit unheated, unsecure, unfinished, unsightly and unoccupied, with no fire detectors.

[...] the actions of the Respondent if left unaddressed, will continue to devalue the Units of all other Unit holders in the Condominium. Further, the requirement to disclose this serious unresolved situation to prospective buyers of Units through the required Estoppel Certificate will be a serious disincentive for prospective purchasers. Unit 3 [...] is on the market at this time, and has been for sale for over 14 months, without a sale.

[...] the Respondent's actions are placing great strain and creating ongoing and increasing uncertainty for the other Unit holders of the Condominium, six of whom are retirees.

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> [...] the Applicant and all other Unit holders of the Condominium require the remedies requested from this Honourable Court in order to deal with this most unusual and untenable situation which requires immediate action.

Copies of the Declaration, By-Law Number 1 and the Survey Plan mentioned above were attached as exhibits to Mr. Guérette's affidavit.

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[32] In her affidavit, Ms. Patterson deposed to the following:

> [...] I am the Vice-President and Secretary, of the Applicant Westmorland County Condominium Corporation No. 29, in the within Application and have a true, personal and correct knowledge of the facts herein deposed to, except where based on information and belief.
>
> [...] I reside at 272 McLaughlin Dr., Unit 7, Moncton, in the Province of New Brunswick. My unit is adjacent to Unit 8 owned by the Respondent. The Respondent's unit is an end unit.
>
> I purchased my condominium Unit 7 on or about November 26th, 1997.
>
> [...]
>
> [...] the Respondent has had a SOLD Sign in the kitchen window of Unit 8 since at least 2001. Attached hereto and marked as Exhibit "2", is a true copy of a photograph I took on or about September 28th, 2010 showing the SOLD sign in the window of the Respondent's Unit 8.
>
> [...] the Respondent has attended meetings of the Unit owners, exercised his voting rights and spoke at general meetings as a Unit owner of the Condominium, and paid Common Element dues to the Applicant since at least 2001.
>
> [...] the Respondent has failed to perform his duties as the owner of Unit 8, in that his Unit is unheated, unsecure, unfinished, unsightly and unoccupied, with no fire detectors. Further, the Respondent has failed to provide proof of insurance for his Unit to the Applicant as requested on many occasions.

[...] attached hereto and marked as Exhibit "3", is a true copy of a photograph I took on or about September 28th, 2010 showing the lack of cleaning and upkeep and unkempt exterior condition of the Respondent's Unit 8.

[...] attached hereto and marked as Exhibit "4", is a true copy of photographs I took on or about September 28th, 2010 showing the unfinished state and dirty condition of the interior of the Respondent's Unit 8.

[...] attached hereto and marked as Exhibit "5", is a true copy of photographs I took on or about September 28th, 2010 of the NB Power Electrical Consumption Meters for Unit 7 and Unit 8. There is no meter installed for the Respondent's Unit 8.

[...] the fire risks and deficiencies of the Respondent's Unit 8 as pointed out by the Fire Marshall were never disclosed by the Respondent to the Applicant nor myself.

[...] the actions of the Respondent is placing ongoing strain and increased risk to the long term structural integrity of the Condominium, having an end Unit unheated, unsecure, unfinished, unsightly and unoccupied, with no fire detectors.

[...] the actions of the Respondent if left unaddressed, will continue to devalue the Units of all other Unit holders in the Condominium. Further, the requirement to disclose this serious unresolved situation to prospective buyers of Units through the required Estoppel Certificate that I as Secretary of the Corporation will have to prepare will be a serious disincentive for prospective purchasers. Unit 3 [...] is on the market at this time, and has been for sale for over 14 months, without a sale.

[...]

[...] the Respondent's actions are placing great strain and creating ongoing and increasing uncertainty for myself as I live in the Unit 7 which I now understand has no firewall. I have to sleep every night with the fear that if someone or something causes a fire in Unit 8, that I am at greater risk as the fire would spread to my Unit 7 unabated without warning from fire detectors or any occupant living next door.

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> [...] the derelict and abandoned look of the Respondent's Unit 8 due to its unfinished and unoccupied and unkempt state, creates an increased security risk for vandalism.
>
> [...] the Respondent has refused to provide proof of fire insurance for his Unit 8 when repeatedly requested by the Executive of the Applicant over many years.
>
> [...] the Insurance Agent for the Applicant, Central Insurance Agency Inc. has been advised of the developments of the Fire Marshall's Order, and they are awaiting an update on what is going to happen to evaluate the risk and any policy changes for the umbrella policy for the Applicant's Common Elements policy.

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(4) The affidavit in response

[33] Mr. Estabrooks filed an affidavit in which he acknowledged: (1) Unit #8 is an end unit; (2) it is unheated; (3) it has no electrical power connection; (4) it has no drywall; (5) “none of the finish work has been done” in the unit; (6) he plans on keeping the unit in an unfinished state for an indefinite period, more precisely “until such time as either my mother, or my wife and I are desirous of moving into it”; (7) the bottom floor windows of his unit are covered by “sheets”; and (8) “shelving cabinets and some building materials (for the said unit) [are] stored in the unit and since all of the glass exterior surfaces are covered no one should be able to see them”.

