# Court of King's Bench of Alberta

**Citation: HPWC 9707 110 Street GP Ltd v Condominium Corporation No 0420538, 2023 ABKB 418**

**Date:** 20230712
**Docket:** 2203 18250
**Registry:** Edmonton

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Between:

**HPWC 9707 110 Street GP Ltd**

Plaintiff

- and -

**Condominium Corporation No. 0420538, Barry Brunner and Teresa Ullyott**

Defendants

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**Memorandum of Decision**
**of the**
**Honourable Applications Judge B.W. Summers**

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[1] In this Special Chambers hearing the parties presented cross applications for summary judgment with respect to their respective cross claims. The parties agree that the issues in this case can and should be decided summarily.

## Background Facts

[2] The Defendant Condominium Corporation 0420538 ("Condo Corp") was constituted under Plan 0420538 which plan consists of:

(a) A residential tower divided into individual units, called Tower on the Park ("TOP");

(b) A commercial tower (the "Ledgeview") currently owned by the Plaintiff HPWC 9707 110 Street GP Ltd ("HPWC");

(c) An underground parkade (the "Parkade") of which Condo Corp is the registered owner; and

(d) Common property at ground level, which includes a plaza and an outdoor parking lot ("Surface Common Property").

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[3] The Condominium bylaws ("Bylaws") required Condo Corp to designate or lease an area that would accommodate 88 parking stalls for the exclusive use of the TOP residents, 13 for use by visitors and at least 203 parking stalls for the exclusive use of the Ledgeview tenants.

[4] In 2005 Condo Corp and a predecessor owner of Ledgeview called Whitemud Equities Inc ("Whitemud") entered into a lease for the requisite number of parking stalls for Ledgeview in the Parkade and on the Surface Common Property ("Parking Lease").

[5] A caveat regarding the Parking Lease was not registered on title to the Parkade until 2012 when that was done by 1283596 Alberta Ltd ("128"). 128 then became the owner of Ledgeview having purchased it from Whitemud.

[6] In 2014, when HPWC purchased Ledgeview, Condo Corp signed a consent to the assignment of the Parking Lease to HPWC.

[7] In 2017 Condo Corp granted HPWC a lease of a small area of the Surface Common Property adjacent to Ledgeview for the outdoor play area of a childcare business in the building ("Surface Lease"). A resolution was issued by Condo Corp authorizing the Surface Lease in 2017 and it was re-signed by a further director in 2018 ("Resolution").

[8] The Parkade required structural repair ("Parkade Repair"). An agreement was entered into pursuant to which HPWC would pay for the Parkade Repair, but Condo Corp would reimburse HPWC for TOP's proportionate share which was 30% (Parkade Repair Agreement"). HPWC paid for the Parkade Repair and sent invoices to Condo Corp. When Condo Corp did not pay TOP's proportionate share, HPWC commenced this action against Condo Corp and two individuals seeking payment of $615,191.22. After commencement of this action Condo Corp paid HPWC $527,312.46. HPWC amended its Statement of Claim to reduce its claim for reimbursement to $42,668.28.

[9] The individual defendants were directors of Condo Corp and a claim for negligent misrepresentation was made against them with respect to the approval they provided for the management fee portion of the Parkade Repair.

[10] Condo Corp filed a counterclaim seeking declarations that the Parking Lease, the Surface Lease and the Resolution are all invalid and of no force or effect under the premise that the requisite formalities for each is lacking.

**HPWC's Claim**

[11] Condo Corp does not dispute that the amended claim for $42,668.28 is owing but challenges HPWC's claim to interest. Condo Corp asserts that it had to act prudently and cautiously to ensure that the amount being claimed was in fact calculated properly and this was the reason for its delay in making payment.

[12] After reviewing the evidence on this issue, and in particular the affidavits of Willem Johnson and Justin A. Duknatel, I am satisfied that Condo Corp had no legitimate reason to not pay TOP's proportionate share of the repair expenses for the Parkade, pursuant to the Parkade Repair Agreement and HPWC was certainly justified in commencing action as it did. HPWC is entitled to interest under the *Judgment Interest Act* for the amounts outstanding from the date such amounts were due.

[13] No submissions were made with respect to the claim made against the individual directors and I take it that judgment against them is not pursued as Condo Corp will pay the amount owing.

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## Condo Corp's Counterclaim

### Validity of the Parkade Lease

#### Requirement of a Special Resolution

[14] Condo Corp puts forward several reasons why the Parkade Lease is not valid.

