Court of Queen's Bench of Alberta

Citation: Condominium Corporation No 052 0580 v Alberta (Human Rights Commission), 2016 ABQB 183

Date: 20160324
Docket: 1503 01401
Registry: Edmonton

Between:

Condominium Corporation No. 052 0580

Applicant

- and -

Alberta Human Rights Commission

Respondent

Reasons for Judgment
of the
Honourable Mr. Justice Robert A. Graesser

Introduction

[1] Condominium Corporation No. 052 0580 (the Corporation) brings this application for judicial review as a result of a decision of the Alberta Human Rights Commission (the Commission) to proceed with the investigation of a complaint made by one of the owners of the Corporation.

[2] The Corporation seeks to quash the decision and essentially prohibit the Commission from investigating the complaint or otherwise dealing with it.

[3] The Corporation argues that the Commission has no jurisdiction to deal with complaints by owners of condominiums against the Corporation.

Background

[4] Dennis Goldsack purchased a unit in the Tradition at Southbrook approximately ten years ago. As a result, he was assigned a parking stall and owns a fractional share of the common property of the Corporation. He is also a member of the Corporation, entitling him to vote at meetings and to all the rights (and obligations) of an owner.

[5] Mr. Goldsack is disabled and confined to a wheelchair. He alleges that when he purchased his unit, the developer who then ran the Corporation assigned him the parking stall nearest the elevator in the building. Mr. Goldsack believes that the stall is a designated "handicapped" stall, although that characterization is apparently controversial.

[6] Sometime in 2014, the Corporation Board decided to change the use of the stall being used by Mr. Goldsack to bicycle parking and storage for the residents, and notified Mr. Goldsack that he would no longer be able to use the stall. As a result, he would have to park in the stall assigned to his unit, which was narrower and further from the elevator.

[7] Mr. Goldsack's approaches to the management company and to the Board have not succeeded in having the Board change its position so on September 9, 2014 he made a complaint of discrimination to the Commission based on physical disability.

[8] The Commission reviewed his complaint and wrote the Corporation seeking its response. Mr. Noce responded for the Corporation by letter dated October 10, 2014 advising that the Corporation's position was that the Commission had no jurisdiction over it. The Commission reviewed Mr. Noce's letter and Garth Borle, the Commission's Assistant Regional Director, responded that it believed that it had jurisdiction to investigate the complaint. A copy of ***Ganser v Rosewood Estates Condominium Corporation***, 2002 AHRC 2 was sent to Mr. Noce.

[9] This application was then brought, seeking to quash the Commission's decision to proceed with the investigation.

Issues

[10] The issue on this application is straightforward: Does the Commission have jurisdiction over complaints made to it by owners of condominium corporations concerning the actions of the condominium corporation affecting the complainant?

[11] The Corporation argues that case law in Alberta makes it clear that there is no such jurisdiction, and it argues that there is no need for the Commission to be involved because the *Condominium Property Act*, RSA 2000, c C-22, provides adequate remedies for owners unhappy with their treatment by the Corporation.

[12] The Commission argues that the Courts should not intervene with the Commission's processes at this stage of the proceeding. It also made submissions with respect to the standard of review to be used on this application. It also argues that it has threshold jurisdiction to investigate a complaint made to the Commission.

Case Law

[13] The starting point is ***Ganser v Rosewood Estates Condominium Corporation***, a 2002 decision of the Alberta Human Rights Commission. In that case, the Commission ruled that it had jurisdiction with respect to the activities of condominium corporations.

[14] That was a case involving Section 3 of the *Human Rights, Citizenship and Multiculturalism Act*, RSA 1980, c H-11.7 (now essentially Section 4 of the *Alberta Human Rights Act*, RSA 2000 c A-25.5 (the Act)), following an allegation that discrimination occurred in relation to services "customarily available to the public" by the condominium corporation against an owner. The Commission considered ***University of British Columbia v Berg***, [1993] 2 SCR 353 and held at pages 14 and 15:

