

Restrictive covenants and short-term vacation rentals

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Owning a condominium unit that can be leased for short-term vacation rentals can be exciting. Not only does the owner have a property at which to stay while on vacation without the need to pay for overnight accommodations, but the owner can earn money to cover expenses, such as monthly condominium fees, utilities, property taxes, insurance and mortgage payments. If the property earns enough revenue, it can also generate a passive income for the owner. But not all short-term vacation rentals are created equal. While in some cases the owner can engage a property manager of choice or independently advertise their unit for short-term accommodation on VRBO and/or Airbnb or other online platforms, in other cases the owner will only be able to rent the unit through a rental pool system because of restrictive covenants and by-laws that govern short-term rentals, particularly in a condominium-hotel.

The issue of a condominium-hotel owner's ability to independently rent their unit outside of a short-term rental pool system was recently examined by the British Columbia Court of Appeal in *Kent v. Panamora Mountain Village Inc.*, 2021 BCCA 332.

In 2004, Intrawest Corporation completed the construction of the Panorama Mountain Resort, a tourist destination resort built around a ski hill, golf course and other infrastructure to create a year-round outdoor and sport recreational playground. Six strata-titled buildings (or condominiums) were part of the project. The buildings were intended to be operated as hotel-condominiums, with the units therein individually owned. Essentially the buildings would be operated as hotels, with a reception desk, housekeeping, laundry facilities and other amenities, but individual unit owners would either have the option of using their units for personal use only, or renting their units to the public through a specified short-term rental management system.

The format of operation was expressly described in disclosure documents when the resort development was marketed to the public. The disclosure was mandated by Part 2 of B.C.'s then *Real Estate Act* or was otherwise required by the British Columbia Securities Commission under B.C.'s *Securities Act*.

The following restrictive covenant was also registered against all of the units, including the owner's unit in this case:

The Residential Lot Owner covenants and agrees, with the intent that this covenant shall run with and burden each of the Residential Lots for the benefit of the Management Lots, that the Residential Lot Owner will not occupy, use or permit or cause to be occupied or use, all or any portion of any Residential Lot for the purposes of Rental Use except through a Rental Management System operated and managed by the Management Lot Owner and/or the Manager.

The terms "Manager", "Rental Use" and "Rental Management System" were defined in the restrictive covenant. More specifically, "Rental Management System" was defined as a "rental or rental pool management system or arrangement operated by the Manager to provide for the orderly, consistent and uniform management of the Rental Use of the Rental Lots."

The owners purchased their unit in 2004 and signed a rental pool agreement. However, they subsequently terminated this agreement and began to rent privately. In 2010, they re-entered the Rental Management System and signed a new agreement. The owners also terminated this agreement, and four years later began renting their unit through an online rental platform. Notice was sent to the owners that they were not permitted to privately rent their unit and eventually the dispute over their ability to privately rent ended up in court.

At first instance, the court found that the owners were allowed to privately rent their unit through online platforms outside of the management system on the grounds that the restrictive covenant at issue was impermissibly uncertain. In reaching this conclusion, the court had considered *585582 B.C. Ltd. v. Anderson*, 2015 BCCA 261 and *1120732 B.C. Ltd. v. Whistler (Resort Municipality)*, 2020 BCCA 101 and relied upon the conclusion reached in *Anderson* where a covenant requiring an

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owner to rent out their unit was unenforceable because there was a requirement to enter into a form of agreement with a third party having unknown terms, and which actually did not even exist.

The Court of Appeal in this case distinguished *Anderson* and other cases that did not enforce restrictive covenants on the grounds that the restrictive covenant here was neither uncertain nor vague. The facts revealed that the owners had entered into a rental pool management agreement when they first bought their unit and did so again in 2010 without difficulty or confusion.

It was contended that the owners simply were using the online platforms because they wanted to generate more revenue than they might otherwise make through the rental pool system and were being opportunistic, by taking advantage of the various services and marketing provided by the condominium-hotel concept, without paying for a share of the expenses. The owners countered that they were dissatisfied with the services. However, these squabbles were irrelevant to the scope and enforceability of the restrictive covenant.

The appellate court found that the restrictive covenant was enforceable against the owners because it simply and unambiguously required owners to place their units into a rental pool if they wanted to use their units for short-term vacation rentals. At paragraph 49, the court stated:

In this case, the Covenant notifies strata unit owners that if they wish to rent out their units, they must do so through the centralized rental management system that is operated by the management lot owner or manager. This requirement is neither vague nor uncertain. Neither the Covenant, nor the covenant in *Whistler*, make any reference to a rental agreement or to the actual terms under which the rental pools are to be operated.

The court also found that there was no requirement for a restrictive covenant like the one at issue to contain all of the commercial terms of the rental pool system and that as a matter of “commercial reality” the owners, and all other initial buyers, knew with a degree of commercial certainty, what the detailed terms and conditions of the rental pool management agreement that they were to sign, if they wanted to rent out their units, would be. This was all disclosed in the disclosure statement by Intrawest. The disclosure statement and its attachments directly informed the interpretation that was given to the restrictive covenant by the court.

The court noted as well that similar considerations applied to successors and subsequent purchasers of condominium-hotel units.

This case demonstrates that a person who wants to buy a condominium for the purposes of short-term vacation rentals must carefully review all documents that govern a condominium, particularly a condominium-hotel that has been constructed in or near a resort village. In Ontario, Blue Mountain Village would likely have similar restrictions on the ability of an owner to rent out a unit and that in order to do so the unit must be placed into a rental pool operated by the “hotel’s” manager. Blue Mountain Village was also developed by Intrawest. However, in other cases, and in other tourist destinations, a restrictive covenant may not require that a condominium unit be placed into any rental pool or be subject to a specific management system operated by a certain property manager where the owner wants to use the unit for short-term vacation rentals. In those cases, an owner is free to choose their own property manager or seek to generate revenue by renting their unit on online platforms. Nevertheless, the condominium unit owner should always check the condominium’s governing documents and any applicable restrictions to know what can and cannot be done. A PDF version is available to download [here](#).

If you require any litigation assistance, our [Dispute Resolution Group](#) lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.

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