The first reason is that there is no special resolution of the Condo Corp authorizing the Parkade Lease pursuant to ss 49 and 50 of the *Condominium Property Act ("CPA").* Those sections stated in 2005 when the Parkade Lease was entered into:

> Disposition of common property
>
> 49(1) By a special resolution a corporation may be directed to transfer or lease the common property, or any part of it.
>
> (2) When the board is satisfied that the special resolution was properly passed and that all persons having registered interests in the parcel and all other persons having interests, other than statutory interests, notified to the corporation
>
> > (a) have, in the case of either a transfer or a lease, consented in writing to the release of those interests in respect of the land comprised in the proposed transfer, or
> >
> > (b) have, in the case of a lease, approved in writing of the execution of the proposed lease,
>
> the corporation shall execute the appropriate transfer or lease.
>
> (3) A transfer or lease executed in accordance with subsection (2) is valid and effective without execution by any person having an interest in the common property, and the receipt of the corporation for the purchase money, rent, premiums or other money payable to the corporation under the terms of the transfer or lease is a sufficient discharge of and exonerates the persons taking under the transfer or the lease from any responsibility for the application of the money expressed to have been so received.
>
> (4) The Registrar shall not register a transfer or lease authorized under this section unless it has endorsed on it or is accompanied with a certificate under the seal of the corporation stating
>
> > (a) that the special resolution was properly passed,

(b) that the transfer or lease conforms with the terms of it, and

(c) that all necessary consents were given.

(5) The certificate referred to in subsection (4) is,

(a) in favour of a purchaser or lessee of the common property, or part of it, and

(b) in favour of the Registrar,

conclusive proof of the facts stated in the certificate.

(6) On the filing for registration of a transfer of common property, the Registrar

(a) shall, before issuing a certificate of title, amend the condominium plan by deleting from it the common property comprised in the transfer, and

(b) shall register the transfer by issuing to the transferee a certificate of title for the land transferred, but no notification of the transfer shall be made on any other certificate of title in the register.

(7) On the filing for registration of a lease of common property, the Registrar shall register the lease by noting it on the condominium plan in the manner prescribed by the regulations.

RSA 1980 cC-22 s40;1996 c12 s59

Exclusive use areas

50(1) Notwithstanding section 49, a corporation may grant a lease to an owner of a unit permitting that owner to exercise exclusive possession in respect of an area or areas of the common property.

(2) Where the corporation grants a lease permitting an owner to exercise exclusive possession in respect of an area or areas of the common property, the corporation may delegate its responsibility to care for and maintain that area or those areas to that owner.

RSA 1980 cC-22 s41;1996 c12 s40

[15] Condo Corp says that the Parking Lease is a disposition of common property and sections 49 and 50 of the *CPA* must be complied with. Conversely, HPWC says that the Parking Lease is a disposition of common property (with respect to the parking stalls located on the Surface Common Property) and a disposition of real property (with respect to the parking stalls in the Parkade) and the requirements for the latter are under subsection 37(3) of the *CPA* which stated in 2005 when the Parking Lease was entered into:

**(3)** A corporation may by a special resolution acquire or dispose of an interest in real property.

[16] Whichever statutory provision prevails with respect to the Parking Lease is academic in so far as the requirement of a special resolution, as that is a requirement of both s 49 and sub s 37(3) of the *CPA*.

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[17] There is only one definition of special resolution in the *CPA* which would apply to both s 49 and sub s 37(3). It is as follows (from 2005):

> (x) "special resolution" means a resolution
>
> > (i) passed at a properly convened meeting of a corporation by a majority of not less than 75% of all the persons entitled to exercise the powers of voting conferred by this Act or the bylaws and representing not less than 75% of the total unit factors for all the units, or
> >
> > (ii) agreed to in writing by not less than 75% of all the persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting conferred by this Act or the bylaws and representing not less than 75% of the total unit factors for all the units; ...

[18] There is no special resolution authorizing the Parking Lease in evidence. It is unclear whether a written special resolution approving the Parking Lease was in fact executed and it cannot be found, or whether such a document was never executed.

[19] With respect to the requirement that there be a written special resolution, counsel for HPWC refers to the case of ***Kobo Clan Inc v 1862715 Alberta Ltd,*** 2017 ABCA 277 ("***Kobo Clan***"). In that case, Kobo purchased a third unit in the commercial condominium (it already had two) and 2.2 acres of the common property from the condominium corporation at the price of $1.5 million ("Kobo Purchase"). At the time of the Kobo Purchase, Kobo and the owner/developer Viatar were the only owners of condominium property. The only third party with any interest in the condominium property was BDC, as mortgagee. BDC had financed Viatar's development and also agreed to lend Kobo $1.25 million for the Kobo Purchase which would be applied to Viatar's debt to BDC.

