Issue No. 10

Condo Cases across Canada

I have been asked, and it is my pleasure, to provide these brief summaries of recent court decisions across Canada, respecting condominium matters. I don't provide summaries of every decision rendered. I select a handful of decisions that I hope readers will find interesting. I hope readers enjoy this regular column of the CCI Review.

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THE HOT TOPIC: BC CASE RESPECTING RESPONSIBILITIES OF CONDOMINIUM CORPORATIONS

Richardson v. Strata Plan LMS2435

Important case about the responsibilities of Condominium Corporations

In September of 2004, the Strata Council obtained a property inspection report from a qualified property inspector. The inspection report revealed a number of problems including envelope leaks and sewage pipe leaks. These problems apparently did not affect the residential Strata lots. These problems affected only the commercial Strata lots.

One of the commercial Strata lot owners fell into bankruptcy and the Strata Corporation ultimately sought to sell that Strata lot to recover considerable arrears in Strata fees. The mortgagees of that Strata lot asserted that the Strata Corporation had failed to take proper steps to address the problems noted in the inspection report. The mortgagees asserted that they would be badly prejudiced (by reduced sale value) in the event of a sale of the Strata lot in the face of those problems. The mortgagees accordingly petitioned for an order appointing an administrator of the Strata Corporation, for the purpose of hiring consultants to find the source of all building envelope leaks and sewage pipe leaks (affecting the particular Strata lot) and to hire contractors to effect the necessary repairs. They also sought an order that any required funds, for these purposes, be raised by special assessment. The court held as follows:

• Generally, "the democratic government of the Strata community should not be overridden by the court except where absolutely necessary".

• "I am disinclined to impose the expense of an administrator on the Strata Corporation" for the limited purposes identified – namely to engage an expert consultant.

• A Strata Corporation is not an insurer of the property. It's obligation, through the Strata Council, is to do all that can reasonably be done to fulfill its statutory obligations.

• In this case, however, the Strata Corporation had not done all that could reasonably be done. Obtaining the inspection report "was an appropriate but not a sufficient response to the mortgagee's complaints". Once alerted to the problems identified in the inspection report, the Strata Corporation had a duty to do all that was reasonable to address them. In particular, "the next appropriate step was to obtain a professional assessment by recognized engineering experts, of the extent and costs of the necessary repairs and to effect any such repairs either from the contingency funds or by special assessment".

• The Strata Council's failure to take these steps exposed the Strata community to potential litigation. For example, the mortgagees "are vulnerable to a loss" if the Strata lot is sold at a price reduced by the Strata Corporation's failure to fulfill its duty.

• Therefore, the court made the following orders:

a) The mortgagees must pay the outstanding Strata fees into trust.

b) The Strata Corporation must engage an expert consultant to investigate the complaints and report on, and estimate the costs, of any necessary repairs. The costs of the consultant shall be paid out of the trust funds. If the parties cannot agree on the expert, either party may apply to the court for appointment of an administrator for the specific purpose of engaging the expert.

c) The application for appointment of an administrator is adjourned. Once the expert report is received, the Strata Corporation must take appropriate steps to meet its statutory duty to repair and maintain the common property. Failure to do so will provide a basis for the mortgagees to renew their application for the appointment of an administrator for that purpose.

d) If the mortagagees fail to pay the Strata fees as noted above, the Strata Corporation may renew its application for an order for sale of the Strata lot.

*[*Editorial Note: In the editor's view, this decision nicely describes the obligations of condominium corporations and the risks of harm (for example, harm to mortgagees) in cases where condominium corporations fail to take reasonable steps to fulfill their obligations. The decision also highlights the importance of involving expert consultants in appropriate circumstances. Finally, the decision expresses the principle that appointment of an administrator is generally a last resort.]*

Case from Ontario

MTCC No. 1385 v. Skyline Executive Properties Inc. (Ontario Court of Appeal) (April 28, 2005) Note: This is an appeal from the Decision sited in Part 8 of *Condo Cases Across Canada* (November 2004)

Key case related to corporation's right to recover costs under Section 134(5) of the *Condominium Act*

On appeal, the lower court decision was overturned in most respects.

According to the Court of Appeal, Section 134(5) of *Ontario's Condominium Act, 1998* allows condominium corporations to add to an owner's common expenses all costs incurred by the corporation in obtaining an award of damages or costs in an order made against the owner or an occupier of the unit. These costs can include:

• Actual legal costs owing by the condominium corporation to its lawyer, including costs going beyond any costs which the court may have ordered the owner to pay.

• All costs incurred in relation to an appeal in the matter.

• Any other costs – such as administration and managerial costs – incurred by the corporation in the matter, provided the condominium corporation can establish that those costs were incurred "in obtaining the Order".

The Court of Appeal did say, however, that costs incurred to enforce the order must be distinguished from costs incurred to obtain the order. Costs incurred to enforce the order cannot be added to the owner's common expenses under Section 134(5) of the *Act*. However, such costs might be recoverable under Section 85 of the *Act*.