> Chief Justice Lamer in ***Berg*** considered the private and public nature of relationships and expanded the definition of 'public'. He rejected a quantitative approach taken in the courts in a line of cases ***Gay Alliance Toward Equality v. Vancouver Sun*** (1976) 2 S.C.R. 435. He applied a relationship approach. He says, that "every service has its own public" and once this 'public' is defined, the Act prohibits discrimination against the members of that public on the prohibited grounds.
>
> The Respondent provides a variety of services to the owners of property in the condominium complex, therefore, according to Berg, the owners make up the public to whom the services are 'customarily available'. One of the services provided by the Respondent is in relationship to parking. Parking is customarily available to owners. A more specific subset of parking services is the assignment of parking stalls. Pursuant to By-Law 58(h), the Board of the Corporation has full discretion in assigning and re-assigning parking stalls.
>
> It is a finding of this Panel that the Complainant, a resident owner, is therefore a member of the public customarily served by the Respondent as a consequence of her purchase of her unit in the condominium complex in 1991. Parking and more specifically the assignment of parking stalls are incidents of this public relationship between the Respondent and the Complainant. In fact, being a resident owner, according to the By-laws is a primary condition of the assignment of a parking stall. The Complainant is a member of the 'parking public'. She had been assigned parking stall #39 from 1991 when she purchased her unit in the complex to the change in the By-Law in December 1998. She is not being assigned a parking stall now because of the secondary criteria defined in the By-Law. It is the Panel's view that she remains a member of the public for the purposes of reviewing if there has been discrimination against her as a result of the secondary conditions.

[15] The Corporation notes that ***Ganser*** was not appealed, and argues that it is not binding and should not be followed.

[16] The Corporation submitted a number of cases as to the standard of review, the jurisdiction of the Commission and the availability of what it describes as the "correct forum" to deal with allegedly improper conduct by condominium corporations or boards with respect to owners:

1. ***Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)***, 2011 ABCA 3;

2. ***Placer Dome Canada Ltd v Ontario (Minister of Finance)***, [2006] 1 SCR 715, para 45 Driedger on the Construction of Statutes (3rd ed, 1994);

3. *Condominium Property Act*, RSA 2000, c C-22, s. 67;

4. *Residential Tenancies Act*, SA 2004, c R-17.1;

5. ***University of British Columbia v Berg***, [1993] 2 SCR 353;

6. ***The Owners: Condominium Plan No. 9422336 v The Queen***, 2004 TCC 406;

7. ***Condominium Plan No 931 0520 (Owners) v Smith***, 1999 ABQB 119;

8. ***Condominium Plan No. 9910225 v Davis***, 2013 ABQB 49;

9. ***Owners Condominium Plan 7722911 v Marnel***, 2008 ABQB 195.

[17] The Commission submitted a number of cases as to its jurisdiction, as well as cases on the standard of review and its argument that the Court should decline to intervene at this stage of the proceedings:

1. *Alberta Human Rights Act*, RSA 2000, c. A-25.5 (applicable sections only);

2. ***Ganser v Rosewood Estates Condominium Corporation***, 2002 AHRC 2;

3. ***Leon's Furniture Limited v Alberta (Information and Privacy Commissioner)***, 2011 ABCA 94, 502 AR 110;

4. ***Strickland v. Canada (Attorney General)***, 2015 SCC 37, [2015] 2 SCR 713;

5. ***Harelkin v University of Regina*** [1979] 2 SCR 561;

6. ***Halifax v NS (Human Rights Commission)***, 2012 SCC 10, [2012] 1 SCR 364;

7. ***Litchfield v College of Physicians and Surgeons of Alberta***, 2005 ABQB 962, 390 AR 126;

8. ***President of Canadian Border Services Agency and the Attorney General of Canada v. C.B. Powell Limited***, 2010 FCA 61 at para. 28, 400 NR 367;

9. ***Robertson v Wasylyshen***, 2003 ABCA 279, 339 AR 169;

10. ***Canada (House of Commons) v Vaid***, 2005 SCC 30, [2005] 1 SCR 668;

11. ***Syncrude Canada Ltd v Alberta (Human Rights and Citizenship Commission)***, 2008 ABCA 217, 432 AR 333;

12. ***Association of Professional Engineers and Geoscientists of Alberta v Mihaly***, 2016 ABQB 61;

13. ***Mis v Alberta Human Rights Commission***, 2001 ABCA 212, 293 AR 391;
14. ***Konieczna v Owners Strata Plan NW2489 (No. 2)***, (2003) 47 CHRR D/144, 2003 BCHRT 38;

15. ***Williams v Strata Council No. 768***, (2003) 46 CHRR D/326, 2003 BCHRT 17;

16. ***Mahoney v Strata Plan No. NW332***, (2008) 63 CHRR D/283, 2008 BCHRT 274;

17. ***Epp v Strata Plan VR2692***, (2009) 67 CHRR D/116, 2009 BCHRT 97;

18. ***Shannon v Strata Plan KAS 1613 (No. 2)***, 69 CHRR D/43, 2009 BCHRT 438;

19. ***Syndicat Northcrest v Amselem***, 2004 SCC 47, [2004] 2 SCR 551.