[34] He goes on to reject the proposition that there should be fire detectors in his unit. In his view, they are not required because: (1) his unit “is attached to the next unit in the same manner as a garage would be”; (2) he is “not aware of the necessity of a garage having a fire detector”; and (3) the Fire Marshal’s order makes no reference to any such devices. Mr. Estabrooks also takes issue with the appellant’s call for proof of insurance by suggesting the only insurable assets in Unit #8 would be “the filing cabinets and building materials” located therein. In Mr. Estabrooks’ view, he has “nothing to insure as the unit is not finished”.

[35] With respect to the Fire Marshal's order, Mr. Estabrooks makes the following points: (1) the order was directed at both himself and the appellant; (2) "the duly registered plans for the Condominium [...] require a vapour barrier be installed between the fiberglass [B]att insulation and the drywall (gypsum sheathing)": (3) the "area [...] which requires fiberglass [B]att insulation and vapour barrier is part of the common elements of the condominium as the boundary of [his] unit only extends to the exterior surface of the gypsum sheathing"; (4) the "applicant has not installed the fiberglass [B]att insulation nor vapour barrier so that [he is not] able to have the gypsum sheathing (drywall) attached pursuant to the Order of the Fire Marshall".

[36] Mr. Estabrooks concludes his affidavit by stating he "was desirous that this application [...] be dismissed with costs and that the applicant be ordered to do the work which it is supposed to do in the common elements pursuant to the Fire Marshall's Order so that [he] may complete the work ordered by the Fire Marshall within [his] unit".

C. *The findings of the application judge*

[37] The application judge found against Mr. Estabrooks in relation to the Fire Marshal's order. The judge rejected his contention that the condominium corporation was responsible for compliance with the Fire Marshal's order and that his responsibility as the owner of Unit #8 was limited to covering the common wall with gypsum sheathing. In the judge's view, Mr. Estabrooks "should still be seen as the developer and Declarant of the condominium project" (para. 15). The judge went on to find that Mr. Estabrooks retained "responsibility to complete the structure containing the units to a satisfactory standard" (para. 15). The judge ordered the completion of the common wall between Unit #8 and Unit #7 as directed by the Fire Marshal's order, and that the work be done within 60 days. Correlatively, the appellant was allowed to enter Unit #8 and do the work in the event Mr. Estabrooks failed to comply with the Court's order. No feature of the decision in relation to the Fire Marshal's order has been challenged by way of cross-appeal.

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[38] However, the application judge was not prepared to order Mr. Estabrooks to complete the condominium building and Unit #8 or to compel the unit's occupation and use as a private single family residence. The judge concluded nothing in the *Act*, the Declaration or the by-laws provided a legal basis for either order. In that regard, the judge made the following observations:

> There is no evidence that the unit is being occupied other than as a private single family residence.
>
> There is no evidence, except the deficiencies as found by the Fire Marshal, that would support the relief requested because of cancellation or increase in fire insurance rates.
>
> There is no evidence that the unit left unoccupied causes a situation that is likely to damage the condominium property.
>
> There is no doubt that some unit owners see the unoccupied unit as cause to devalue the entire building. While I too might speculate in this regard, I have no evidence that this would warrant the relief requested.
>
> I can find no duty that requires an owner of a unit in the condominium to occupy the unit or cause the unit to be occupied and no authority has been offered to support this position. It might also be noted that it appears all other units in the condominium have been owned and occupied over the past ten years and the present situation relating to Unit 8 has remain unaltered. [paras. 25-29]

[39] The application judge concluded that, since both parties had achieved a measure of success, he would make no order of costs.

D. *The grounds of appeal*

[40] The appellant submits the rejection of its application reflects a misapprehension of or a failure to appreciate the following undisputed facts: (1) all three exterior walls of Unit #8, which constitute three exterior walls of the condominium building, are not finished in that those common element walls have no insulation, no

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vapour barrier and no gypsum sheathing; (2) the unit is not occupied as a private single family residence; (3) the state of the unit, beyond the deficiencies found by the Fire Marshal, supported the relief requested on the grounds of cancellation or increase in fire insurance premiums: and (4) the failure to occupy the unit creates a situation that is likely to damage the condominium property.

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[41] The appellant also contests several of the judge's determinations. Thus, it objects to the judge's finding that Mr. Estabrooks "should still be seen as a developer and Declarant" of the condominium project. In the appellant's submission, that finding is unsustainable having regard to the evidence showing that all the units, including Unit #8, have been sold. The appellant also contends the judge misinterpreted the *Act,* the Declaration and By-Law Number 1 when he concluded Mr. Estabrooks was not under a legal duty to finish his unit and to occupy or cause it to be occupied. On that score, the appellant argues, *inter alia*, that Mr. Estabrooks' approval of the Survey Plan gave rise to a representation that all units in the condominium project were completed. According to the appellant, the fact that this representation remains unfulfilled in respect of Unit #8 constitutes a breach of the respondent's duties.