[20] When BDC commenced foreclosure proceedings against Viatar, Kobo registered a caveat to protect its interests under the Kobo Purchase ("Kobo's Caveat").

[21] 1862715 Alberta Ltd ("186") purchased the property in a judicial sale and issued a Notice to Take Proceedings on the Kobo Caveat. Kobo commenced action and the Chambers Justice ruled that the Kobo Caveat was not valid as the requirements of ss 49 and 50 of the *CPA* had not been met with respect to the Kobo Purchase. The Court of Appeal overturned the Chambers Justice's ruling and stated the following (paragraphs 28-42):

> [28] The *Act* regulates the transfer of common property. First, "[t]he common property comprised in a registered condominium plan is held by the owners of all the units as tenants in common in shares proportional to the unit factors for their respective units": *Act*, s 6(2). Second, except as provided in the *Act*, "a share in the common property shall not be disposed of or become subject to a charge except as appurtenant to the unit of an owner and a disposition of or charge on a unit operates to dispose of or charge that share in the common property without express reference to it": s 6(3). Third, s 49 of the *Act* stipulates the mechanism by which common property can be transferred:
>
> > 49(1) By a special resolution a corporation may be directed to transfer or lease the common property, or any part of it.

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> (2) When the board is satisfied that the special resolution was properly passed and that all persons having registered interests in the parcel and all other persons having interests, other than statutory interests, notified to the Corporation
>
> (a) have, in the case of either a transfer or a lease, consented in writing to the release of those interests in respect of the land comprised in the proposed transfer . . .
>
> the corporation shall execute the appropriate transfer or lease.

[29] The term “special resolution” as defined in s 1(1)(x) of the *Act* means a resolution

> (i) passed at a properly convened meeting of a corporation by a majority of not less than 75% of all the persons entitled to exercise the powers of voting conferred by this Act or the bylaws and representing not less than 75% of the total unit factors for all the units, or
>
> (ii) agreed to in writing by not less than 75% of all the persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting conferred by this Act or the bylaws and representing not less than 75% of the total unit factors for all the units[.]

[30] Section 25(2)(a) of the *Act* states that the condominium corporation consists of all the persons “who are owners of units in the parcel to which the condominium plan applies". Section 25(4) states that "[n]othing in this Act shall be construed so as to prohibit a corporation from acting by means of agents . . . ", and pursuant to s 26, the only parties with “voting rights” at a properly convened meeting of the condominium corporation were Viatar, Kobo, and BDC.

[31] Kobo asserts that in respect of the purchase and sale agreement, Viatar acted as agent for the condominium corporation; there is no evidence to the contrary, and no lawful impediment to Viatar so acting.

[32] The chambers judge determined that because the formalities usually associated with a written resolution had not been followed, there was non-compliance with s 49; and further, that Viatar did not have “title to, nor any legal or beneficial interest in the common property that it could sell or convey to Kobo”: Kobo, at para 29.

[33] Despite 186’s able submissions, we have concluded that together the purchase and sale agreement and Letter of Offer by BDC sufficiently demonstrate an agreement “in writing by not less than 75% of all persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting . . . and representing not less than 75% of the total unit factors for all units” to transfer the 2.2 acres of common property to Kobo.

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[34] In the unique circumstances of this case, it is open to this Court to read into the documents a unanimous intention by *all* holders of the common property as tenants in common (not merely 75%) and all parties interested in the condominium plan to transfer 2.2 acres of common property to Kobo, and that the unanimous intention of all holders of the common property, and BDC, was to substantively conform to all requirements of the *Act*, including the provision requiring a special resolution to transfer common property.

[35] When all unit holders agreed to transfer the 2.2 acres of common property to Kobo, with BDC's consent, no other person or entity had any extant interest in any of the units or common property comprising the condominium plan.

[36] Accordingly, in our view, the statutory pre-condition of an agreement in writing reflecting a special resolution to effect transfer of common property was met: see a similar finding in the concurring reasons of O'Ferrall JA in ***Calgary Jewish Academy v Condominium Plan 9110544*,** 2014 ABCA 279 at paras 61-69, concerning a unanimous resolution involving a lease under the *Act*.

[37] In our view, had the Legislature intended to restrict compliance to only one method of effecting a written special resolution, or had it intended to require only one form of proof evidencing a special resolution, the *Act* would have expressly said so, and would not have included the expanded definition of "special resolution" found in s 1(1)(x)(ii), which permits a resolution "agreed to in writing by not less than 75% of all the persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting conferred by this Act or the bylaws and representing not less than 75% of the total unit factors for all the units".

