

RESEARCH MEMORANDUM

DATE: **September 12, 2023** FILE NO: **173638**
TO: Lauren Randall SENDER: **Anna R Giddy**

COPY TO:

SUBJECT: **Condo Restriction on Rentals**

Lauren,

You asked me whether a Condominium Board can restrict the number of rental units permitted in an apartment complex.

Short Answer

No, a Condominium Board cannot prohibit owners from leasing their apartments, with the exception being short-term rentals, which the Board can restrict.

Law and Analysis

Section 23(5) of the Nova Scotia *Condominium Act* prevents Condominium by-laws from restricting the rights and use of a privately owned unit:

(5) No by-law or amendment or repeal thereof is capable of operating to prohibit or restrict the devolution of a unit, or any transfer, lease, mortgage or other dealing therewith, or to destroy or modify any easement implied or created pursuant to this Act.

Courts have long recognized that the right of alienation includes the right to lease one's property. In *Devlin v Condominium Plan No 9612647*, 2002 ABQB 358, the Alberta Court of Queen's Bench found that a by-law that prohibits an owner from renting their unit is contrary to the fundamental right of an owner to alienate his or her property. The Court applied s. 32(5) of the *Condominium Property Act*, which is very similar to s. 23(5) of Nova Scotia's legislation. The Court gave a helpful overview of the law on the restricting the alienability of property by a Condo Board:

15 In the case of *Peel Condominium Corp. v. Caroe* (1974), 48 D.L.R. (3d) 503 (Ont. H.C.) at p.504 Galligan J. stated:

"If the declaration is given the meaning which the applicant contends it ought to be given, then as a practical matter there would be substantial restriction imposed upon the very nature of the ownership that rests in the owner. One of the fundamental incidence of ownership is the right to alienate the property that one owns. With respect to real property the right to freely alienate dates to 1290, when the imperial statute of *Quia Emptores*, 18Edw. I was an act. The provision of that statute were



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made part of the law of Ontario in 1897 (R.S.O.1897, c 330 (see *Anger v. Honsberger*, Canadian Law of Real Property (1959), p. 21.)"

16 Earl Jowitt, in the dictionary of English Law, at p. 1284, considered the ownership in the following terms:

"Ownership is a essentially indefinite in its nature, but in its most absolute form, it involves the right to posses and use or enjoy the thing, the right to its produce and accessions and the right to destroy, encumber, or alienate it."

17 Pearson, J., in *Rosher, Re* (1884), 26 Ch. D. 801 (Eng. Ch. Div.) p. 818:

"There are various modes of alienation besides sales; a person may lease or he may mortgage, or he may settle". The rights to lease ones property is therefore one of the important ingredients of absolute ownership.

[...]

19 The very nature of condominium construction would indicate that some restrictions on the use and occupancy of the individual units, such as provisions for one family occupancy, age restrictions of unit owners, anti-commercial use and the like, should be permitted in the restrictive covenant, however, I cannot see how the legislature could have intended to take away any fundamental right of an owners right of alienation of his freehold state.

20 The Alberta legislature has incorporated the right of lease of the condominium unit in s. 26 (4) [now, s 32(5)] of the Act . The language is unambiguous and is clearly set out which allows the legal right of the owner of the estate in fee simple to lease his condominium unit.

21 Madam Justice Romaine found that bylaw 212(b) restricting leasing, was void and unenforceable on February 6th, 2002 and in violation of s. 26(4) of the *Condominium Property Act*.

22 I therefore find that the related restrictive covenant is void and unenforceable and there is a direction to the Registrar of the land titles office to cancel the restrictive covenant #961229162 or alternatively a direction to make an entry on it stating that s. 2.1(a) is void and unenforceable.

This was reiterated in *Condominium Corp. No. 0312235 v. Scott* 2015 ABQB 171, where the Court found that:

27 In looking at what the legislature intended, it is imperative to remember that "[t]he legislature is presumed not to intend to abolish, limit, or otherwise interfere with the established common law or statutory rights, including property rights, in the absence of explicit statutory language that it intends to do so": *Hamilton (City) v. Equitable Trust Co.*, 2013 ONCA 143 (Ont. C.A.) at para 34, (2013), 114 O.R. (3d) 602 (Ont. C.A.). Moreover, in order for a court to conclude that a citizen's rights have been truncated or reduced, the legislature must do so expressly using express language in the statute: *Morguard Properties Ltd. v. Winnipeg (City)*, [1983] 2 S.C.R. 493 (S.C.C.), at p 509.



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28 Section 32(5) of the *Act* does not expressly permit bylaws restricting or preventing leasing of condominium units. Nor does it contain a reasonableness standard inviting such restrictions. Its language is clear and absolute. In effect, this provision contains no articulated prohibition curtailing a substantive right to lease a condominium unit.