[42] Finally, the appellant submits the judge erred in his interpretation and application of the *Act,* the Declaration and By-Law Number 1 in failing to award solicitor and client costs in accordance with ss. 37(5) and 46(1) of the *Act* and Part IV(l)(c) of the Declaration. Under s. 37(5), the condominium corporation has a right to recover from an owner "by an action for debt" the unpaid amount of an assessment, monies expended by the corporation for repairs or work done to comply with an order "by a competent public or local authority in respect of that portion of the building comprising the unit" and monies expended by the corporation for repairs made under s 48(6). Section 48(6) provides that the condominium corporation is to make "any repairs that an owner is obligated to make that he or she does not make within a reasonable time". Section 46(1) grants to the corporation a lien against a defaulting owner's unit and his/her common interest for the unpaid amount, together with "the reasonable legal costs and reasonable expenses incurred by the corporation in connection with the collection or attempted

collection of the unpaid amount". As for Part IV(1)(c), it provides that a unit owner must comply with the *Act,* the Declaration and the by-laws of the condominium corporation.

III. Legislative Provisions

[43] The legislative provisions referenced in the record are attached as Appendix "A".

IV. Further Evidence

[44] The appellant sought leave to adduce fresh evidence, which consisted of a post-hearing building inspector's report and attached photographs providing an updated view of Unit #8's condition. Mr. Estabrooks objected, raising two grounds. First, he pointed out that significant portions of the report consisted of opinion evidence, which is inadmissible by virtue of Rule 39.01(4). We agreed with that assessment and summarily rejected all opinion evidence in the report. Second, Mr. Estabrooks submitted the informational remainder of the report could have been presented to the application judge if the appellant had exercised due diligence. In our view, the point is well taken. Moreover, we are satisfied the factual evidence offered through the report and the attached photographs would not tilt the scales in the appellant's favor. It follows that the test for the admission of fresh evidence has not been met (see *Cassista v. Cyr* (1988), 93 N.B.R. (2d) 177, [1988] N.B.J. No. 1126 (C.A.) (QL); *Ferris v. The City of Fredericton,* 2010 NBCA 55, 362 N.B.R. (2d) 342 and *MacDonald v. MacDonald,* 2011 NBCA 25, 372 N.B.R. (2d) 179).

V. Analysis and Decision

[45] We begin with the appellant's objections to the application judge's findings of fact.

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[46] The judge found there was "no evidence" that Unit #8 was being occupied "other than as a private single family residence" (para. 25). With respect, this finding reflects a palpable and overriding error in the assessment of the evidence. In that regard, suffice it to underscore Mr. Estabrooks conceded in his affidavit that Unit #8 was not occupied and used as a private single family residence. His position was that nothing in the *Act*, the Declaration or the condominium corporation's by-laws required him to complete his unit, and to occupy and use it as a private single family residence.

[47] The judge also found there was no evidence: (1) to support the relief sought "because of cancellation or increase in fire insurance rates" (para. 26); and (2) that leaving the unit unoccupied "causes a situation that is likely to damage the condominium property" (para. 27) or "devalue the entire building" (para. 28). The appellant bore the onus of establishing those allegations. In our view, it failed to do so. It follows, therefore, that the judge did not commit reversible error in his assessment of the evidence pertaining to those subject matters. That said, the insurance-related claims in the Notice of Application, and perhaps others, should be revisited in light of the declaratory relief granted herein and the judicial measures that will ensue in the Court of Queen's Bench.

[48] At the end of the day, the core issue in the present appeal is whether Mr. Estabrooks was under a duty to complete the condominium building and Unit #8 to such an extent that the latter could be occupied and used as a private single family residence. We now grapple with that issue and address it against the background provided by the evidential record, the law of condominium in this province and, in particular, the provisions of the Declaration that bear on the topic.

A. *The General Framework*

[49] The term "condominium" connotes a regime of separate ownership of individual units in a multiple-unit building, co-ownership of common elements and management of the overall arrangement through a body corporate, the condominium corporation. Each purchaser of a residential condo unit acquires "a fee simple in an

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apartment and an undivided interest in the common areas of the building" (see *Corpus Juris Secundum,* Vol. 15A (Brooklyn, NY: American Law Book, 1967) at 343). Although there was a time when a unit owner's rights and duties were "in most cases regulated by agreement" (see J. Lyser "Ownership of Flats – A Comparative Study", (1958) 7 Int'l. and Comp. L.U. 31 at 43), nowadays those rights and duties are commonly regulated by legislation, which typically insists upon compliance with and enforcement by the condominium corporation of its provisions, the declaration and the condominium corporation's by-laws and rules.

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[50] While condo units are real property for all purposes, the *Act* imposes limits on the freedom of choice that commonly accompanies ownership of real property. Those limits are designed to reflect the communal nature of condominium ownership and living. As noted nearly four decades ago in *Hidden Harbour Estates Inc. v. Norman* (1975, Fla App D4), 72 ALR (3d) 305, "[i]nherent in the condominium concept is the principle that to promote the health, happiness and peace of mind of the majority of the unit owners, living in close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property". Perhaps the best general description of the condominium regime in effect in all common law provinces was provided by Cromwell J.A., as he then was, in *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12, [2001] N.S.J. No. 21 (QL):

> The term "condominium" refers to a system of ownership and administration of property with three main features. A portion of the property is divided into individually owned units, the balance of the property is owned in common by all the individual owners and a vehicle for managing the property, known as the condominium corporation, is established: see A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (1985), Vol. II, s. 3801 and Alvin B. Rosenberg, *Condominium in Canada* (1969). The condominium may be seen, therefore, as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development: Oosterhoff and Rayner at s. 3802. <u>In a sense, the unit owners make up a democratic society in which each has</u>

many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority: see Robert J. Owens et al. (eds), *Corpus Juris Secundum* (1996), Estates § 195, Vol. 31, p. 260.

As Oosterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a co-operative community. It follows, they note, that common features of all condominiums are the need for balance and the possibility of tension between individual and collective interests: at s. 3802.

From a more purely legal perspective, a modern condominium is created pursuant to detailed legislative provisions such as, in Nova Scotia, the *Condominium Act*, R.S.N.S. 1989, c. 85 (the "*Act*"). The condominium is, therefore, a creature of statute. But condominium legislation reflects the combination of several legal concepts and relies on, and to a degree incorporates by reference, principles drawn from several different areas of law. The law relating to individual ownership of real property is, of course, central because the owners of the individual units are, subject to certain limits, entitled to exclusive ownership and use of their units: see s. 27(2) of the *Act*. The law relating to joint ownership is significant because the owners are tenants in common with respect to the common elements: see s. 28(1). The law relating to easements and covenants is relevant because the unit owners have rights to compliance by the others with the provisions governing the condominium and certain easements are, by statute, appurtenant to each unit: see s. 30(2) and 29. The law relating to corporations is also of importance because the condominium is administered by the condominium corporation in which the unit holders are in a position analogous to shareholders: see, e.g., ss. 13 and ff and s. 25. While the *Condominium Act* enables and, to a degree, regulates the legal aspects of condominium ownership, it does so against a vast background of general legal principles which will frequently be relevant to the interpretation and application of the *Act*. As has been said, "[i]n its legal structure, the condominium first combines elements of several concepts ... and then seeks to delineate

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> separate privileges and responsibilities on the one hand from common privileges and responsibilities on the other." *Corpus Juris Secundum, supra* at p. 260. [paras. 3-5]
> [Emphasis added.]

[51] As indicated, the *Act* imposes upon a unit owner the duty to comply with its provisions, the declaration and the condominium corporation by-laws and rules. Moreover, the legislation accords each unit owner the right to compliance by fellow owners. On that score, we endorse the views of Finlayson J.A. in *Re Carleton Condominium Corp. No. 279 and Rochon et al.*, [1987] O.J. No. 417 (C.A.) (QL):

> The declaration, description and by-laws, including the rules, are therefore vital to the integrity of the title acquired by the unit owner. He is not only bound by their terms and provisions, but he is entitled to insist that the other unit owners are similarly bound. [para. 26]

[52] Importantly, the condominium corporation is itself duty bound to take all reasonable steps to enforce compliance with the *Act*, the declaration, as well as its by-laws and rules. Needless to say, chaos would be courted if a condominium corporation were derelict in respecting that fundamental obligation. As Strathy J. observed in *York Condominium Corporation No. 26 v. Ramadani*, 2011 ONSC 6726, [2011] O.J. No. 5156 (QL) "[o]wners and occupiers are entitled to expect that others will observe the rules and that if they fail to do so, the corporation will take measures to enforce the rules" (para. 42). That statement echoes, in substance, the views expressed by Wood J. in *Muskoka Condominium Corporation No. 39 v. Kreutzweiser*, 2010 ONSC 2463, [2010] O.J. No. 1720 (QL):

> Section [119(1)] of the *Condominium Act* provides that all owners and occupiers of units must comply with the condominium corporation's declaration and rules. Section 17(3) of the Act requires a condominium corporation to enforce the declaration and rules. These provisions are crucial to the orderly operation of condominiums and for the protection of condominium unit owners and occupiers. The owner of a condominium unit does not have a classic freehold. He or she is not at liberty to deal with property in the same manner as the owner of a single family residential dwelling might be. [...] [para. 8]

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[53] In sum, if an individual fails to comply with duties arising from his or her ownership and/or occupation of a condo unit, fellow unit owners are entitled to expect the condominium corporation will take reasonable remedial steps and, in turn, the corporation may rightfully expect the court to lend its hand in ensuring performance of those duties (see *York Condominium Corporation No. 26 v. Ramadani*, para. 47). The key question here is this: what unfulfilled duties, if any, did Mr. Estabrooks owe to his fellow condo unit owners and the appellant at the time of the hearing in the court below? Of course, a related and perhaps more pointed question is whether he was duty bound to complete the condominium building and Unit #8, and to occupy and use the latter as a private single family residence.

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B. *The duties at issue*

(1) The duty to complete the building

[54] The application judge determined Mr. Estabrooks' obligations as a co-developer of the condominium project and as Declarant did not cease by reason of his co-ownership and, ultimately, full ownership of Unit #8. We agree. If it were otherwise, Mr. Estabrooks would have been relieved of those obligations before anyone acquired title to the other units. That is so because, since the very beginning, Mr. Estabrooks has owned Unit #8, initially as joint tenancy holder in fee simple, more recently as sole proprietor.

[55] As will be recalled, the Survey Plan that accompanied the Declaration and was filed in the Westmorland County Registry Office depicts more than the condominium property's location, size and description. It details the make-up of the building and each unit. For example, the exterior walls of all units, including Unit #8, are described as comprising interior gypsum sheathing over UV Poly Vapour Barrier and 3½" (R-12) Batt insulation. By way of further illustration of the detailed information provided by the plan, the specifications for the ceiling/floor assembly, between the first and second level, go beyond particularizing the required strapping, joists, bridging, etc.

and call for ½" Gypsum sheathing for the first floor ceiling. Additionally, the roof assembly description specifies ½" Gypsum sheathing for the second level ceiling.

