

Case Law Update:

Appointing an Administrator

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When the *Strata Property Act* was first proclaimed in July 1, 2000, the only way to predict how a judge would interpret its provisions was to consider how judges had previously interpreted the *Condominium Act*, and how judges in other jurisdictions had interpreted legislation governing condominium matters.

As time goes on, there will be a body of written decisions by judges that will offer everyone involved in condominium matters further direction on how to interpret sections of the *Strata Property Act*.

One of the sections of the *Strata Property Act* that judges have now interpreted is the section regarding the appointment of an administrator. This article reviews the test that has been developed and how it has been applied.

The provision of the *Strata Property Act* dealing with the appointment of an administrator is section 174, which provides as follows:

Appointment of administrator

174 (1) The strata corporation, or an owner, tenant, mortgagee or other person having an interest in a strata lot, may apply to the Supreme Court for the appointment of an administrator to exercise the powers and perform the duties of the strata corporation.

(2) The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation.

(3) The court may

- (a) appoint the administrator for an indefinite or set period,
- (b) set the administrator's remuneration,
- (c) order that the administrator exercise or perform some or all of the powers and duties of the strata corporation, and
- (d) relieve the strata corporation of some or all of its powers and duties.

(4) The remuneration and expenses of the administrator must be paid by the strata corporation.

(5) The administrator may delegate a power.

(6) On application of the administrator or a person referred to in subsection (1), the court may remove or replace the administrator or vary an order under this section.

This section offers little direction to owners and strata corporations about when a judge will appoint an administrator. The only criteria set out in the *Strata Property Act* is that "The court may appoint an administrator if, in the court's opinion, the appointment of an administrator is in the best interests of the strata corporation".

In the case of *Lum v. Strata Plan VR 519*, [2001] B.C.J. No. 493 Mr. Justice Harvey set out factors for judges to consider when deciding whether to exercise their discretion to appoint an administrator. The factors to consider include:

- a. whether there has been established a demonstrated inability to manage the strata corporation;
- b. whether there has been demonstrated substantial misconduct or mismanagement or both in relation to affairs of the strata corporation;
- c. whether the appointment of an administrator is necessary to bring order to the affairs of the strata corporation;
- d. where there is a struggle within the strata corporation among competing groups such as to impede or prevent proper governance of the strata corporation;
- e. where only the appointment of an administrator has any reasonable prospect of bringing to order the affairs of the strata corporation.

This was an expansion of the old test under *Cook v. Strata Plan N-50* (1995) B.C.J. No. 2882 that an administrator would be appointed in circumstances where there has been substantial misconduct or mismanagement by those who control the strata corporation.

The Judge in *Lum* also noted that the problem presented by the costs of the involvement of the administrator must be considered. In his written decision, Mr. Justice Harvey decided not to describe the 12 incidents alleged in detail. Mr. Justice Harvey found that the owners who wanted an administrator had failed to establish that there was substantial misconduct, mismanagement or a demonstrated inability to manage the affairs on the part of the Strata Council of the day. He also found that the complex was in excellent condition and was under active, professional management.

In the case of *McGowan v. Strata Plan NW 1018* (2002) B.C.J. No. 673 the reasoning in the *Lum* case was followed. In the *McGowan* case, Mr. Justice Cullen considered a Court Petition brought by an owner to appoint an administrator. The Petitioner, Ms. McGowan, through her legal counsel, brought areas of concern regarding the Strata Corporation's legal, fiscal and managerial responsibilities to the attention of the Judge. For instance, she pointed to a number of instances over an eight year period where the Strata Council had not obtained a 3 vote resolution before spending contingency reserve funds. There was also evidence produced by Ms. McGowan that 21 balcony enclosures were in violation of the bylaws and that the Strata Council had only required six to be removed. One of the six balcony enclosures that was ordered by the Strata Council to be removed was Ms. McGowan's. The Strata Council argued that the six enclosures were required to be removed for safety reasons.

Mr. Justice Cullen cautioned the Strata Council on a number of matters including: not making expenditures from the contingency reserve fund; ensuring that it took appropriate action concerning the other balcony enclosures; and ensuring that the minutes would be carefully vetted to ensure that no critical or derogatory comments regarding individuals within the organization were included. Mr. Justice Cullen decided that although areas of concern had been identified that required the careful attention of the Strata Council, Ms. McGowan had not surmounted the threshold necessary for the appointment of an administrator.

In summary, judges are mindful of the importance of the democratic governance of strata corporations and the cost of an administrator. Mr. Justice Harvey has formulated the test for the appointment of an administrator, which will undoubtedly be applied and refined by judges in the future.

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