[18] Following argument on March 3, 2016 the Commission cited two additional cases:

Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association, 2011 SCC 61; and

SMS Equipment Inc. v Communications, Energy and Paperworkers Union, Local 707, 2015 ABQB 162.

[19] The Corporation responded with a supplemental brief, citing a number of additional authorities:

1. Condominium Property Act, RSA 2000, c C-22;

2. ***Hnatiuk v Condominium Corporation No. 032-2411***, 2014 ABQB 22;

3. ***Condominium Plan No. 9524710 v Webb***, 1999 ABQB 7;

4. ***Owners: Condominium Plan No. 022 1347 v N.Y.***, 2003 ABQB 790;

5. ***Condominium Plan No. 8222909 v Francis***, 2003 ABCA 234;

6. ***Condominium Plan No. 8210034 v King***, 2012 ABQB 127;

7. ***934859 Alberta Inc. v Condominium Corporation No. 0312180***, 2007 ABQB 640;

8. ***Owners Condominium Plan 7722911 v Marnel***, 2008 ABQB 195;

9. ***Owners: Condominium Plan No. 982 2595 v Fantasy Homes Ltd.***, 2008 ABQB 584;

10. ***Leeson v Condominium Plan No. 9925923***, 2014 ABQB 20;

11. *Condominium Complexes are Private; a Defense Against the creeping expansion of the Alberta Human Rights Commission*;

12. ***McCormick v Fasken Martineau Dumoulin LLP***, 2014 SCC 39.

Arguments

Corporation

[20] The Corporation submits that the standard of review is correctness.

[21] The Corporation argues that ***Ganser v Rosewood Estates*** should not be followed, citing the fact that the Act does not apply to single detached homeowners.

[22] Section 5 prohibits discrimination against tenants:

> 5 No person shall
>
> (a) deny to any person or class of persons the right to occupy as a tenant any commercial unit or self contained dwelling unit that is advertised or otherwise in any way represented as being available for occupancy by a tenant, or
>
> (b) discriminate against any person or class of persons with respect to any term or condition of the tenancy of any commercial unit or self contained dwelling unit,
>
> because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.

[23] The Corporation argues that section 5 protects tenants and inferentially excludes residents who are property owners.

[24] It argues that if Section 4 of the Act were intended to protect condominium unit owners, "then the wording of Section 4 would equally protect tenants".

[25] Section 4 provides:

> 4 No person shall
>
> (a) deny to any person or class of persons any goods, services, accommodation or facilities that are customarily available to the public, or
>
> (b) discriminate against any person or class of persons with respect to any goods, services, accommodation or facilities that are customarily available to the public,
>
> because of the race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability,

> ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or class of persons or of any other person or class of persons.

[26] The Corporation argues that the Commission's interpretation of Section 4 leads to a redundancy within the Act, and offends the presumption against tautology, citing ***Placer Dome Canada Ltd v Ontario (Minister of Finance)***, [2006] 1 SCR 715.

[27] The Corporation argues that no void is left if the Commission is without jurisdiction, as the *Condominium Property Act* provides appropriate and sufficient remedies in section 67:

> 67(1) In this section,
>
> (a) "improper conduct" means
>
> (i) non-compliance with this Act, the regulations or the bylaws by a developer, a corporation, an employee of a corporation, a member of a board or an owner,
>
> (ii) the conduct of the business affairs of a corporation in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,
>
> (iii) the exercise of the powers of the board in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party,
>
> (iv) the conduct of the business affairs of a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit, or
>
> (v) the exercise of the powers of the board by a developer in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of an interested party or a purchaser or a prospective purchaser of a unit;
>
> (b) "interested party" means an owner, a corporation, a member of the board, a registered mortgagee or any other person who has a registered interest in a unit.
>
> (2) Where on an application by an interested party the Court is satisfied that improper conduct has taken place, the Court may do one or more of the following:
>
> (a) direct that an investigator be appointed to review the improper conduct and report to the Court;
>
> (b) direct that the person carrying on the improper conduct cease carrying on the improper conduct;

(c) give directions as to how matters are to be carried out so that the improper conduct will not reoccur or continue;

(d) if the applicant suffered loss due to the improper conduct, award compensation to the applicant in respect of that loss;

(e) award costs;

(f) give any other directions or make any other order that the Court considers appropriate in the circumstances.