[38] We are satisfied that the parties' agreements substantively constituted the requisite special resolution upon which the condominium corporation could duly act under s 49(1), through its agent Viatar - "[b]y a special resolution a corporation may be directed to transfer or lease the common property, or any part of it". The agreements constituted sufficient lawful authority from which the condominium corporation could execute the appropriate transfer under s 49(2)(b), namely: "[w]hen the board is satisfied that the special resolution was properly passed and that *all persons having registered interests* in the parcel and all other persons having interests, other than statutory interests, notified to the Corporation (a) have, in the case of either a transfer or a lease, *consented in writing* to the release of those interests . . . the corporation shall execute the appropriate transfer" (emphasis added).

[39] The *Act* does not prescribe the precise formalities necessary to meet the legislated requirement of a special resolution. Further, a distinction is to be drawn between the existence of a unanimous agreement of all unit holders to transfer common property and the best available evidence thereof. Although there is no separate document entitled "special resolution", in our view, that is not indispensable because compliance with the *Act* has been proven by other means.

[40] Further, the chambers judge's finding that ". . . Viatar had neither title to, nor any legal or beneficial interest in the common property that it could sell or

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convey to Kobo" is plainly incorrect, given that the *Act* provides that *all* unit holders hold the common property as tenants in common.

[41] In sum, we conclude from the record before us that not less than 75% of all persons who, at a properly convened meeting of a corporation, would be entitled to exercise the powers of voting conferred by the *Act*, did exercise the powers of voting conferred by the *Act*, and the proof of their unanimous agreement is in writing. At its core, 186's complaint is about the *form* of compliance, but this objection does not withstand the best available proof revealed by the record that the parties unanimously and lawfully agreed to transfer 2.2 acres of common property to Kobo.

[42] This Court well recognizes that the *Act* functions as a comprehensive code, and that one of its intended objectives is to protect innocent third party purchasers for value from unscrupulous developers who may see fit to deal with common property as an exclusive, unqualified right, to the potential detriment of interested third parties. That is not the situation in this appeal; cases where there are aggrieved parties whose interests were or were potentially detrimentally affected by a developer's actions are wholly distinguishable.

[22] HPWC asserts that the evidence before the Court in this case substantiates that Condo Corp received the requisite authority via special resolution to enter into the Parking Lease. That evidence is as follows:

(a) On February 14, 2005 the Bylaws were passed by way of special resolution and on the following day the corporate seal of Condo Corp was affixed to that special resolution. The Bylaws of course required Condo Corp to designate or lease 203 parking stalls for the use of the occupants of Ledgeview;

(b) On that same day (February 15) Condo Corp and Whitemud entered into the Parking Lease; and

(c) This occurred when the only owners were the Developer and Whitemud.

[23] HPWC says that the Parking Lease signed by both Whitemud and the Condo Corp, which was controlled by the Developer which owned all of the units in TOP is a unanimous written consent by all of the unit holders and the requirement of the special resolution was met.

[24] Condo Corp argues that ascribing the written consent of the Developer to the signature on behalf of the Condo Corp on the Parking Lease ignores the concept of the separate corporate personality of the Developer.

[25] I disagree with Condo Corp's submissions in this respect. I think that the reasoning in ***Kobo Clan*** applies and I specifically follow it. That is, I read into the signed Parking Lease a unanimous intention of *all* holders of the common property (Developer and Ledgeview) to substantively comply with the *CPA* in so far as the necessity for a special resolution.

**Requirement of Approval of Registered Interests**

[26] I now turn to whether the lease of the parking stalls in the Parkade is a lease of common property (requiring compliance with s 49 of the *CPA*) or a lease of real property (requiring a compliance with sub s 37(3) of the *CPA*). In the case of the former, the approval of registered interest holders is required. In the case of the latter, there is not.

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[27] HPWC's submits that the Parkade is not common property because it is designated as unit 1 and the *CPA* defined common property (in 2005) as (f) ... so much of the parcel as is not comprised in a unit shown in a condominium plan.... (emphasis added by me).

[28] The definition of unit found within the *CPA* (at 2005) was:

> (y) "unit" means
>
> (i) in the case of a building, a space that is situated within a building and described as a unit in a condominium plan by reference to floors, walls and ceilings within the building, and
>
> (ii) in the case other than that of a building, land that is situated within a parcel and described as a unit in a condominium plan by reference to boundaries governed by monuments placed pursuant to the provisions of the *Surveys Act* respecting subdivision surveys.

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[29] Condo Corp argues that the Parkade was intended as common property given the following definition of "Common Property" in the Bylaws:

> The Leased Parkade area and those portions of the Condominium Plan which are not designated as a Unit and such additional portions of the Parcel, as shall from time to time, be designated as Common Property and any Unit acquired by or transferred to the Corporation for common use of the Owners and Occupants of the Project.

