

**IN THE SMALL CLAIMS COURT OF NOVA SCOTIA**  
cite: *Sutcliffe et al v. Halifax County Condominium Corporation 286* 2021 NSSM 7

SCCH 487076

Between:

Keith Gordon Sutcliffe, Cheryl McKinley, Charlene Marie Isenor and Joseph Jean Denis Turbide  
Claimants

— and —

Halifax County Condominium Corporation 286  
Defendant

**Adjudicator:** Augustus M. Richardson, QC

**For the Claimants:** Keith Gordon Sutcliffe

**For the Defendant:** Richard Norman, counsel

**Heard:** March 23, 2021 (by teleconference)

**Decision:** March 31, 2021

**DECISION and ORDER**

[1] This is a claim for repair and maintenance costs for Heat Recovery Units (sometimes called “Heat Recovery Ventilation” units, or HRVs) located in each of the condominium units owned and occupied by the claimants. The claimants say that the HRVs are common elements, and hence the responsibility of the defendant Halifax County Condominium Corporation 286 (the “Condo Corp”). The claimants rely on the definitions of “common elements” and “residential unit” in the Condo Corp’s Declaration, as well as a brief decision of Adjudicator Thompson in *McKay v. Halifax County Condominium Corporation No. 286* (SCCH 486626, unreported, June 24, 2019). The defendant says that the decision in *McKay* is wrong, and that the HRVs instead fall within the boundaries of the condominium units as defined in the Declaration, and hence the responsibility of the owners.

[2] Based on the evidence and the definitions contained in the Declaration, and for reasons set out below, I am satisfied that the HRVs fall within the boundaries of the residential units as defined and so are the responsibility of the individual unit owners.

**The Hearing**

[3] The hearing took place by teleconference.

[4] It was confirmed at the beginning of the hearing that the claimant Cheryl McKinley no longer wished to participate in these proceedings, and had withdrawn her claim. The claim on behalf of the other three claimants proceeded.

[5] On behalf of the claimants I heard the testimony and submissions of Mr Sutcliffe. He also introduced a number of exhibits.

[6] On behalf of the defendant I heard the testimony of Mr David Brown, the president of the Condo Corp. Mr Norman made submissions. He also filed a book of exhibits, including a photograph of a HRV in place.

### **The Facts**

[7] There really was no dispute on the facts. The dispute rather centred on how those facts fit within the definitions contained in the Declaration.

[8] The condominium building is composed of 42 units. Looked at in cross-section, the units are constructed as follows, from the bottom up: concrete floor (the surface of which may be covered with ceramic tile, carpet or wood flooring); the unit space; drywall ceiling; small air space; concrete ceiling (being the bottom of the floor of the unit above). The HRVs for each unit are attached by bolts or straps (or both) to the underside of the concrete ceiling above, in the space between the bottom surface of the concrete ceiling and the top surface of the drywall ceiling. Access to the HRVs is by a metal hatch that is cut into the drywall ceiling. The HRV is wired to a control box in each unit. Each HRV is controlled by a controller that is on an interior wall in a unit.

[9] The HRVs do two things. They circulate air in the unit. That appears to be their primary function. However, because of the air gaps between the drywall ceiling and walls, and the concrete shell of the building, they also provide air circulation that assists in preventing the growth or spread of moisture-loving mold.

[10] I turn now to the Declaration of the Condo Corp. The parties agreed that the answer to the question posed by the claim depended on how the facts fit within the Declaration.

[11] Clause 1.01 contains the definitions of common elements and residential unit, as follows:

1.01(c) “Common Elements” means all the property except the units;

- 1.01(i) “Residential Unit” means the part or parts of the land intended for occupancy by owners, tenants, or guests, which units are shown on the plan of Servant, Dunbrack, McKenzie & MacDonald Limited prepared in conjunction with the submission of this Declaration and on file with the Registrar of Condominiums.
- 1.01(k) “Unit” means the part or parts of the land included in the description, and designated as a unit by the description including Residential Units and Parking Units, and comprises the space enclosed by the boundaries and all the material parts of the land within this space at the time the declaration and the description are registered.

1.04(A) **Boundaries of Residential Units**

EACH RESIDENTIAL UNIT SHALL  
COMPRISE THE AREA BOUNDED:

HORIZONTALLY, ON ALL LEVELS:

By the exterior surfaces of the drywall  
sheeting on the walls and extensions of the planes of  
such surfaces across windows, doors and other openings.