(3) The Court may grant interim relief under subsection (2) pending the final determination of the matter by the Court.

[28] The Corporation also argues that the decision of the Commission to proceed to investigate under the provisions of section 4 offended the "relational approach" to human rights protection as set out in ***University of British Columbia v Berg***, [1993] 2 SCR 353.

[29] It argues that a condominium corporation does not provide "services" to owners as they are "a mechanism by which groups of property owners manage their collective resources". It cites the analysis in ***Condominium Plan No 9422336 v The Queen***, 2004 TCC 406.

[30] Further, the Corporation argues that the issue has been decided by the Court of Queen's ***Bench in Condominium Plan No 931 0520 (Owners) v Smith, 1999 ABQB 119 and Condominium Plan No 991 0225 v Davis***, 2013 ABQB 49.

[31] In ***Condominium Plan No 991 0225 v Davis***, Stevens J held at para 9:

> [9] Because condominium By-laws are in the nature of a contract between the owners of the units of the condominium, and because the Canadian Charter of Rights and Freedoms does not extend to "activities by non-governmental entities created by government for legally facilitating private individuals do things of their own choosing without engaging governmental responsibility", the by-laws of the condominium corporation are not bound by the Charter: Condominium Plan No. 9310520, at para.5. Nor, as Hawco J. concluded at para.6, are they governed by s.4 the Alberta Human Rights Act, R.S.A. 2000, c.A-25.5, because that section prohibits discrimination against any person or class of person with respect of accommodation or facilities that are customarily available to the public, and of course condominium units are not. It is not at all uncommon, for example, for condominium By-laws to discriminate on the basis of age, and it is well established that a condominium corporation is legally entitled to do so.

[32] Next, the Corporation argues that deference should be given to the democratic decisions of an elected condominium corporation board, citing ***Owners Condominium Plan 7722911 v Marnel***, 2008 ABQB 195.

[33] Finally, the Corporation argues that a decision favourable to the commission as to its jurisdiction over condominium corporations would open a floodgate of complaints.

Commission

[34] No issues were raised with the Commission's standing to make the submissions it did on this application.

[35] The Commission submits that the standard of review is reasonableness.

[36] The Commission also argues that the decision of Mr. Borle to proceed with an investigation into Mr. Goldsack's complaint is not one that can be reviewed by way of judicial review as it was not a final determination and was a matter of "screening and administration, not of adjudication", citing ***Halifax v NS (Human Rights Commission)***, 2012 SCC 10.

[37] Its main argument was that the application brought by the Corporation is premature, and that the Corporation should have waited for a decision on the merits of the matter rather than bring this pre-emptive strike against the Commission's threshold jurisdiction.

[38] The Commission notes that judicial review is ultimately discretionary in nature, citing ***Strickland v Canada (Attorney General)*** and argues that:

1. Human rights legislation sets up a complete regime for the determination of human rights complaints;

2. The Act contains an adequate and effective remedy in the form of a hearing before a tribunal and a statutory appeal;

3. Human rights tribunals have specialized expertise in the resolution and adjudication of human rights complaints;

4. Early judicial intervention would disrupt and fragment the statutory regime; and

5. The common law "overwhelmingly supports dismissing this application on the basis of it being premature".

Standard of Review

[39] I am satisfied that the standard of review on this application is reasonableness. Mr. Borle (who is not the Commissioner) was considering an issue involving only the Commission's home statute.

[40] As recently held in ***Association of Professional Engineers and Geoscientists of Alberta v Mihaly***, 2016 ABQB 61, questions of law concerning the interpretation of the Act are to be reviewed on the basis of reasonableness unless they either involve an issue of "central importance to the legal system" or fall outside the adjudicator's specialized area of expertise.