[56] It may be timely to bring Mr. Estabrooks' affidavit evidence into the analytical mix. It is his sworn testimony that "the duly registered plans for the Condominium [...] require a vapour barrier be installed between the fiberglass [B]att insulation and the drywall (gypsum sheathing)" and that the "area [...] which requires fiberglass [B]att insulation and vapour barrier is part of the common elements of the condominium as the boundary of [his] unit only extends to the exterior surface of the gypsum sheathing". He goes on to complain that he could not "have the gypsum sheathing (drywall) attached pursuant to the Order of the Fire Marshall" because the appellant "has not installed the fiberglass [B]att insulation nor vapour barrier". It may also be recalled that he sought an order compelling the appellant "to do the work which it is supposed to do in the common elements" so that he might complete the work the Fire Marshal's Order required of him as a unit owner.

[57] As mentioned, the application judge found Mr. Estabrooks *qua* Declarant and developer was duty bound to perform the work he testified was required by "the duly registered plans for the Condominium". We agree, but can find no reason to limit that duty to the common wall between Unit #8 and Unit #7. To be plain, that duty logically extends to all wall and ceiling specifications in the Survey Plan. It bears repeating that it is Mr. Estabrooks' agent, the surveyor, who certified "that the building shown on this plan is in existence and that the units designated on this plan of survey substantially represent the units within the structure". The evidence demonstrates "the building <u>shown on this plan</u>" was not fully in existence at the time the Survey Plan was registered, and, some 16 years later, that remains the case (emphasis added).

[58] The Survey Plan, which Mr. Estabrooks approved *qua* owner of the condominium property, carries legal consequences. In particular, the plan's specifications constitute representations by Mr. Estabrooks as to the state of the building. In our view,

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Mr. Estabrooks is duty bound to finish the building in accordance with those specifications.

[59] In addition, and as Mr. Estabrooks underlined in his affidavit, the description of the boundaries of the condo units found in Schedule "C" to the Declaration is premised on drywall sheathing being installed on the outer walls and the second floor ceiling of each unit. The description reads as follows:

> Horizontally by the exterior surface of the gypsum sheathing and the extensions of the planes of such surfaces across openings for doors and windows leading out of the unit area.
>
> Vertically from the top of the concrete slab on the first floor to the exterior surface of the gypsum sheathing in the ceiling on the second floor.

This wording makes plain the top level's ceiling and the outer walls of Unit #8 were to conform to the Survey Plan specifications, which commanded completion with Gypsum sheathing. It is with that in mind, and in the light provided by By-Law Number 1 and the other provisions of the Declaration, that the single most important feature of the documentation under consideration stands to be considered and interpreted.

(2) Part IV(1)(a) of the Declaration and the duty to occupy and use the unit as a private single family residence

[60] Mr. Estabrooks, the Declarant, stated in Part IV(1)(a) that "each unit shall be occupied and used only as a private single family residence and for no other purpose" (emphasis added). Although subject to interpretation and provisos, that statement articulates an unequivocal duty to occupy and use Unit #8 as a private single family residence. Indeed, it is not formulated with a view to prescribing what constitutes permissible occupation and use if and when a unit is occupied and used. The unit owner's obligation is clear: it is to occupy and use the unit as a private single family residence. That said, the phrase "occupied and used" is not free of ambiguity.

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[61] As is the case for most words in our vocabulary, "occupy" has many shades of meaning and the process of identifying the correct one is context-driven. In some instances, the word "occupy" connotes "live in" or "reside", while in others a less embracing meaning is warranted. Thus, for example, in *Toronto Transit Commission v. City of Toronto*, [1969] O.J. No. 1371 (C.A.) (QL), Laskin J.A., as he then was, who delivered reasons for the Court, described the following observations in *R. v. St. Pancras Assessment Committee* (1877), 2 Q.B.D. 581, as providing a useful frame of reference in defining what the Ontario Legislature intended by occupation for the purposes of its property tax assessment legislation:

> Occupation includes possession as its primary element, but it also includes something more. Legal possession does not of itself constitute an occupation. The owner of a vacant house is in possession ... but as long as he leaves it vacant he is not rateable for it as an occupier. If, however, he furnishes it, and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, though he may not reside in it one day in a year. [para. 12]

Black's Law Dictionary, 4th ed. (St. Paul, Minn.: West Publishing Co., 1968) offers a broad inventory of definitions for the words "occupation", "occupier" and "occupy":

> Occupation – Possession. Sweet; Kinnear v. Southwestern Mut. Fire Ass'n, 118 Pa.Super. 312, 179 A. 800. Where a person exercises physical control over land. Lancaster County Bank v. Marshel, 130 Neb. 141, 264 N.W. 470, 475. Control; tenure; use.
>
> "Occupation" of a dwelling house means living in it. The use for which premises are intended should be considered in determining what is meant by the word "unoccupied" as contained in a policy. Hoover v. Mercantile Town Mut. Ins. Co., 93 Mo.App. 111, 69 S.W. 42. As used in a fire insurance policy the word *unoccupied*, is not synonymous with *vacant*, but is that condition where no one has the actual use or possession of the thing or property in question, Yost v. Ins. Co., 38 Pa.Super.Ct. 594; Hardiman v. Fire Ass'n, 212 Pa. 383, 61 A. 990.

