# Court of Queen's Bench of Alberta

**Citation: Condominium Corporation No 072 9313 (Trails of Mill Creek) v Schultz, 2016 ABQB 338**

**Date:** 20160617
**Docket:** 1503 07452
**Registry:** Edmonton

2016 ABQB 338 (CanLII)

Between:

**Condominium Corporation No. 072 9313 o/a Trails of Mill Creek**

Applicant

- and -

**Stacey L Schultz**

Respondent

---

**Reasons for Judgment**
**of**
**W.S. Schlosser, Master in Chambers**

---

[1] This started as an application to evict a 15 year old child from the Trails of Mill Creek. Now it is about costs and fines.

[2] The originating application, and an 'improper conduct' cross-application, under section 67 of the Condominium Property Act, RSA 2000, c. C.-22, started out in regular chambers. The decision was reserved. While it was reserved the condominium unit sold and the eviction issue became moot. The parties have asked for determination of these remaining issues.

**Authorities cited:**

1. ***Condominium Plan No. 9910225 v Davies***, 2013 ABQB 49;
2. ***Re: Carleton Condominium Corp No. 279 v Rochon***; 1987, 59 OR ($2^{nd}$) 545 (Ont CA);

3. ***Condominium Plan No. 931 0520 v Smith,*** 1999 ABQB 119;
4. ***Condominium Corporation No. 8110264 v Farkas***, 2010 ABCA 294;
5. ***Condominium Plan No. 7621302 v Stebbing***, 2001 ABQB 487 (M)
6. ***Owners Condominium Plan No. 7621302 v Stebbing***, 2015 ABQB 219 (Ackerl, J.);
7. ***Sager v Condominium Plan No. 9523979, 2015 ABQB 549*** (Smart, M.);
8. ***Leeson v Condominium Plan No. 9925923,*** 2014 ABQB 20;
9. ***Condominium Plan No. 7721806 v Gobeil***, 2011 ABQB 318;

By the Court

1. ***BCE v 1976 Debenture Holders,*** [2008] 3 SCR 560;
2. ***Patel v Chief Medical Supplies Limited,*** 2015 ABQB 694;
3. **Principles of Administrative Law**, Jones and De Villars, Carswell 6th ed. 2014;
4. ***Oommen v Capital Regional Housing Corporation***, 2016 ABQB 283.
5. ***New Brunswick (Board of Management) v Dunsmuir***, 2008 SCC 9;
6. ***Condominium Corporation No. 031 2235 v Scott***, 2015 ABQB 171;
7. ***Canadian National Railway v Canada (AG)***, 2014 SCC 40

2016 ABQB 338 (CanLII)

**Facts**

[3] Stacey Schultz purchased Unit 33 in 2012. At that time, Ms. Schultz and her husband were estranged. They shared custody of their minor son Brett. Ms. Schultz made Brett a condition of her offer to purchase from the Trails of Millcreek (Estates) Inc. Mr. Hanna, who was the representative of the Developer and, later, the Developer's Representative on the Board, told her that this would not be a problem. It is an adult building but the by-law is permissive.

[4] In March 2014, the Board took the position that Brett could not live there even temporarily. They gave notice that he was to leave by July 6, 2014. Brett's father could not help. It is not lost on this Court that the Youth Emergency Shelter is only a few blocks away.

[5] Ms. Schultz tried to sell her unit. She had two realtors and she lowered her listing price. Over the course of these listings she had accepted two separate offers but they fell through. The Board met in November 2014. The draft meeting minutes said:

> **6.1 Age Restriction Issue – Unit 33 and 41** The Board has reviewed the ongoing breach of Bylaw 63 by the owner and has resolved to increase the enforcement of the Bylaws. It is resolved that unit no. 33 be fined $250.00 every 2 weeks beginning January 1, 2015 for every 2 weeks the Bylaw breach continues and the underage occupant remains in the unit.
> **Motion was made to implement this deadline and impose a fine of $250 every**

**2 weeks after the 1st of January, 2015 for Unit 33 not being sold or the underage occupant removed.**

(emphasis added)

[6] Ms. Schultz was caught between the decision of the board and her legal and moral obligation to her son. There was little more that she could do.

[7] By May 2015, the issue had not been resolved and the Board took out an originating application to evict the minor. The fines were accumulating but the unit had not sold. Ms. Schultz had a right to appeal the fines to a special general meeting of the owners, but she did not exercise it. Instead, she brought a section 67 cross-application.