[41] Ross J held at para 47 - 49 in that case:

> [47] With the release of Saguenay, Bombardier and Stewart, many of the previously contentious issues regarding standard of review were conceded by the parties. The governing standards of review are set out below.
>
> [48] Questions of procedural fairness are reviewed on the basis of whether the proceedings met the level of fairness required by law: Wright v College and

> Association of Registered Nurses of Alberta (Appeals Committee), 2012 ABCA 267 (CanLII) at para 31, 355 DLR (4th) 197 [Wright].
>
> [49] Questions of law concerning the interpretation of the Alberta Human Rights Act, RSA 2000, c A-25.5 [AHRA] are reviewed for reasonableness, unless they are "of central importance to the legal system and fall outside the adjudicator's specialized area of expertise": Saguenay at paras 46-48.

[42] The Corporation cites ***Lockerbie & Hole Industrial Inc v Alberta (Human Rights and Citizenship Commission, Director)*** as authority for its argument that questions of law before the Commission are to be reviewed on the basis of correctness. However, that decision makes it clear that the interpretation of the word "employer" was an extricable question of law and that the determination of who is an employer "is a question of general importance to the legal system and outside the specialized area of expertise of the Panel" (at para 8).

[43] Here, the Commission is ultimately being called on to determine whether or not the assignment or taking away of an assigned parking stall is a "service customarily available to the public" and whether prohibited discrimination occurred in the provision of that service to an owner.

[44] There is no body more capable of determining what is "discrimination" in the context of human rights than the Commission. Decisions as to what are "services customarily available to the public" may be are also part of their bread and butter.

[45] I do not see that determinations on these questions are matters that transcend to questions "of general importance to the legal system". These are human rights issues and well within the specialized expertise of that body.

[46] As such, the decision of Mr. Borle, to the extent that it is a decision that can be reviewed on judicial review, should be reviewed on the basis of reasonableness.

Threshold Issues

[47] One threshold issue here is whether Mr. Borle's decision can be reviewed at all because it is not adjudicative in nature and is not final.

[48] The second threshold issue is the Commission's position that the Court should decline to exercise a jurisdiction to review the decision at this stage on the basis of it being premature.

[49] The Commission makes a very strong argument that the Court should hold off any review until the process has been allowed to run its course. ***Canada (House of Commons) v Vaid***, 2005 SCC 30, strongly supports the Commission's arguments in that regard.

[50] The position taken by the Corporation, that the Commission has no jurisdiction to even embark on an investigation of a complaint by an owner about the actions of the condominium corporation of which he is a part owner, is one that might have been brought by way of an application for prohibition rather than for judicial review of an administrative decision.

[51] I am going to proceed to a review on the merits of the application on two bases: firstly, that there is some benefit to having an issue determined on its merits rather than get tangled in procedural issues. In that regard, I am mindful of the foundational provisions in the Rules of Court which encourage, if not require, the parties to identify the real issues in dispute at an early

stage and find a way of adjudicating those issues economically and expediently. Sending the Corporation away to bring a prohibition application instead of a judicial review application does not accomplish those objectives.

[52] Secondly, this application for judicial review was directed to be heard by Browne J on the first return of the application over a year ago. It has taken a year for this application to be scheduled to be heard, not because of any delays by the parties but rather because of the institutional delay in getting an application for judicial review heard in the Court of Queen's Bench.

[53] I recognize that Browne J made no determination on the application before her other than whether Mr. Goldsack was to be given notice of the application and, if so, how he was to be notified, as well as on the Corporation's application for a stay of proceedings before the Commission. Browne J ruled that Mr. Goldsack should continue to have access to the handicapped stall until the matter had been heard. The judicial review application itself was presented as a consent adjournment.

[54] I do not accept that Browne J made any determination that the matter should be heard on its merits. There were no technical arguments made before her. However, the first notice given to the Corporation of the Commission's intention to raise these threshold issues was in its brief, filed February 19, 2016.

[55] I note that counsel for the Commission is newly appointed, and was not counsel who appeared before Browne J or who had conduct of the matter until recently. But it seems to me that having regard to the delay in scheduling this matter for a hearing, there is utility in determining the Corporation's threshold issue as to whether the Commission has any jurisdiction to embark on an investigation of this nature.