[30] Condo Corp says that the Parkade is owned by it and it is treated as common property by all and should be treated as such pursuant to the foregoing provision in the Bylaws.

[31] The question to be answered is whether the Parkade is common property within the meaning of the *CPA*. To answer that question, it is the terms of the *CPA* that must be considered. Whatever the Condo Corp Bylaws state cannot dictate the interpretation of the statute.

[32] Since the title to the Parkade is in fact a "unit", it does not meet the definition of common property in the *CPA*. However, Condo Corp further argues that the lease of parking stalls in the Parkade should still be governed by ss 49 and 50 of the *CPA* because sub s 37(3) of the *CPA* uses the verb "dispose", while ss 49 and 50 of the *CPA* specifically use the verbs "transfer" and "lease". That is, Condo Corp says that sub s 37(3) of the *CPA* should not apply to a "lease", but to a different form of "disposition".

[33] I do not read the use of the word "dispose" in sub s 37(3) as excluding a lease. There is no rationale for doing so. In fact, I note that the subtitle to ss 49 and 50 of the *CPA* is "Disposition of Common Property" and it then of course specifically references "lease".

[34] The lease of parking stalls in the Parkade is a lease of real property and compliance with sub s 37(3) of the *CPA* is only required.

[35] However, it is common ground between the parties that the lease of the parking stalls on the Surface Common Property is a lease of common property which requires compliance with ss 49 and 50 of *CPA*.

[36] Condo Corp says there was a failure to comply in having the written permission of all registered interest holders (pursuant to sub s 49(2) of the *CPA*). Condo Corp says that there were

six, including Epcor. HPWC challenges the need to get Epcor's written consent, on the basis that it is a statutory interest. However, I do not need to determine that issue because my decision rests on there being no written permission from any of the registered interest holders.

[37] At the hearing of this matter, counsel for HPWC provided me with a table listing all of the registered interests against the title to the Parkade and reasons why written consent may be implied or should not be required. There were 14 registrations in total. Nine of the registrations related to a mortgage or mortgages in favour of a mortgagee called CDPQ Mortgage Corporation ("CDPQ"). HPWC argues that the mortgage terms contemplated the mortgaged property being leased and that the mortgagor would comply with all requirements of the *CPA*. HPWC suggests that the reasoning in ***Kobo Clan*** should apply to all of these registrations. With respect, I disagree. It is a world of difference to find the written agreement of BDC to the Kobo Purchase in ***Kobo Clan***, to the written agreement of the registered interest holders in this case. BDC was very involved in the Kobo Purchase. In this case before me, the registered interest holders were not involved in the Parkade Lease.

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**Whitemud was not the registered owner when it executed the Parking Lease**

[38] Condo Corp further argues that the Parking Lease is invalid because Condo Corp was not the registered owner when it signed the Parking Lease on February 15, 2005. Condo Corp became the registered owner the next day.

[39] However, the evidence indicates that the transfer to Condo Corp was executed by the Developer on February 14, 2005. Therefore, Condo Corp was an unregistered owner at the time that it executed the Parking Lease (as was Whitemud). Condo Corp did have the requisite ownership interest to enter into the Parking Lease.

**Since a colour copy showing the leased stalls cannot be located, the Parking Lease is void for uncertainty**

[40] The parties only have a black and white copy of the Parking Lease. Therefore the schedule showing the leased stalls outlined in red cannot be determined. For this reason Condo Corp says that the Parking Lease is void for uncertainty.

[41] I agree with HPWC that any uncertainty vanishes when examined in the light of common sense. The parties have been operating under a common understanding for many, many years. In fact the parties have altered the locations of the leased parking stalls from time to time and the location of the current stalls is clearly defined and not in dispute.

**The Assignment of the Parking Lease from Whitemud to its successor cannot be located**

[42] Although the fact that the assignment of the Parking Lease from Whitemud to its successor 128 cannot be located was noted by Condo Corp, it did not really develop an argument that this invalidated HPWC having received an assignment of the Parking Lease. However, even if that argument were fully made by Condo Corp, I think that the evidence is quite substantial from other documents referencing this assignment having occurred, that such an argument by Condo Corp is not sustainable.

[43] In summary to this point, all arguments by Condo Corp that the Parking Lease is invalid fail, except for the argument that s 49 of the *CPA* was not complied with in so far as obtaining the written consent of all registered interest holders. However, this argument only applies to the

lease of parking stalls in the Surface Common Property as the lease of parking stalls in the Parkade (which is real property and is subject to sub s 37(3) of the *CPA*) did not require such consents.