2016 ABQB 338 (CanLII)

**The By-laws**

[8] By-law 63 provides:

63.- RESTRICTIONS ON OCCUPATION

(a) "Occupation", "occupied' or 'occupant' means a regular and ordinary presence in the Unit whether or not the person is frequently absent by reason of employment or ill health. A person shall be deemed to be an occupant if his or her occupation of the Unit exceeds thirty (30) consecutive days or any accumulative total of sixty (60) days within a three hundred and sixty five (365) day period. A person whose primary purpose for residing in the Unit is to provide medical assistance to an Occupant who complies with the Restrictive Covenant shall be deemed not to be an Occupant within the meaning of this definition.

*(b) A Unit shall not be occupied by a person or persons who have not attained or will not have attained his or her eighteenth (18th) birthday within twelve (12) months of occupancy of the said Unit (hereinafter referred to as "18th birthday") or by any child/children of the owner who are under the age of eighteen (18).*

*(c) Notwithstanding the above paragraph 63(b), a Unit may be occupied by a person who has not attained his or her 18th if the Board authorizes a person to occupy a Unit for specified periods of time for compassionate reasons. The permission granted by the Board may be revoked by a special Resolution at the duly convened meeting of the Corporation.*

(emphasis added)

[9] Number Item 43 'Violation of By-laws' provide:

...

(d) If the Board resolution so provides, the Board of Directors *may impose a fine*, not exceeding $250.00 per infraction, which will be levied if the breach has not been rectified within the time specified in the notice. If a fine is to be levied, the notice alleging the breach shall also specify the fine to be levied if the breach is not rectified.

(emphasis added)

[10] Finally, By-law 43(b) provides for the recovery of costs:

(b) The Corporation may recover from an Owner by an action for debt in any court of competent jurisdiction any sum of money *which the Corporation is required to expend* as a result of any act or omission by the Owner, his servants, agents, licensees, invitees or tenants, which violates these By-laws or any rules or regulations established pursuant to these By-laws or the Restrictive Covenant Agreement and there shall be added to any judgment, all costs of such action *including costs as between solicitor and client*. Nothing herein shall be deemed to limit any right of any Owner to bring an action or proceeding for the enforcement and protection of his rights and the exercise of his remedies;

(emphasis added)

[11] By-law 43(f) provides for an appeal of the fine to a special general meeting of the Owners. Section 43(g) and (h) provide for the conduct of an appeal.

2016 ABQB 338 (CanLII)

**Analysis**

[12] There are four issues:

1. The ability of the Developer to bind the Condominium Corporation.
2. The nature and the sufficiency of the evidence in support of the originating application;
3. The sufficiency of the Board's reasons in levying these fines;
4. The role of the Court in reviewing the decision of the properly elected condominium board;

**Developers Representations**

[13] The evidence about the Developer's representations is second hand and paper thin. Hawco J., in ***Smith*** (at para 14), cites ***Carleton,*** and finds that private arrangements between a Developer and an individual cannot bind the subsequent owners of a Condominium Corporation.

[14] However, this isn't the end of the story. Even if permission might once have been given, it was withdrawn, as the minutes referred to above indicate. By-law 63 is discretionary. The central issues remain the propriety of the decision to fine Ms. Schultz for breach of the by-law and the Board's ability to recover their enforcement costs.

**The Nature and Sufficiency of the Evidence**

[15] The application to evict the minor was brought by an originating application. This procedure is meant to be used when there are no facts in dispute, or when a decision is the subject of judicial review: Rule 3.2(2). Unlike the usual summary judgment application under Rules 7.3 or 3.68, an originating application is decided on a balance of probabilities. As the evidence may dispose of some or all of the issues, once and for all, it is required to be first-hand, direct, personal evidence; and not hearsay (Rule 13.18(3)).

[16] The affidavit in support of the application is taken by John Krysler, the property manager of the Trails of Mill Creek. He purports to swear his affidavit on personal knowledge but it is really only the evidence of a bystander. Mr. Krysler is an employee or Officer of the property management company, KDM Management Inc. He does not claim any power to bind the board, or speak on its behalf. He was apparently one of four persons in attendance at the November 5,

2014, Board Meeting, when the fines were levied; if we can go by the draft minutes. He doesn't even swear that he was there.

[17] Mr. Krysler does not give us any real insight into the Board's decision to levy the fines. Paragraphs 9 and 10 of Mr. Krysler's affidavit are as follows:

> 9. On or about November 5th, 2014 the Board discussed observations and complaints made about the underage occupant. The Board resolved to issue fines against Ms. Schultz to correct the behavior complained of. The resolution is that a fine of $250.00 every two weeks until the underage occupant moves out beginning January 1st, 2015. I attach as **Exhibit G** a copy of the meeting minutes. As of May 12th, 2015, the fines equal $2,250.
>
> 10. On May 13th, 2015 the Board considered further observations and complaints about the underage occupant. The Board resolved to assess the legal expenses of the Corporation to remedy the violation of the age restriction as against Unit 33, being the unit owned by Ms. Schultz. The Board also resolved to commence legal proceedings to seek the removal of the underage occupant within the unit; I attach as **Exhibit H** a copy of the meeting minutes.