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> Occupier – An occupant; one who is in the enjoyment of a thing.
>
> A tenant, though absent, is, generally speaking, the occupier of premises; 1 B. & C. 178; but not a servant or other person who may be there *virtute officii*; 26 L.J.C.P. 12; 47 L.J.Ex. 112; L.R. 1 Q.B. 72.
>
> Occupy – To take or enter upon possession of; to hold possession of; to hold or keep for use; to possess; to tenant; to do business in. People v. Roseberry, 23 Cal.App.2d 13, 71 P.2d 944. Actual use, possession, and cultivation. Jackson v. Sill, 11 Johns., N.Y., 202, 6 Am.Dec. 363.
>
> The term, under fire policy, implies use by some person according to purpose for which it is designed, and does not imply that some one shall remain in building all of the time without interruption, but merely that there shall not be a cessation of occupancy for any considerable length of time. Washington Fire Ins. Co. v. Cobb, Tex.Civ.App., 163 S.W. 608, 612; Southern Nat. Ins. Co. v. Cobb, Tex.Civ.App., 180 S.W. 155, 156. As used in connection with a homestead, it does not always require an actual occupancy, but may sometimes permit a constructive occupancy. Kerns v. Warden, 88 Okl. 297, 213 P. 70, 72.

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[62] Of course, here, the occupation requirement is accompanied by the further obligation to use the condo unit as a private single family residence. The parties do not appear to have applied their minds to the meaning of the word "occupied", let alone its meaning when used conjunctively with the word "used". Thus, it is an open question whether Part IV(1)(a) prescribes actual residence in Unit #8 or whether it merely requires that it be in a state which would permit its occupation and use as a private single family residence.

(3) <u>The duty to complete the unit</u>

[63] Be that as it may, no matter what meaning is attributed to the phrase "occupied and used as a private single family residence", even the least onerous for Mr. Estabrooks presupposes his unit is completed to the extent that it is occupiable and

useable as a private single family residence. True, there are provisos to the requirement that a unit be occupied and used as such, however none provides an answer to the appellant's claimed entitlement to a completion order.

[64] The first proviso recognizes the Declarant's right to complete the building and make improvements to the property. Common sense dictates this right stood to be exercised in the early stages of the condominium project's development. More than a decade and a half later, this right is simply incidental to the performance of the duty to complete confirmed by the present decision.

[65] The second and third provisos acknowledge the Declarant's entitlement to "maintain units as models for display and sale purposes" and to "maintain construction offices, displays and signs". Once again, common sense dictates these provisos were not intended to survive the initial construction phase and the sale of the units. All of the units are sold, and remedial construction work is required only because of the respondent's unjustified failure to perform, in a timely fashion, his lawful duty to complete the building and his unit.

[66] Finally, it bears mention that nothing in the context militates against the conclusion that the duty to occupy and use condo units as private single family residences necessarily implies, at the very least, a state that allows them to be so occupied and used. Indeed, each and every term of the Declaration, including those reproduced at paragraphs 10-16 of these reasons, as well as each and every provision of By-Law Number 1 set out at paragraph 18 herein supports that understanding.

C. *The substantive remedy*

[67] The *Act* provides that if a duty imposed by it, the declaration or the by-laws is not performed, the corporation may apply to the court for an order "that the duty be performed" (s. 60(1)). Sections 60(2) and (3) also provide for the appointment of an administrator to which the Court may attribute powers and duties. The Court may also

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specify the duration of the administrator's mandate, as well as such other terms and conditions it deems necessary. Section 60(5) goes on to preserve the remedies otherwise available for failure to perform any statutory duty. We note that s. 60 is not confined to duties imposed on an individual *qua* condo unit owner: it applies to all duties imposed by the *Act*, the declaration and the by-laws.

[68] Interestingly, Ontario case-law supports the view that the condominium legislation in effect in that Province confers broad remedial jurisdiction upon the courts. Indeed, there are judicial precedents for the view that this jurisdiction includes the power to order the sale of a unit, admittedly in exceptional circumstances (see *Waterloo North Condominium Corp. v. Webb*, 2011 ONSC 2365, [2011] O.J. No. 2195 (QL) and *Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh*, 2010 ONSC 4448, [2010] O.J. No. 3491 (QL)). At any rate, the remedial powers under the *Act* undoubtedly include the power to order work done inside a condo unit. Of course, the application judge's order in relation to the work required by the Fire Marshal is an illustration of that power. *Albert County Condominium Corp. No. 1 v. Matthews* (1996), 176 N.B.R. (2d) 223, [1996] N.B.J. No. 174 (Q.B.) (QL) is another example. In that case, P.S. Creaghan J. ordered an owner to remove a propane fireplace (inclusive of all piping, storage ranks, etc.) from her condo unit, at her cost and expense. He went on to order her to "perform [...] to the satisfaction of the applicant [condominium corporation], all repairs necessary to return [her unit] to its original structural state prior to the installation of the propane fireplace" (para. 48) (emphasis added).

