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Real Estate

B.C. condo ruling will 'absolutely' have impact outside province: lawyer

By **Ian Burns**

(January 9, 2018, 9:22 AM EST) -- A recent British Columbia Supreme Court decision that said a minority of condo owners cannot block the sale of their building will have reverberations across the country, according to a lawyer involved in the case. But the decision may not be the final word on the subject, as it is likely headed to appeal.

In April 2016, residents of the Hampstead, a 33-unit building on Vancouver's west side, were informed in an e-mail that building representatives were approached by parties interested in purchasing the building for future development as a tower. In June 2017, the Hampstead held a meeting to consider resolutions to wind up and cancel the strata plan (*strata* is a term used in British Columbia to refer to condominiums) and consider the approval of the building's sale for development. With 32 of 33 units represented, it received 28 affirmative votes and, requiring an 80 per cent majority vote, the resolution passed. A subsequent vote was held in November 2017 with all 33 lots represented, where the vote was 27-6 to sell. Requiring an 80 per cent majority, the resolution passed.

The majority petitioners sought a court order under the provincial *Strata Property Act* (SPA) confirming the windup resolution and allowing the sale of the Hampstead to Townline Ventures Inc. The opposing respondents contended that the petition was a nullity; the petitioners misconstrued the statutory scheme for winding up; the process surrounding the winding up resolutions was not in the best interests of the owners, and is significantly unfair; and it would cause significant confusion and uncertainty.

But Justice Linda Loo, in *Strata Plan VR2122 v. Wake* 2017 BCSC 2386, disagreed with the minority respondents and ordered the wind-up of the strata plan and the building sale, saying she did not agree that "property rights as a home should be given greater emphasis in the face of 80 per cent or more of the owners who want to take advantage of the increased profit to be made as a result of rezoning and redevelopment, particularly when the preponderance of the evidence is that the owners who want to remain living in the community can do so."

In November 2015, amendments to the SPA under Bill 40 (the *Natural Gas Development Statutes Amendment Act*) received royal assent and subsequently came into force on July 28, 2016. Bill 40, among other things, amended the SPA by reducing the unanimous consent provisions for winding-up and terminating a strata corporation to 80 per cent.

The opposing respondents argued the court should consider that "reasonable expectations of the owners who purchased their units prior to Bill 40 could live in their units as long as they wanted, or as long as they were able to live there." But Justice Loo, in a decision released Dec. 22, said reasonable expectations are not static but change over time in view of surrounding circumstances.

"In my view, the question should be: whether examined objectively, does all of the

evidence support the assertion that owners who purchased prior to Bill 40, reasonably expected to live in their units as long as they wanted, or for the rest of their lives," she said. "I say the answer to that question must be no. I do not accept the position of some of the dissenting owners that they will be displaced from their community, or that they will be unable to find similar condominium units and remain in the community, if the order confirming the wind-up and termination were made."

Some of the minority owners argued they were confused by the process, but Justice Loo said "the preponderance of evidence is that the owners were informed every step of the way, the process was transparent, and all of the owners were provided with any information they sought." She then concluded "the evidence does not convince me that a winding-up resolution would or is significantly unfair to one or more of the owners."

But Justice Loo acknowledged that some respondents "may feel stressed by having to move, and that being forced to move is unfair to them."

"[But] I cannot find that an order confirming the winding-up resolution is significantly unfair to any of them," she said. "While the opposing respondents contend that having to move from their home will cause 'significant confusion and uncertainty' the SPA clearly contemplates that owners on a winding-up of the strata corporation will have to move. I do not agree that having to move as a result of the termination of a strata corporation results in the kind of 'significant confusion and uncertainty' in the affairs of the owners."

Peter J. Roberts, Lawson Lundell LLP

Peter J. Roberts of Lawson Lundell LLP, who represented the majority owners who were in favour of the sale of the Hampstead, called the result a "great decision in that it deals substantively with a whole bunch of generic arguments that get made in opposition to strata wind-ups."

"This is the first judicial consideration [of wind-ups] and it provides a roadmap for others to follow to try as hard as they can to organize themselves and get approval for sale," he said. "The first thing you have to do is be organized right from the outset. The second is the need for transparency and information sharing with all owners in a proactive fashion to ensure the process itself is fair."

Roberts said the Supreme Court decision will "absolutely" have an impact outside B.C., as there is not much jurisprudence across Canada on strata or condominium wind-ups.

"So the extent that other courts are looking for guidance on these things, absolutely they'll

look to this decision," he said. "How applicable it is will depend on how compatible the underlying legislation is — the duties of fairness and all that kind of stuff that are mentioned here are going to play out when there is wind-up legislation, even if it is not identical."

Steve Hamilton, Hammerberg Lawyers LLP

But Steve Hamilton of Hammerberg Lawyers LLP, who represented the minority owners, said the issue is settled only "for the time being." He said his clients "certainly didn't think [the process] was followed responsibly."

"I think [my clients] have made the decision to appeal and we'll see where it goes," he said. "I just hope, regardless of the outcome, the B.C. Court of Appeal provides some explanation of how this legislation works."

Hamilton said he felt the court did not "analyze many of the important legal issues that we had argued in a particularly fulsome way," some of which will be grounds for any appeal. He said the court did not do a proper statutory construction in looking at some of the language surrounding strata wind-ups.

"Construction of a statute can be tedious, but the thrust of our argument was that control of the sale process should have been left with the liquidator," he said. "If you look at the way the statute was written, we argued there is nothing in the Act that allows a strata council to enter into a contract with a listing realtor with the developer to sell individual strata lots, and that's what they did. In our statute there's just no such power that would allow a council to sell another owner's home or list it for sale — just as I can't list your property for sale or sell it, neither can the council."

Roberts said "the most important thing" to take away from the decision is that the court will look at the fairness of the process when determining whether to terminate a strata corporation.

"Although it's going to be mindful of individual effects of a confirmation owner on owners and the unfairness that exists there, the court is going to look at a systemic level," he said. "Has the process been fair? Have people been given access to the information in a timely way? Only in exceptional cases are individual prejudices going to outweigh the collective will of an 80 per cent supermajority of owners."

Hamilton said "a lot of mischief" seems to be happening in B.C. where condominium councils are driving the bus on sales and the minority owners who want to resist the sales are not getting the information they feel they need.

"The council and the supermajority are really pushing them into a corner and really ignoring their concerns because they have all the voting power," he said. "So our argument was put this process in the hands of a court-appointed officer like a liquidator who has expertise on how to market and sell a property and has no skin in the game and has duties to the court. They're not going to fool around with this, they're going to be transparent and look at everybody's interest and just avoid all of this conflict."

Denise Lash, Lash Condo Law

Denise Lash of Toronto's Lash Condo Law said she believed the court was correct in its decision according to B.C. law.

"I think what this case is saying is really that as long as the process is followed, under the legislation, then a court's not going to step in and prevent a sale on behalf of [minority] owners," she said. "And I think that's a good decision — courts here in Ontario are also trying not to interfere with condominium corporation boards, as long as the decisions are made reasonably and as long as the procedures are followed."

Lash said "it's the nature of condominium living" that people buy into a condo under the impression that things will stay the same for a long time.

"But documents change. There can be substantial changes to legislation that impose all kinds of things," she said. "Of course it's anticipated that not everyone will want to sell, so the question arises of how do you protect those people — you give them a mechanism to ensure all steps are followed and that they're being given a fair price."

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