[56] While there are good arguments that the application is premature, there is also merit in determining this threshold issue. If indeed the Commission has no jurisdiction in matters such as this, it would be a waste of scarce government and court resources to proceed further, and would be an unnecessary expense for the Corporation if it were required to respond to the complaint, continue to make jurisdiction arguments, and potentially proceed through the Commission's processes to a hearing on the merits before it could get a court decision on threshold jurisdiction.

[57] In the circumstances of this case, I consider it appropriate to exercise a discretion to consider the Corporation's application.

Previous Queen's Bench Decisions

[58] The Corporation places great store on the two Queen's Bench decisions in this area. In ***Condominium Plan No 931 0520 v Smith***, Hawco J considered the jurisdiction of the Commission to hear a complaint under Section 3 of the old Act relating to "goods, services, accommodation or facilities that are customarily available to the public". He specifically considered a provision in the bylaws prohibiting residents under the age of forty-five in the context of the son of a disabled resident-owner who required assistance.

[59] Hawco J held at para 7:

> [7] I am satisfied that this section, insofar as it prohibits discrimination with respect to "accommodation," is not applicable in this case. Rather, it is

> applicable - as found in Gay Alliance v. Vancouver Sun (1979), 1979 CanLII 225 (SCC), 97 D.L.R. (3rd) 577 (S.C.C.) at 590, to such matters as accommodation in hotels, inns and motels. Even if "accommodation" can be read as including a condominium building or complex, it seems to me that Section 11.1 of the Human Rights Act covers this situation. As stated by Allen Co. Ct.J, in Borsodi:
>
> > Further the declaration is in the nature of a private agreement among all of the owners of units in the condominium, including the defendants, for the joint and several benefit. The owners...are entitled to the protection of their contractual and property rights. If those rights are not protected they perceive, with cause, that their enjoyment of their property and thus their quality of life will be adversely affected.

[60] And in ***Condominium Plan No. 9910225 v Davis***, Stevens J considered a provision in the bylaws that arguably prohibited a live-in caregiver for disabled resident-owners. He held at para 9:

> [9] Because condominium By-laws are in the nature of a contract between the owners of the units of the condominium, and because the Canadian Charter of Rights and Freedoms does not extend to "activities by non-governmental entities created by government for legally facilitating private individuals do things of their own choosing without engaging governmental responsibility", the by-laws of the condominium corporation are not bound by the Charter: Condominium Plan No. 9310520, at para.5. Nor, as Hawco J. concluded at para.6, are they governed by s.4 the Alberta Human Rights Act, R.S.A. 2000, c.A-25.5, because that section prohibits discrimination against any person or class of person with respect of accommodation or facilities that are customarily available to the public, and of course condominium units are not. It is not at all uncommon, for example, for condominium By-laws to discriminate on the basis of age, and it is well established that a condominium corporation is legally entitled to do so.

[61] The difficulty with these decisions is that ***Davis*** relies entirely on ***Smith***. ***Smith*** in turn relies on an interpretation given to ***Gay Alliance v Vancouver Sun***, (1979) 97 DLR (3d) 577 (SCC). However, ***Gay Alliance*** was effectively overturned, or limited to very narrow facts, by the Supreme Court's decision in ***University of British Columbia v Berg***.

[62] In that case, the Supreme Court stated at page 18:

> I agree, and would limit the holding in Gay Alliance on two bases: (i) the respondent's competing interest in the freedom of the press was used to limit the complainant's right to freedom from discrimination in that decision, and (ii) the reasoning of Martland J. leads to an artificial and unacceptable distinction between the rights a person has at the threshold of admission to an accommodation, service or facility, and the rights he or she has once admitted to the accommodation, service or facility.

[63] The decision continued at page 20:

> Therefore, I would reject any definition of "public" which refuses to recognize that any accommodation, service or facility will only ever be available to a subset of the public. Students admitted to a university or school within the university, or people who enter into contracts of insurance with a public insurer, or people who open accounts with financial institutions, become the "public" for that service. Every service has its own public, and once that "public" has been defined through the use of eligibility criteria, the Act prohibits discrimination within that public.

[64] As such, the finding in ***Berg*** that "every service has its public" and the limitations in that case on Gay Alliance indicate that I should not follow the two previous Alberta decisions on point.