[69] We conclude the *Act*, and in particular the Declaration, impose upon Mr. Estabrooks the duty to complete his condo unit so that it becomes occupiable and useable as a private single family residence. Correlatively, the appellant was entitled to apply for an order that this duty be performed (see s. 60(1)). Moreover, in our judgment, the appellant has satisfied all of the requirements for the issuance of an order that the duty be performed pursuant to s. 60(2).

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[70] That said, the parties have not satisfactorily addressed a number of incidental questions, including: (1) whether it would be appropriate to prescribe a term such as the one included in the order issued in *Albert County Condominium Corp. No. 1 v. Matthews*, which we underlined in the preceding paragraph; (2) whether an administrator should be appointed and, if so, for what period of time; and (3) what would be a reasonable timeframe for the execution of the work required. This list is not intended to be exhaustive.

D. *Indemnification for legal costs*

[71] Under Part IX ("Indemnification") of the Declaration, the appellant is entitled to indemnity for its reasonable legal expenses. Accordingly, we order the respondent pay the appellant's costs throughout on a solicitor-client basis. In making that order, we are mindful of the respondent's lack of cooperation throughout and the unfair burden that would otherwise be imposed upon the seven other condo unit owners. That said, we also see merit in the observations of Low J. in *MTCC No. 985 v. Vanduzer*, 2010 ONSC 900, [2010] O.J. No. 571 (QL):

> The costs incurred by the applicant in the application were for the purpose of obtaining compliance with the *Act*. I would fix substantial indemnity costs at $18,000 inclusive of disbursements. The applicant is entitled, however, to full indemnity, which would entail a top-up to costs on a scale as between a solicitor and his own client. In cases where an unsuccessful party is required to pay full indemnity costs to the successful party, there is an inherent danger of "overlawyering" a matter with the knowledge that it is the other party who will have to pay. I do not suggest that overlawyering has happened here. The matter was very ably prepared and argued by counsel for the applicant. On the other hand, a condominium corporation's right to full indemnity is not a carte blanche and the issue is whether the totality of the applicant's legal expenses in relation to this matter is reasonable and therefore recoverable from the respondent. On that point, the court is not in a better position to assess the matter than an assessment officer. I am therefore referring to the assessment officer the issue of full indemnity costs to be assessed as between a solicitor

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> and his own client. The parties are at liberty, however, to agree to the quantum of costs to avoid the additional expense of the assessment. [para. 35]

As indicated, the Registrar will hear and determine any dispute over costs.

VI. Conclusion and Disposition

[72] The appellant condominium corporation applied to the Court of Queen's Bench for, *inter alia*, an order compelling the respondent to complete the condominium building and his unit, which is basically no more than a shell. The judge refused to make the order, being of the view that it was not available as a remedy under the *Act*, the Declaration or the appellant's by-laws. In our view, that refusal is unsustainable, the respondent being duty bound by the *Act* and, in particular the Declaration, to complete the building and upgrade his unit so that it can be occupied and used as a private single family residence. Accordingly, we would allow the appeal, in part, and declare the appellant is entitled to an order that the duty in question be performed, in accordance with the reasons outlined above. We would also direct the respondent to indemnify the appellant for its reasonable legal costs in connection with the application in first instance and the appeal. Any dispute over those costs will be heard and determined by the Registrar. As mentioned, that leaves undetermined a number of claims for relief in the appellant's Notice of Application, and we are of the view that it is just and convenient to refer to the Court of Queen's Bench the resolution of those claims, as well as all issues incidental to the completion order to which the appellant is entitled by virtue of the present decision, including the crafting of any appropriate terms, conditions and ancillary orders. Needless to say, the parties are entitled to be heard on these issues.

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[73] Finally, we wrap up the proceedings at this level by expressing the hope that the parties will make every reasonable effort to bring their dispute to an amicable resolution. Protracted litigation, particularly over details, is unlikely to further either party's best interests.

J. ERNEST DRAPEAU
CHIEF JUSTICE OF NEW BRUNSWICK

KATHLEEN A. QUIGG J.A.

I CONCUR:

J.T. ROBERTSON J.A.

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APPENDIX "A" / ANNEXE « A »

Condominium Property Act, S.N.B. 2009, c. C-16.05

15(1) Units and common interests are real property for all purposes.

15(2) Subject to this Act, the declaration and the by-laws, an owner is entitled to exclusive ownership and use of his or her unit.

15(3) No condition shall be permitted to exist and no activity shall be carried on in a unit or the common elements that is likely to damage the condominium property.

15(4) On 48 hours' notice, the corporation or a person authorized by the corporation may enter a unit between the hours of 8 a.m. and 8 p.m. to perform the objects and fulfil the duties of the corporation.

15(5) The corporation or a person authorized by the corporation may enter a unit without prior notice in order to gain immediate access in the case of an emergency.

[...]

19(4) A corporation has a duty to take all reasonable steps to ensure that the owners comply with this Act, the declaration and the by-laws.

19(5) Each owner, and each person having a claim against a unit and common interest, has the right to the performance of a duty

Loi sur la propriété condominiale, L.N.-B. 2009, ch. C-16.05

15(1) Les parties privatives et les intérêts communs sont, à toutes fins, des biens réels.