However, the scope of the alienability clauses is not unlimited. In refusing to apply s. 32(5) to short-term rentals, the Court in *Condominium Corporation No 042 5177 v. Kuzio*, 2020 ABQB 152 states:

39 While I accept that s 32(5) should be given a broad and purposive interpretation, this does not mean that the right to alienate a unit is unrestricted.

40 Firstly, s 32(5) does not reference licenses. Secondly, if the Legislature had intended that there be an unrestricted right of alienation, it could have easily said so and there would be no need to list the types of alienation which are permitted.

Condominium Act

CHAPTER 85 OF THE REVISED STATUTES, 1989

as amended by

1996, c. 33; 1998, c. 28; 1999, c. 5, s. 62; 2001, c. 6, s. 100;
2002, c. 10, ss. 2, 3; 2006, c. 16, ss. 4, 5; 2009, c. 10; 2010, c. 46;
2017, c. 4, s. 78; 2022, c. 8, s. 5; 2022, c. 10



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Corporation may bring action

21 Any action with respect to the common elements may be brought by the corporation and a judgment for the payment of money in favour of the corporation in such an action is an asset of the corporation. R.S., c. 85, s. 21.

Winding up

22 (1) When the owners and the property cease to be governed by this Act, an order for winding up shall be deemed to have been made and registered under the *Companies Winding Up Act* and, subject to the provisions of subsection (2), that Act shall apply *mutatis mutandis* to the winding up of the corporation.

(2) The following provisions apply to the winding up of a condominium corporation:

(a) the liquidator or liquidators or some of them may be appointed from the members of the board;

(b) the Court may make any order that it deems just and equitable concerning the management of the property before sale, including any order relating to the payment by the owners of municipal taxes and of expenses that would have been common expenses had the property not ceased to be governed by this Act;

(c) the assets of the corporation shall be used to pay any claims for the payment of money against the corporation; and

(d) the remainder of the assets of the corporation shall be distributed among the members of the corporation in the same proportions as the proportions of their common interests. R.S., c. 85, s. 22.

By-laws

23 (1) The corporation, by an affirmative vote of members who own at least sixty per cent of the common elements, may make by-laws

(a) governing the management of the property;

(b) governing the use of units or any of them for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and other units;

(c) governing the use of the common elements;

(d) regulating the maintenance of the units and common elements;

(e) governing the use and management of the assets of the corporation;

(f) respecting the board;

(g) specifying duties of the corporation;

(h) regulating the assessment and collection of contributions towards the common expenses;

(i) respecting the conduct generally of the affairs of the corporation.

(2) The by-laws shall be reasonable and consistent with this Act, the *Human Rights Act* and the declaration.

(2A) By-laws adopted by a corporation pursuant to subsection (1) are not required to contain provisions found in the corporation's declaration, but may provide additional details, if such details are not inconsistent with the declaration.

(2AA) The Governor in Council may prescribe standard sets of by-laws for corporations and, where there are no by-laws made by a corporation pursuant to this Act that are in effect, the standard set of by-laws so prescribed for that corporation are the by-laws of that corporation.

(2B) The Governor in Council may prescribe standard by-laws pursuant to subsection (2A) for different classes of corporations and prescribe different standard by-laws for different classes of corporations.

(3) When a by-law is made by the corporation, the corporation shall submit for registration a copy of the by-law together with a certificate in prescribed form executed by the corporation that the by-law was made in accordance with this Act, the declaration and the by-laws, and the Registrar shall accept such by-law and certificate for registration.

(4) Upon acceptance for registration, the Registrar shall deal with the by-law as provided in clauses 7(1)(b), (c) and (d) but, until the copy and certificate are accepted for registration, the by-law is ineffective.

(5) No by-law or amendment or repeal thereof is capable of operating to prohibit or restrict the devolution of a unit, or any transfer, lease, mortgage or other dealing therewith, or to destroy or modify any easement implied or created pursuant to this Act. R.S., c. 85, s. 23; 1998, c. 28, s. 16; 2009, c. 10, s. 13; 2022, c. 10, s. 8.

Rules for use of common elements

24 (1) The by-laws may provide for the making of rules by the owners respecting the use of the common elements for the purpose of preventing unreasonable interference with the use and enjoyment of the units and common elements.

(1A) The board of directors may propose new rules or amend or repeal existing rules respecting the use of the common elements to promote safety and security of the members and property or to prevent unreasonable interference with the use and enjoyment of the units and common elements.

(1B) A rule proposed to be made, amended or repealed by the board of directors is not effective until such time as the board provides the members of the corporation with notice of the proposed rule in the prescribed form, which notice must include a form to allow the unit member to object to the rule.

(1C) Where the board does not receive a notice of objection within ten days of delivery of the notice of rule, the rule is in force until it is ratified by a majority of the members present at the next general meeting of the members with the requisite quorum.