[65] I note that the Courts in British Columbia have had no difficulty with the applicability of human rights legislation to condominium corporations, as evidenced by the cases from British Columbia cited by the Commission. British Columbia human rights legislation appears similar to Alberta's. I also note that in ***Syndicat Northcrest v Amselem***, 2004 SCC 47, none of the Courts appear to have had any difficulty with the applicability to human rights legislation to a condominium corporation decision banning an owner from placing a ceremonial sukkah (hut) on his balcony during Sukkot, a Jewish festival.

[66] I have not compared Quebec human rights legislation with Alberta's, and jurisdictional arguments do not seem to feature in at least the Supreme Court's decision.

[67] There appears to be no judicial precedent that supports the Corporation's arguments on the absence of jurisdiction. Different considerations were at play in ***The Owners: Condominium Plan No 9422336 v the Queen***. That was a tax case that essentially pierced the corporate veil, not a human rights case. It is of no assistance here.

Condominium Property Act

[68] Mr. Noce argues that the *Condominium Property Act* provides a complete mechanism or code for dealing with all complaints between an owner and the condominium corporation by way of Section 67 of that Act, quoted above.

[69] No precedent has been provided where an owner has used an oppressive conduct remedy such as that provided in Section 67 to address human rights-prohibited discrimination.

[70] I accept that Section 67 is broad enough to encompass a claim for discrimination, and undoubtedly goes beyond the prohibited grounds in the Act by allowing for remedies in appropriate circumstances when the exercise of the board's powers is "oppressive or unfairly prejudicial to or that unfairly disregards the interests" of an interested party.

[71] That being said, the process under Section 67 is to commence an action in the Court of Queen's Bench and proceed through civil litigation processes.

[72] That process is a difficult and expensive process that would be difficult for an unrepresented party. A disabled party may have even more difficulty with such a process. The conduct of the process is the responsibility of the applicant. The application or trial would ultimately be heard by a judge who likely has no specialized expertise in human rights. The applicant may find it especially galling when the board approves a special levy on all owners to pay the legal costs of defending itself against the application. The disabled party must pay his

proportionate share or run the risk of proceedings being brought against him for non-payment. I recognize Mr. Noce's argument that the Courts have dealt with such issues creatively, but court remedies are slow, uncertain and long after the fact.

[73] Contrast this with a complaint to the Commission. There is specialized expertise there at all levels of the process. The complaint process is essentially free to the complainant. Safeguards remain in place by way of an appeal of the ultimate decision to the Court of Queen's Bench.

[74] The *Condominium Property Act* does not purport to limit proceedings between owners and the condominium corporation or board to proceedings under that Act, and there is nothing in the *Condominium Property Act* to oust the jurisdiction of the Commission.

[75] Ultimately, this is a situation where there is likely concurrent jurisdiction. A complainant might choose to commence proceedings under the *Condominium Property Act*. There may be greater scope there for damages against individual board members or different remedies. An aggrieved owner may have a host of complaints, some of which may clearly be outside the jurisdiction of the Commission.

[76] However, that does not mean that complainants may not simply proceed with a complaint to the Commission when they believe that they have been unlawfully discriminated against.

[77] In their supplemental brief, the Corporation emphasizes the unique nature of condominiums and contrasts them with natural persons and "real" corporations. The cases cited emphasize the binding nature of bylaws and board decisions and their applicability to all owners.

[78] Interference with board decisions is limited to situations where the "board's decision is clearly oppressive, unreasonable and contrary to legislation" (citing ***934859 Alberta Inc. v Condominium Corporation No 0312180***, 2007 ABQB 640 at para 54).

[79] The Corporation also cites a blog by Richard I. John, *Condominium Complexes are Private: a Defense Against the creeping expansion of the Alberta Human Rights Commission*. The Corporation's brief states "Mr. John's comments are very insightful and forewarn of the possible difficulties which may arise in Alberta as a consequence of the imposition of human rights legislation".

[80] I am doubtful that self-published blogs should be considered as authorities for court purposes. However, since it has been submitted to me, I reject the tenor of it that there is anything particularly wrong with human rights protections being expanded. That is contrary to the broad scope to be given to protect Canadians from unlawful discrimination as directed in cases such as ***McCormick v Fasken Martineau DuMoulin LLP***, 2014 SCC 39 at paragraph 21:

> As this Court said in University of British Columbia v. Berg, 1993 CanLII 89 (SCC), [1993] 2 S.C.R. 353: "It is the duty of boards and courts to give [provisions] a liberal and purposive construction, without reading the limiting words out of the Act or otherwise circumventing the intention of the legislature" (p. 371).