[44] Given my decision that follows, I need not consider if the entire Parking Lease is invalid, or whether severance of the invalid from the valid is possible.

**Validity of the Resolution and the Surface Lease**

[45] Condo Corp challenges the validity of the Surface Lease and the Resolution that authorized it.

[46] With respect to the Resolution, Condo Corp says that the signature of Michael Hungerford is not valid, as he was and is, a director of HPWC, which is the party that benefited from the granting of the Surface Lease. Section 28 of the *CPA* prohibits a condominium board member from voting on a transaction or arrangement in which the member has a material interest. Condo Corp also says that the Resolution was also not validly signed by a majority of the Board of the Condo Corp as the signatures of two other directors were given at different times and they were not directors at the same time.

[47] Condo Corp says that the Surface Lease was not valid as it did not comply with ss 49 or 50 of the *CPA* as there was no Special Resolution authorizing it nor was there the written consent of registered interest holders.

[48] In response, it is HPWC's position that Condo Corp's challenge to the validity of the Resolution and the Surface Lease is limitation barred as it did not bring its claim (in the counterclaim) within the limitation period set out in subparagraph 3(1) of the *Limitations Act*. That subsection states:

> 3(1) Subject to subsections (1.1) and (1.2) and sections 3.1, 3.2 and 11, if a claimant does not seek a remedial order within
>
> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding,
>
> or
>
> (b) 10 years after the claim arose,
>
> whichever period expires first, the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim.

[49] HPWC says that Condo Corp knew or ought to have known that the Resolution and the Surface Lease were invalid when they were executed on April 12, 2017, or alternatively, with the later execution on August 30, 2018. Since Condo Corp did not file its counterclaim seeking relief

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until November 22, 2021, it is well past the two year limitation period (and 75 day extension under Ministerial Order 27/2020).

[50] HPWC also asserts that Condo Corp's claim is not saved by subsection 6(2) of the *Limitations Act* because it is not "related to the conduct, transaction or events described in the original pleading". HPWC's claim was for reimbursement pursuant to the Parkade Repair Agreement. That is, HPWC says that the validity of the Resolution and Surface Lease have nothing to do with the monetary claim of HPWC under the Parkade Repair Agreement.

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[51] Condo Corp says that its counterclaim is not limitation barred because it is not seeking a remedial order, but only declaratory relief. Indeed, Condo Corp has amended the remedies sought in its counterclaim to seek only declaratory relief.

[52] I discussed the issue of the distinction between a remedial order and declaratory relief in the recent decision of ***Condominium Corporation 022 6956 v Mercier,* 2023 ABKB 125** as follows:

> [79] Simply, if the relief sought by Condo Corp is truly declaratory, it is not subject to prescription under subsection 3(1) of the *Limitations Act*. If the relief sought by Condo Corp is a remedial order, it is subject to prescription under subsection 3(1) of the *Limitations Act*.
>
> [80] The leading case in our jurisdiction on the distinction between a remedial order and declaratory relief is ***Yellowbird v Samson Cree Nation No. 444*,** 2008 ABCA 270. In that case, the Court of Appeal agreed with the following test enunciated by the trial judge (at paragraph 45):
>
>> If the Court granted the declaration, and the defendant resisted the implementation of the declaration, could the plaintiff "leave the court in peace" and enjoy the benefits of the declaration "without further resort to the judicial process"?
>
> [81] I also note that in the case of ***Ginn v Feng*,** 2021 ABQB 292 the Court noted the importance of following the wording in the definition of "remedial order" in determining whether the relief sought requires the defendant "to comply with a duty or pay damages for violating a right" (at paragraph 20).
>
> [82] It is also important to note that the Court of Appeal stated in the case of ***Joarcam, LLC v Plains Midstream Canada ULC,*** 2013 ABCA 118 that (at paragraph 7):
>
>> A claim for declaratory relief is an exception to the usual remedial order sought in litigation. Indeed, the exception is as to "a declaration of rights and duties, legal relations or personal status,": Act, section 1(i)(i). It is construed narrowly so as to discourage litigants from claiming declaratory relief merely to avoid the limitation period. The task of the court is to characterize the remedy actually being sought.

[53] In this case, declarations that the Resolution and the Surface Lease are invalid do appear to be declaratory only. However, Condo Corp's claim for relief that "(HPWC)... cannot receive any benefit of ... the Surface Lease" is not purely declaratory. In its Brief Condo Corp says that

with the declaration it will be entitled to remove fencing and other property on the Surface Lease without the need for judicial process. That is only the case if HPWC and its subtenant do not resist Condo Corp's actions. It cannot be forgotten that HPWC and its subtenant are the ones in possession of the Surface Lease property and Condo Corp will need to dispossess them, and not the other way around.