[18] There is no evidence of any 'observations and complaints' about the underage occupant other than the reference in paragraph 9. Ms. Schultz swears in her affidavit: "My son is not causing problems or is a nuisance." The draft minutes may be implicitly consistent with what Mr. Krysler says in his affidavit but they do not disclose any specific complaints or issues and, instead, refer to two units. There is a conflict on the face of the evidence about the reason for the fines; other than a desire to enforce the by-law strictly. The compassionate jurisdiction to provide an exemption is not referred to or considered. It is not self-evident how a fine could correct Ms. Schultz's behavior, if that was what was intended.

[19] I appreciate that Condominium Corporations cannot speak for themselves and must speak through others. Mr. Krysler says he has personal knowledge but the key evidence is really second-hand. Mr. Krysler does not purport to be empowered to speak on behalf of the Corporation, as a Corporate Officer would. He was not a decision-maker and, in essence, is only reporting, with some embellishment, what appears to be part of what he saw or heard at the two Board meetings in question.

[20] Mr. Krysler's affidavit is silent about Ms. Schultz's efforts to remedy the issue. I accept her evidence about the efforts she made. This evidence is uncontracted.

**Improper Conduct**

[21] Section 67(1)(a) of the *Condominium Property Act,* provides:

> 67(1)(a) In this section, "improper conduct" means
>
> (i) non-compliance with this Act, the regulations or the by laws 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,

2016 ABQB 338 (CanLII)

(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.

[22] Section 67(2) provides a wide range of remedies. It permits the Court to relieve harm and provide remedies for improper conduct on the part of the Board.

[23] The law relating to Section 67 can be summarized as follows (from ***Leeson v Condo Plan No. 9925923***, 2014 ABQB 20):

> [15] Subsections 67(1)(a)(ii) - (v) use the words 'oppressive or unfairly prejudicial [conduct]'. An oppression remedy is well established in a company law setting, though it goes without saying that the remedy in that context protects a narrower range of interests than those that might be found in a condominium setting.
>
> [16] The learned authors of the *Condominium Law and Administration*, Carswell, vol. 2, (Looseleaf) Ch. 23 (T. Rotenberg), identify British Columbia as the pioneering jurisdiction for an oppression remedy in the condominium context. Mr. Rotenberg notes five general principles that apply in this setting:
>
> > (a) It is a broad remedy, broadly applied; attempts to narrow its impact and effectiveness should therefore be resisted.
> >
> > (b) The purpose of the oppression remedy is to protect the objectively reasonable expectation that caused the relationship to begin or continue.
> >
> > (c) Either the cumulative results of the conduct complained of or a specific egregious act ultimately determines whether there is an actionable wrong.
> >
> > (d) The court must balance the competing interests of the minority, who are to be treated fairly, with the rights of majority to govern. Only if the minority's interest is unfairly treated will the courts intervene.
> >
> > (e) The selection of a remedy must be sufficient to achieve the desired result. Remedies should not be narrowly limited, and may be granted against individuals in appropriate cases.
>
> (17) The source of the remedy is the recognition that there are different, sometimes competing, interests within any group. Not every interest can prevail,

2016 ABQB 338 (CanLII)

so the law requires due consideration and fair treatment of the various stakeholders.

[24] Though the company law remedy might be narrower, there is another advantage to be gained from the comparison: which is the concept of the reasonable expectations of the claimant (***BCE*** and ***Patel***). This can be helpful in terms of identifying threshold conduct to be considered under section 67; ***Sagar*** (per Smart, M), and ***Scott***, (per Ackerl, J; at paras 44 and following). It is similar to the 'legitimate expectation test' in Administrative Law (e.g. ***Stebbing*** (M) at para 19 and the reference cited there); though this goes more to the measure of procedural fairness.

[25] In this case, a unit owner could reasonably, or legitimately expect that she would not be fined when there would be no useful purpose served by it. Both the by-law about minor persons staying in the complex and the power to levy a fine are discretionary. Enforcement by fines is not mandatory. The by-laws are not to be treated as a version of legislated inhumanity.

2016 ABQB 338 (CanLII)

**Should there be Deference?**

[26] The starting point for review is frequently said to be to give decisions of the condominium boards considerable deference (eg ***Stebbing***, 2015 ABQB 219 at para 29 – 31, and the cases cited there). But this is never the end of the story. It may mean that the Court should be reluctant simply to substitute its decision for that of the Board. It does not mean 'hands off'. Certain analogies have been drawn to applications for judicial review in the administrative law context: see ***Stebbing,*** 2014 ABQB 487 at para 29 and following. Arbitrary decision making cannot immunize the Board from scrutiny by this Court (***Stebbing*** at para. 32, ***Gobeil*** at para 11).