[81] I offer an example. Assume that a condominium corporation has as part of its common property a swimming pool. Assume that the duly elected board of that corporation decides that no *****s (fill in whomever you choose by way of race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin,

marital status, source of income, family status or sexual orientation) may use the swimming pool. Ms. X is *****.

[82] Is Ms. X to be required to commence an action under section 67 of the *Condominium Property Act* to address that discrimination, or is Ms. X able to make a complaint to the Commission?

[83] It seems to me that the answer is clearly "yes".

Overbreadth and Tautology

[84] I am unable to find any inconsistencies between Sections 4 and 5, as argued by the Corporation. I see nothing inconsistent with providing express remedies for tenants in Section 5, intended to deal with landlords refusing to rent premises to people on the basis of their personal characteristics.

[85] Indeed, I do not see that Section 4 does not, or cannot apply to tenants in the context of the ***Berg*** decision. Following that decision, tenants are likely the "public" to their landlords, such that landlords may be subject to Section 4 in the event of prohibited discrimination in the provision of a service to its "public".

Deference

[86] Mr. Noce argues that the Court should give deference to the decisions of the democratically elected board of a condominium corporation. No deference is due to a body that discriminates under the *Alberta Human Rights Act*. The tyranny of the majority does not withstand unlawful discrimination. This argument is without merit.

Floodgates

[87] The Corporation also suggests that the possibility of a huge number of complaints about condominium corporations flooding the Commission is a factor against interpreting the Act as permitting such complaints to be made.

[88] That argument is without merit for at least two reasons. Firstly, that argument was rejected in ***SMS Equipment Inc v Communications, Energy and Paperworkers Union, Local 707***, 2015 ABQB 162, at paragraph 78:

> [78] As discussed by the Arbitrator, proponents of a restrictive test for prima facie discrimination based on family status raised concerns regarding a potential flood of requests for workplace accommodation on the basis of family status. I agree with the Arbitrator's comments regarding this argument (Arbitrator's Decision at para 61):
>
> > … I am of the opinion that "floodgate" arguments have no place in the analysis of whether discrimination exists. If an employer rule expressly prohibited the hiring of mothers as welders, we would not be reluctant to find the prohibition to be discriminatory for fear that employers would now be flooded with application by mothers. To the extent that a flood of requests for accommodations imposes an excessive burden upon an employer, the place for considering

> that is in the assessment of undue hardship. In this case, there is no evidence that the Employer has received any other requests for accommodation on the basis of family status. More broadly, family status was added to the [AHRA] as a prohibited ground of discrimination in 1996. There are fewer than one dozen reported human rights tribunal or arbitration cases in Alberta dealing with family status employment discrimination in the past 17 years. This does not suggest to me that Alberta employees are routinely demanding that their employers accommodate every conflict between a work and a parental obligation.

[89] Secondly, ***Ganser v Rosewood*** is some sixteen years old. Anecdotally, the Commission has processed complaints against condominium corporations by owners since then. If there was a worry about the floodgates opening, they would appear to have been open for a long time, with no sign of any floods.

Conclusion

[90] The decision of Mr. Borle to accept jurisdiction to investigate Mr. Goldsack's complaint was reasonable. The ***Berg*** decision opens the door to the Commission looking to see if the assignment of parking stalls in Tradition at Southbrook was the provision of a service to the public, in the context that the owners at Tradition at Southbrook are the "public" for the Corporation and its board. Following the ***Ganser v Rosewood*** decision from the Commission was not unreasonable.

[91] In my view, no reviewable error was made. The Commission is entitled to proceed with its investigation. If the Commission determines that parking stall allocations are a service within Section 4, and that Mr. Goldsack is a member of the Corporation's "public," they will have to go on to consider whether there has been unlawful discrimination and to consider the appropriate remedy.

[92] Those decisions are all within the jurisdiction and expertise of the Commission, and it should be allowed to proceed.

[93] I make no finding on these issues other than to hold that the Commission has jurisdiction to investigate under the Act.

Heard on the 3rd day of March, 2016.
Dated at the City of Edmonton, Alberta, this 24th day of March, 2016.

Robert A. Graesser
J.C.Q.B.A.

Appearances:

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