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[54] The reason that a declaration that HPWC cannot receive any benefit of the Surface Lease is not just declaratory is that it involves the right to possession and use of the Surface Lease property. I do not think that Condo Corp can leave this Court in peace without addressing the issues of possession and use of the Surface Lease property. I conclude that the relief Condo Corp seeks with respect to invalidating the Surface Lease is limitation barred.

[55] I need not deal with HPWC's alternative argument that the Surface Lease is valid in any event.

**HPWC's claim to Proprietary Estoppel**

[56] HPWC asserts that if the Court finds favour with Condo Corp's argument that the Parking Lease or the Surface Lease is invalid, the doctrine of proprietary estoppel prevents Condo Corp from being entitled to a remedy.

[57] HPWC acknowledges that traditional estoppel cannot otherwise render an *ultra vires* agreement enforceable. However, it argues that proprietary estoppel may found a cause of action as it recognizes a new right and interest in land.

[58] In ***Idle-O Apartments Inc v Charlyn Investments Ltd,*** 2014 BCCA 451 ("***Idle-O***") a lease was invalid because it constituted an unapproved subdivision contrary to the *Land Title Act* (BC). However, the British Columbia Court of Appeal upheld the lessee's claim to the leased premises through proprietary estoppel. The Court stated (at paragraph 67):

> In my view, it was not necessary for the trial judge to apply s. 73.1 (retrospectively) in order to grant a remedy in proprietary estoppel in this case. The trial judge herself wrote at para. 185 that the cause of action is not founded on the unenforceable agreement – nor, one might add, on the statute – but upon "the defendant's conduct which, when viewed in all relevant respects, is unconscionable." (Citing ***Kinane*** at para. 29.) The judge had only to determine whether the remedy she was considering would, as stated in *Snell's Equity* (at §12-023), "stultify" the operation of the statute.

[59] The test for proprietary estoppel is found in the case of ***Cowper-Smith v Morgan,*** 2017 SCC 61, as follows (at paragraph 15):

> An equity arises when (1) a representation or assurance is made to the claimant, on the basis of which the claimant expects that he will enjoy some right or benefit over property; (2) the claimant relies on that expectation by doing or refraining from doing something, and his reliance is reasonable in all the circumstances; and (3) the claimant suffers a detriment as a result of his reasonable reliance, such that it would be unfair or unjust for the party responsible for the representation or assurance to go back on her word....

[60] With respect to the stalls leased under the Parking Lease HPWC notes that: (a) Condo Corp consented to assignment of the Parking Lease when HPWC purchased Ledgeview; (b) the

Bylaws (which are valid and extant) specifically provide that the owner of Ledgeview is entitled to 203 parking stalls; (c) HPWC and Condo Corp have agreed to alter which stalls may be used from time to time; (d) the Parking Lease Caveat was in place for two years before HPWC purchased Ledgeview; (e) HPWC always paid its proportionate share of operating and capital expenses with respect to the Parkade and the Surface Parking and for seven years of ownership by HPWC, Condo Corp never raised any concern.

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[61] I find that HPWC reasonably relied upon these representations that it would enjoy the benefits of parking in 203 stalls and pursuant to that reliance represented to its tenants that they would be entitled to this parking. Is it not fair to presume that parking was a very important issue for HPWC and its tenants?

[62] It certainly seems to me that it would be manifestly unjust and unfair for HPWC to lose the benefit of this parking when the Bylaws specifically call for it.

[63] Condo Corp responds that proprietary estoppel cannot be used to defeat the *CPA* and refers to the case of ***Stratton v Richter,*** 2022 BCCA 337 ("***Stratton***") for the proposition that there is no general power in a court to override a statute (in that case the *Strata Property Act*) in order to effect equity.

[64] I find ***Stratton*** to be distinguishable. The proponent for proprietary estoppel in that case was attempting to assert a property right against a subsequent owner to the original party making a representation. Furthermore, in our case HPWC is not seeking to override the *CPA*. What it is in fact seeking is to ensure that the terms of the Bylaws are complied with.

[65] Similarly, I find that there were representations made to HPWC as to its entitlement to use the property that was subject to the Surface Lease, in the document itself and the signing of the Resolution by the two directors other than Mr. Hungerford. Furthermore, Condo Corp has never done anything to interfere with HPWC's right to possession, or the right to possession of the subtenant of the Surface Lease.