VERTICALLY, ON ALL LEVELS:

By the upper surface of the concrete  
floor slab and the upper surface of the sprayed texture on  
the ceiling or the upper surface of the drywall sheeting  
on the ceiling as the case may be.

NOTWITHSTANDING THE  
FOREGOING, THE UNIT SHALL NOT INCLUDE:

Any load-bearing walls, column or  
beams within the boundaries of the Unit;

Such pipes, wires, cables, conduits,  
ducts, flues, public utility lines and other horizontal or  
vertical service facilities which are used for the  
distribution of power, water, drainage and other services

within the building and that are within the boundaries of the Unit;

The Unit shall include:

- (a) fixtures, outlets, ducts, heat recovery ventilators, fireplace if applicable and other facilities with respect to such service facilities which are within the boundaries of the Unit and which service the Unit only.

### **Submissions**

[12] The claimants say that the HRVs are clearly outside of the boundaries of a unit as defined in the Declaration. They are located above “the upper surface of the drywall sheeting on the ceiling.” And because they are not within the boundaries of the unit they are not caught by the last part of the definition of the boundary. Mr Sutcliffe also points to the decision in *McKay*, which on the same facts came to the conclusion that the HRVs were common elements because they lay above “the upper surface of the drywall.”

[13] The defendant says that the decision in *McKay* was wrong. It pointed to two reserve studies that had been performed, neither of which included the cost of maintaining or repairing the HRVs for each unit. Maintenance memos and advice by the Condo Corp to unit owners had always said that HRVs were the responsibility of the unit owners. It also pointed to the differences in the horizontal and vertical boundary definitions. The horizontal boundaries spoke of extending the plane of the exterior surface over windows, doors and other openings—the vertical boundary did not. The defendant submitted that the absence of any reference in the vertical boundary to the extension of planes was to allow for the presence of service hatches (such as the one for each HRV). It also pointed out that the HRV was directly over a metal hatch rather than drywall.

### **Analysis and Decision**

[14] Common elements are the responsibility of the Condo Corp. Residential Units are the responsibility of the unit owner. Insofar as is relevant for our purposes, parts of the building belong to either the common areas or to the residential units. Where they fall depends on whether they land within or without the boundaries of residential units as defined in the Declaration.

[15] On the face of it the claimants’ position seems strong. On the facts there is a space, however slight, between the upper surface of the drywall sheeting of the ceiling and the concrete floor slab above

it. The HRV would appear then to be above “the upper surface of the drywall sheeting on the ceiling” and hence outside the boundary of the unit. And indeed, that was the conclusion in the *McKay* decision.

[16] However, it’s not clear from the very brief reasons in *McKay* whether Adjudicator Thompson was made aware of the fact that the HRVs were actually above a metal access plate, presumably to permit access to the HRV for maintenance purposes. In other words, the HRV is not actually above *drywall sheeting*. But if it is not above drywall sheeting then it does fit neatly within the first part of clause 1.04(A). Does that mean that the answer lies elsewhere in the Declaration?

[17] This brings us to the last part of clause 1.04(A), which for convenience I repeat here:

The Unit shall include:

- (a) fixtures, outlets, ducts, heat recovery ventilators, fireplace if applicable and other facilities with respect to such service facilities which are within the boundaries of the Unit and which service the Unit only.

[18] Here we have an express reference to HRVs. The Unit “shall include ... heat recovery ventilators.” As a rule in questions involving interpretation, the specific governs in the face of the general. Further support for this interpretation may be found in the phrase that follows: “and other facilities with respect to such service facilities which are within the boundaries of the Unit and which service the Unit only.” A controller on the inside face of an interior wall in the unit is in my view an “other facility” that relates to “such service facilities [*i.e.* the HRV]” that are “within the boundaries of the Unit and which service the Unit only.”

[19] For the above reasons I am satisfied that the HRVs that service each Unit fall within the boundaries of a “Residential Unit” as described in clause 1.04(A) of the Declaration. That being the case, their repair and maintenance are the responsibility of the three claimants as unit owners. The claim is dismissed.

DATED at Halifax, NS  
this 31<sup>st</sup> day of March, 2021

Augustus Richardson, QC  
Adjudicator