[27] The administrative law context (or the judicial review context) is also helpful because it gives us a framework for when deference should be accorded a decision of the Board (i.e., ***Dunsmuir*** at para. 62); depending on the nature of the decision and not just because board members are elected to their posts.

[28] ***Dunsmuir*** does not apply only to Administrative Tribunals: ***CNR v Canada (AG)*** at para 53. There are two standards:'correctness' and 'reasonableness'. The latter imparts a measure of deference: the former does not. This case involves the Board's exercise of discretion and is to be measured against the standard of reasonableness.

**What Were They Thinking?**

[29] The Board's decision is not self-explanatory. There is no evidence of any complaints or issues other than the oblique reference in the affidavit of John Krysler. Ms. Schultz denies any problems or issues.

[30] Decisions of significant import, such as the extraordinary remedy of eviction of an owner or an occupant (***Farkas,*** at para. 7) may also bring with it obligation to adhere to the principles of natural justice and to provide reasons for the decision. Reference to an Administrative Law Textbook is enough to tell us that: (e.g. **Principles of Administrative Law**, at p. 382 and following). Reasons form the three pillars of responsible decision-making; 'justification, transparency and intelligibility'. (**Principles of Administrative Law**, at pp. 395, 396) the failure to give reasons in a serious case may invalidate the decision. A reviewing court might just as well assume that the absence of reasons means that the decision is arbitrary, or that there are no proper purposes for it. And this may not be such a wild assumption here; there is no apparent

reason how a fine could correct Ms. Schultz's behavior or to cause her to do anything other than what she had diligently been doing.

[31] The purposes of sanctions were recently reviewed (though in a civil contempt context) by Veit, J. in the ***Oommen*** case. There, citing authority, including an earlier decision of Gates, J., the learned Justice indicated that the Court should consider whether the conduct was deliberate and willful, whether like cases had been treated in a like way, whether there are mitigating or aggravating factors, as well as the principle of deterrence and the reasonableness of a fine. The overriding principle is proportionality.

[32] No reasons are provided. We cannot tell what the Board had in mind.

[33] There is no consideration of the purpose of sanction in the Board's decision. The fines levied here appear to be pointless except, possibly, from the standpoint of deterrence. Otherwise the decision seems to be punitive and to serve no useful purpose. It might have been different if Ms. Schulz was unwilling to comply.

2016 ABQB 338 (CanLII)

**Denouement**

[34] It is important that the law be consistent, not just case-to-case but, ideally, area-to-area. From this perspective there appears to be much to be gained by drawing on other, analogous, areas where useful concepts have been developed and considered.

[35] It appears to me that the approach to this type of decision should be as follows:

1. Apply a reasonable or legitimate expectations analysis to determine the nature of the right or interest affected, and to identify whether there is threshold conduct for the application of section 67(1)(a)(ii)-(v);
2. Consider the nature and the sufficiency of the evidence in support of the application; especially with Rule 13.18(3) in mind;
3. Identify the type of the decision (i.e., whether it involves a question of law like the interpretation of the *Condominium Property Act,* or a by-law, or an exercise of discretion based on a set of facts). Condominium Boards may be especially in tune with the needs and interest of the unit owners but unless demonstrated, their election gives them no special ability to interpret questions of law. This leads to the fourth question which is to;
4. Consider what level of deference the Court should afford the decision. That is, what standard should be applied: reasonableness, or correctness;
5. If the decision involves an interest that is not trivial, and if the result is not self-evident, the Court should ask whether reasons are necessary and whether the rules of natural justice have been followed.

**Disposition**

[36] In some circumstances, the Court might be inclined to send a decision back to the Board for reasons or further evidence about how this decision was arrived at (e.g. ***Gobeil***). But the facts here are compelling. The justification for the decision is not self-evident. The stakes are high for all concerned when this level of review is engaged. More is expected of the Board.

[37] The originating application for fines and recovery costs is dismissed. The cross application is allowed under 67(2) (f) and the fines are set aside with costs to the cross-applicant on column 1.

**Dated** at the City of Edmonton, Alberta this 17th day of June, 2016.

---

**W.S. Schlosser**
**M.C.C.Q.B.A.**

**Appearances:**

Hugh Willis
Willis Law
for the Applicant

Todd Shipley
Reynolds, Mirth, Richards & Farmer LLP
for the Respondent

2016 ABQB 338 (CanLII)