[66] HPWC relied on these representations and its reliance was reasonable. Relying on the representations of Condo Corp, HPWC subleased space for the operation of a daycare. It would be unfair and unjust to take away from HPWC, and its subtenant, the right to use the property which is the subject of the Surface Lease.

[67] Proprietary estoppel prevents Condo Corp from invalidating the Parking Lease and the Surface Lease.

### Alternative Claim by HPWC for relief under s 67 of the *CPA*

[68] HPWC requests in the alternative that if this Court declares either or both of the Parking Lease and/or the Surface Lease void, then the Court provide a remedy under s 67 of the *CPA* requiring Condo Corp to cure any deficiency. The relevant portions of s 67 are as follows:

> Court ordered remedy
>
> 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,

...

(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.

[69] As I have not declared the Parking Lease or the Surface Lease to be void, I need not consider this claim for alternate relief by HPWC. However, I believe that it is worthy of discussion as it leads to what this case is really all about and reinforces the decision made by me.

[70] If I declared the Parking Lease to be void, this would place Condo Corp in breach of the Bylaws since the Bylaws require Condo Corp to provide 203 parking stalls to Ledgeview. Failure to comply with this Bylaw would amount to “improper conduct” on the part of Condo Corp which would allow me to grant a remedy under subsection (2). The appropriate remedy would of course be to grant an order requiring Condo Corp to provide those parking stalls.

[71] This brings about the fundamental question as to why Condo Corp would undertake this legal fight if it results in no change, in any event. Condo Corp explains that when the Parking Lease was entered into, the Developer was fully in charge of Condo Corp and when the Surface Lease was entered into, HPWC directors were in charge of Condo Corp (suggesting unfair terms being put in place). Condo Corp’s brief goes on to state:

> 141. The Corporation does not suggest that HPWC is not entitled to use of the Parkade and the Surface Common Property. The Bylaws are clear that the Corporation must designate or lease an area that would allow HPWC the use of 203 parking stalls and the Corporation is aware of that it, and all owners are bound by the Bylaws.
>
> 142. The Corporation’s goals in seeking the declarations referred to in its Amended Counterclaim are to ensure that:
>
> a. HPWC cannot interfere with the Corporation’s statutory duty to control, manage and administer the common property.

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b. the Corporation is able to maintain an even hand as between all owners in the Corporation; and

c. HPWC has all of the same rights and obligations as the other owners in the Corporation.

143. The Corporation submits that at present, it cannot meet these goals because the Parking Lease and Surface Lease prevent it from doing so:

a. Section 10.1 of the Parking Lease interferes with the Corporation's statutory duty to control, manage and administer the common property by imposing additional repair obligations on the Corporation and allows HPWC, which is an owner like any other, to effect repairs to the Parkade and charge the repair costs back to the Corporation, despite HPWC not being accountable to the owners of the Corporation;

b. The Parking Lease and the Surface Lease afford preferential treatment to HPWC which is contrary to the *Condominium Property Act;* and

c. The Parking Lease is different from the parking agreements between the Corporation and all other owners insofar as it imposes additional obligations on the Corporation and grants HPWC rights which are not available to any of the other owners.

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[72] Essentially, residential unit owners in TOP are not happy with the apportionment of costs regarding the Parkade (and perhaps some other common areas) as between themselves and the owner of Ledgeview (HPWC). They know that Ledgeview is entitled to 203 stalls, which the Condo Corp says that it will provide, but the unit owners in TOP want a new deal in relation to costs. The Parking Lease, and perhaps to a lesser extent, the Surface Lease, are contracts in place that prevent the unit holders from reallocating operational and capital costs as they wish.

[73] Although this explanation of the underlying motivation to Condo Corp's counterclaim is helpful, it does not change the conclusions reached by me in this Memorandum of Decision. Those conclusions are:

(a) Although the Parking Lease did not comply with ss 49 and 50 of the *CPA* in so far as the parking stalls on the Surface Common Property (because of a lack of written agreement by all registered interest holders), pursuant to the doctrine of proprietary estoppel HPWC continues to be entitled to use of those stalls which the parties have apparently agreed to;

(b) Condo Corp's challenge to the validity of the Surface Lease (and Resolution) is limitation barred; and

(c) If I had found the Parking Lease or the Surface Lease to be invalid, I would have granted a remedy under s 67 of the *CPA*.

[74] If the parties cannot agree on legal costs, an application may be made before me in morning chambers within 35 days of this Memorandum of Decision.

Heard on the 2nd day of May, 2023.
**Dated** at the City of Edmonton, Alberta this 12th day of July, 2023.

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**Brian W. Summers**
**A.J.C.K.B.A.**

**Appearances:**

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