
Is Your Strata Corporation Legally Obligated to Pay an Adjoining Landowner?

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This article deals with easements and cost sharing when a strata corporation has the right to use a facility situated on adjoining land.

In the recent court case of *The Owners, Strata Plan LMS 3905 v. Crystal Square Parking Corporation et al*, 2017 BCSC 71 ("Crystal Parking Case") the Supreme Court of British Columbia considered whether a Strata Corporation in Burnaby was bound to pay for a portion of expenses related to a parking facility owned by another Strata Corporation.

The decision in the Crystal Parking Case has been appealed to the British Columbia Court of Appeal. The decision, and any decision that may be made by the Court of Appeal, has implications for many British Columbia strata corporations that have easement agreements registered in the land title office.

General Nature of Easements

An easement agreement is "...a right which one person may exercise with respect to the land of another". The land which is used by the adjoining landowner is called the "servient tenement" and the land that receives the benefit of the use is called the "dominant tenement".

The four requirements to create an easement accepted in Canadian Courts, and set out in the Crystal Parking Case are as follows:

1. There must be a dominant and a servient tenement.
2. The easement must accommodate the dominant tenement.
3. The dominant and servient tenement owners must be different persons.
4. The right granted must be capable of forming the subject-matter of the grant.

Easement agreements may be used in various situations, as further explained in the Crystal Parking Case.

The dominant tenement may have the right to encroach on or use the servient tenement. For instance, if a new structure, such as an apartment building, is being built on a dominant tenement then an easement agreement may be used to grant the dominant tenement certain rights to use all or a portion of the servient tenement in relation to the construction.

The dominant tenement may be granted the use of the servient tenement in a way that curtails the right of the owner of the servient tenement to use its own land, whether the right of the dominant tenement is general or specific. For instance, the owner of the servient tenement may not be able to build a structure on a certain area of its land so that the owner of the dominant tenement can use the area as a road. If the dominant tenement has the right to excavate on part of the servient tenement when building a structure on the dominant tenement, then the owner of the servient tenement cannot use its land in a way that interferes with that use.

If a strata corporation enters into an easement agreement as the "servient tenement" it will often receive monetary compensation. A $\frac{3}{4}$ vote resolution of the owners is necessary to properly approve an easement agreement.

Things get complicated when the terms of an easement agreement place obligations on the owner of the dominant tenement to pay for expenses incurred by the servient tenement. In Canada, these obligations generally do not bind future owners of the dominant tenement and are said to not "run with the land".

When Easement Agreements Are Used

Strata corporations are frequently becoming parties to easement agreements. Strata corporations are asked to enter into easement agreements that facilitate excavation and construction on adjoining lands.

Strata corporations also share the use of facilities with other strata corporations and other legal entities. For instance, an amenity building may be owned by one strata corporation, but used by the residents of several strata corporations, pursuant to the terms of an easement agreement.

Also, mixed-use complexes are often developed by legally creating several strata corporations, and the rights and obligations of these strata corporations are set out in agreements called “air space parcel agreements”, which are a type of easement agreement. The Crystal Parking Case considers some of the rights and obligations set out in an air space parcel agreement.

Crystal Parking Case

The Crystal Development is located close to Metrotown in Burnaby, British Columbia. It consists of a retail complex, an office tower, a residential tower, a hotel, some community facilities and a parking lot. The Supreme Court of British Columbia had to decide whether the Strata Corporation comprised of the office tower (“Office Strata”) was obligated to pay the Strata Corporation that owned the parking facility (“Parking Strata”) certain charges under an easement agreement registered in the land title office on March 17, 1999, regarding the use of the parking facility (“Parking Easement”). The Parking Easement included complicated terms regarding the payment of a “parking fee”, including operating costs, capital costs and repayment of original capital costs plus interest. The Parking Easement was registered on title prior to the existence of the Office Strata. The strata plan for the Office Strata was deposited in the land title office on May 26, 1999.

A senior planner from the City of Burnaby testified at trial that the parking facility was a secondary use to provide parking for the owners in the various strata corporations and that it was not the intention that the parking facility would be a stand-alone profit centre. The Judge found at trial that the Developer incurred \$13.3 million of capital losses and then sold the Parking

Strata at a considerable loss, to Crystal Square Parking Corporation in June 28, 2002. The Crystal Square Parking Corporation, took an assignment of the Parking Easement. Impark managed the parking facility.

The President of the Council of the Office Strata testified that he made the assumption that the capital costs under the Parking Easement that were supposed to be reimbursed by the Office Strata would be paid off in a reasonable time, perhaps in the range of eight to ten years. On the other hand, the President of the Crystal Square Parking Corporation testified that at the time Crystal Square Parking Corporation purchased the Parking Strata he believed that the capital costs would never be paid down because of the high interest rate and the low annual base rate.

While the Office Strata refused to make contributions to the reserve fund being established to pay for the eventual replacement of the parking membrane, it did pay the base rent and operating costs.

The Judge found that at no time had the Office Strata agreed to the payment provisions in the Parking Easement. The Developer did not pass a unanimous resolution when it was the sole owner agreeing to the terms of the Parking Easement and the Office Strata, after appointing a Council, also did not agree to the payment provisions in the Parking Easement. In fact, the Office Strata’s Council spent many years trying to understand the payment provisions of the Parking Easement and repeatedly requested further information. Initially the Office Strata’s Council was under the mistaken belief that the Office Strata was bound by the payment terms under the Parking Easement.

A spreadsheet provided by Impark projected that the outstanding capital costs plus interest would equal approximately \$2.9 billion dollars by 2099. The Judge found that the Office Strata never was a party to the Parking Easement, so that the “positive covenants”, or in other words the obligation of the Office Strata to pay for the costs under the Parking Easement, were not binding on the Office Strata.

Conclusion

If the owners in a strata corporation use facilities on another landowner's property, such as an amenity building or parking, the strata corporation benefitting from the use of the facility may not be obligated to pay for a share of the costs of the facility as set out in the easement agreement, if the strata corporation was not a party to the easement agreement. The obligation to pay may not exist even if members of the strata corporation have used the facility for many years. Refusing to be bound by an easement agreement may result in the owners of the strata corporation that holds the "dominant tenement" losing the right to use the facilities. Legal advice should be sought to analyze the particular facts and to determine the best strategy moving forward.