Bahadoor v. York Condominium Corporation No. 82 et al (Ontario Superior Court of Justice) (February 11, 2005)

Court approves reports of condominium administrator

An administrator was appointed, under Section 131(1) of the *Condominium Act*, 1998, to carry out various tasks on behalf of the condominium corporation. Those tasks included a review of the physical condition of the property and, if deemed appropriate, levy of a special assessment and/or delivery of a revised budget for the purpose of obtaining funds for proper operation of the condominium corporation and for the maintenance and repair of its property and assets.

The administrator determined that $3,000,000 was required to fund the most urgently-needed repairs. The administrator levied a special assessment to recover this amount and also took steps to arrange borrowing of the amount (as an alternative), including arranging for the passing of the necessary borrowing by-law.

One of the owners objected to the steps taken by the administrator. However, the court confirmed that all of the steps taken by the administrator were completely appropriate. The owner also expressed a desire to see the entire condominium property sold to a developer. The court agreed that this sale alternative should be explored, and ordered the administrator to expeditiously examine the possibility of selling the entire property (in accordance with the procedures set out in Sections 124 and 125 of the *Condominium Act*, 1998).

215 Glenridge Avenue Limited Partnership v. Waddington (Ontario Superior Court of Justice) (February 18, 2005)

"No pets" provision in declaration held unenforceable

In this case, the court held that provisions akin to rules, contained in a condominium declaration, must comply with Section 58 of the *Condominium Act* (which governs rules). The court said: "If any part of a declaration conflicts with Subsection 58(1), it is void and unenforceable". The court said that where, pursuant to clause 7(4)(b) of the *Condominium Act*, a declaration con-

tains conditions or restrictions with respect to the occupation and use of the units or common elements, those provisions cannot go beyond that which is permitted in Subsection 58(1).

The court held that the cats which were the subject-matter of the particular application did not "run afoul of clauses (a) or (b) of Subsection 58(1)". The court said that, "it cannot be said that the presence of all pets inherently constitutes a breach of those clauses". Therefore, the court held that the "no pets" provision in the declaration could not be applied to require removal of the cats.

[Editorial Note: In the editor's view, this case is wrongly decided. There have been many previous decisions which have confirmed the distinction between "no pet" rules and "no pet" provisions in a condominium declaration. In the editor's view, provisions in a condominium declaration are not subject to Section 58 of the Condominium Act. In the editor's view, "no pet" provisions in a declaration are enforceable, subject only to compliance with human rights. There have been many previous decisions which have confirmed these principles.]

Other Cases from Ontario

York Region Condominium Corporation No. 890 v Toronto (City) (Ontario Superior Court of Justice) (February 8, 2005)

Condominium Corporation appeals issuance of building permit to neighbouring land owner

Under Ontario's *Building Code Act*, any person "who considers themselves aggrieved by an order or decision made by an inspector or chief building official" (including issuance of a building permit) "may appeal the order or decision to a judge of the Superior Court."

In this case, the condominium corporation appealed the decision of the chief building official to issue building permits to a neighbouring landowner, on the grounds that the permits should not have been issued without the benefit of site plan review. The neighbouring landowner argued that the condominium corporation did not have standing to bring the appeal. The court found that the condominium corporation did have standing to bring the appeal.

Rogers Cable Communications Inc. v. Carleton Condominium Corporation No. 53 (Ontario Superior Court of Justice) (March 7, 2005)

Agreement between Condominium Corporation and Rogers not binding

The condominium corporation had entered into a bulk service agreement with Bell ExpressVu Limited Partnership ("Bell"). Rogers Cable Communications Inc. ("Rogers") sought an injunction to prevent the condominium corporation from entering into the bulk service agreement with Bell.

Rogers asserted that it had entered into a previous binding agreement with the condominium corporation (earlier in 2004) which agreement prohibited the condominium corporation from entering into any such bulk service agreements.

The court found that there was no binding agreement between Rogers and the condominium corporation. The agreement in question had been signed by a single member of the board of directors, without authorization by resolution of the board.

The Court said: " The evidence before me would indicate that the agreement between CCC No. 53 and the Plaintiff was signed by a single member of the board of directors thinking that this agreement was simply a continuation of an earlier (simple access) agreement when in fact he was granting an agreement in perpetuity to (Rogers) that the Defendant, CCC No. 53 would not enter into any bulk service agreement with any cable service provider."

The court noted that the "indoor management rule" has no application to condominium corporations. A single member of the board of directors cannot bind the condominium corporation. Decisions of the board must be taken by resolution at a properly-constituted meeting of the board.

The *Condominium Act* is consumer protection legislation, the purpose of which is to protect condominium owners. The condominium owners were entitled to the protections afforded by the requirement for a Board resolution. The court said that Rogers should have "made sure their contract received the approval of the board of directors if they wanted a binding agreement".

Other Cases from British Columbia

Sunray Advanced Hotel Management Inc. v. Strata Corp. BCS226 (British Columbia Supreme Court) (March 23, 2005)

The Plaintiff, a management firm, sued for damages for breach of the management agreement (for alleged improper, unilateral termination of the agreement). The defendant, Strata Corporation alleged that it had cause to terminate the agreement.

The Strata Corporation made application for dismissal of the claim on procedural grounds. That application was dismissed. The Strata Corporation also made application for an order requiring that the plaintiff post security for costs. That application was granted. The Court was not satisfied that the plaintiff had sufficient assets to satisfy any award of costs, and therefore made the order for security for costs.