15(2) Sous réserve des dispositions de la présente loi, de la déclaration et des règlements administratifs, chaque propriétaire a droit à la propriété et à l'usage exclusifs de sa partie privative.

15(3) Sont interdites dans une partie privative ou dans les parties communes les situations et activités susceptibles d'endommager la propriété condominiale.

15(4) Sur préavis de quarante-huit heures, l'association ou toute personne qu'elle autorise peut, entre 8 h et 20 h, entrer dans une partie privative afin de réaliser les objets et d'accomplir les devoirs de l'association.

15(5) En cas d'urgence, l'association ou toute personne qu'elle autorise peut entrer dans une partie privative sans préavis.

[...]

19(4) Il est du devoir de l'association de prendre toutes mesures raisonnables pour s'assurer que les propriétaires se conforment à la présente loi, à la déclaration et aux règlements administratifs.

19(5) Chaque propriétaire et chaque titulaire d'une créance sur une partie privative et sur un intérêt commun a le

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of the corporation specified by this Act, the declaration and the by-laws.

droit d'exiger l'accomplissement de tout devoir de l'association que prévoient la présente loi, la déclaration ou les règlements administratifs.

[...]

23(1) An owner is bound by and shall comply with this Act, the declaration, the by-laws and the rules.

23(1) Le propriétaire est assujetti à la présente loi, à la déclaration, aux règlements administratifs et aux règles et s'y conforme.

23(2) An owner has a right to the compliance by the other owners with this Act, the declaration, the by-laws and the rules.

23(2) Le propriétaire a le droit d'exiger que les autres propriétaires se conforment à la présente loi, à la déclaration, aux règlements administratifs et aux règles.

23(3) A corporation and a person having a claim against a unit and common interest has a right to the compliance by the owners with this Act, the declaration, the by-laws and the rules.

23(3) L'association et tout titulaire d'une créance sur une partie privative et un intérêt commun a le droit d'exiger que les propriétaires se conforment à la présente loi, à la déclaration, aux règlements administratifs et aux règles.

[...]

37(5) A corporation has a right to recover the following from an owner by an action for debt:

(*a*) the unpaid amount of an assessment;

(*b*) a sum of money expended by the corporation for repairs to or work done by the corporation or at its direction to comply with a notice or order by a competent public or local authority in respect of that portion of the building comprising the unit of that owner; and

(*c*) a sum of money expended by the corporation for repairs made under subsection 48(6).

37(5) L'association a le droit de recouvrer auprès de tout propriétaire, par voie d'action en recouvrement de créance, les montants suivants :

a) la somme impayée d'une contribution aux dépenses communes;

b) les sommes qu'elle a dépensées au titre des réparations ou des travaux effectués par elle ou à sa demande sur la partie du bâtiment qui comprend la partie privative de ce propriétaire conformément à un avis ou à une ordonnance provenant d'une autorité locale ou publique compétente;

c) les sommes qu'elle a dépensées au titre des réparations effectuées en application du paragraphe 48(6).

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[...]

48(1) For the purposes of this Act, the obligations to repair after damage and to maintain are mutually exclusive, and the obligation to repair after damage does not include the repair of improvements made to the units after the registration of the declaration and description.

[...]

48(1) Aux fins d'application de la présente loi, l'obligation de faire des réparations à la suite de dommages et celle de s'occuper de l'entretien sont distinctes, et l'obligation de faire des réparations à la suite de dommages ne comprend pas la réparation des améliorations apportées aux parties privatives après l'enregistrement de la déclaration et de l'état descriptif.

[...]

48(4) An owner shall maintain his or her unit.

[...]

48(4) Chaque propriétaire entretient sa partie privative.

[...]

60(1) If a duty imposed by this Act, the declaration or the by-laws is not performed, the corporation, an owner, or a person having a registered encumbrance against a unit and common interest may apply to the Court for an order that the duty be performed.

60(2) The Court may order that the duty be performed and may appoint an administrator for the period of time and with the terms and conditions that it considers necessary.

60(3) An administrator appointed under subsection (2)

(*a*) has the powers and duties of the corporation that the Court shall order, to the exclusion of the corporation, and

(*b*) has the right to delegate any of the powers vested in the administrator.

60(4) An administrator shall be paid for the

[...]

60(1) L'association, le propriétaire ou le titulaire d'une charge grevant une partie privative et un intérêt commun peut demander à la cour d'ordonner l'exécution d'une obligation prévue par la présente loi, la déclaration ou les règlements administratifs.

60(2) La cour peut ordonner l'exécution d'une obligation et peut nommer un administrateur pour la durée et suivant les modalités et aux conditions qu'elle estime nécessaires.

60(3) L'administrateur nommé en application du paragraphe (2) :

a) exerce, à l'exclusion de l'association, les attributions de celle-ci que la cour lui assigne;

b) a le droit de déléguer tout pouvoir qui lui est conféré.

60(4) L'administrateur est rétribué pour ses

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administrator's services by the corporation, which payments are common expenses.

60(5) Nothing in this section restricts the remedies otherwise available for failure to perform any duty imposed by this Act.

services par l'association ses honoraires constituant des dépenses communes.

60(5) Rien dans le présent article ne limite les autres recours disponibles pour inexécution d'une obligation imposée par la présente loi.

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