Issue No. 11

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: ONTARIO CASE – CONDOMINIUM DIRECTORS SUED FOR DEFAMATION

Starwood Group Inc. v. Calvelti et al
(May 2005)

The condominium corporation had commenced a Court action against the developer and others involved in the original construction, seeking damages for various alleged deficiencies and other matters relating to the development.

The condominium corporation published newsletters containing statements about the developer (Starwood).

Starwood asserted a claim for trade defamation allegedly flowing from the statements made in the newsletters. Starwood asserted the claim against three of the condominium's Directors and a further party who was involved in preparation of the newsletters.

The Defendants in the defamation claim brought a motion to dismiss the claim on the grounds that the action was abusive or vexatious, and was essentially designed to intimidate the condominium corporation and its Directors. The condominium Directors asserted that the statements made in the newsletters were protected by "qualified privilege", thus preventing a claim for defamation.

[Editor's Note: Under defamation law, corporate directors and officers are protected by "qualified privilege". In general, this means that corporate directors and officers can report freely to the corporate members, without fear of resulting claims for defamation.]

The developer argued that the protection afforded by qualified privilege is only available if the extent and nature of the distribution does not go beyond what was required in the circumstances. The developer argued that the Board of Directors went beyond what was required in the circumstances by placing the comments in newsletters that were left in the lobby of the building and by delivering the newsletters to tenants as well as owners of the units. The developer said that the condominium corporation should have communicated these matters only to the owners and in the form of legal notices.

The Court said that the evidence appeared to more strongly support the arguments made by the condominium Directors (that they were entitled to claim qualified privilege in respect of the statements). However, the Court was not prepared to dismiss the developers' defamation claims without a trial, because the Court could not conclude that "it is clear that the claim for defamation related to these statements will not succeed".

Other Ontario Cases

St. Louis-Lalonde v. Carleton Condominium Corp. No. 12 (June 2005)

Condominium Corporation not negligent

The Plaintiff brought a claim against the condominium corporation for injuries suffered when she used the elevator in her high-rise apartment building to access her unit. The Court found that the Plaintiff did not establish that the Condominium Corporation had been negligent in its maintenance of the elevator and the Court also found that the Plaintiff had failed to establish that the injuries were caused by any malfunction of the elevator.

Peel Condominium Corp. No. 33 v. Johnson
(June 2005)

Mediation and Arbitration did not apply to dispute about door colour

The condominium corporation sought to recover, from the owner, costs which the condominium corporation had incurred in attempting to arrange mediation and arbitration of a dispute with the owner. The dispute related to the improper colour of a door installed by the owner. After the Condominium Corporation had requested mediation and then arbitration of the dispute (but before any mediation or arbitration had been held), the owner arranged for the door to be painted the proper colour. That resolved the dispute about the door. However, the condominium corporation sought recovery of the costs incurred in attempting to arrange the mediation and arbitration.

The Court said that the mandatory mediation and arbitration provisions did not apply to this dispute. Therefore, the condominium corporation was not entitled to recover the costs incurred by it in seeking to follow those procedures. The Court stated as follows: "If (the

condominium corporation) felt compelled to pursue (the owner) for its costs even after the door was repainted, its proper remedy was to apply directly to the Court for an order enforcing compliance with the *Act* under section 134 (1)."

Atkinson v. TWS Developments Inc. (June 2005)

Purchaser entitled to rescind agreement

The Plaintiff had entered into an agreement to purchase a new condominium unit from the Defendant. The Plaintiff sought rescission of the agreement and return of his deposit. The Court granted the Plaintiff's request. The Court said that the Defendant had failed to disclose material amendments to the disclosure statement, including the following:

a) The common expenses were $331.00 per month, as opposed to the $182.26 per month set out in the disclosure materials;

b) The Condominium Corporation had initiated legal proceedings against the Defendant because of concerns about extensive deficiencies in the construction of the building, and other matters.

Eva Osvath v. C.C.C. No. 237 et al. (Divisional Court) August 2005

Extension of Appeal Period denied

The owner sought leave to extend the period for delivery of a Notice of Appeal. [The owner was seeking to appeal the decision summarized in *Condo Cases Across Canada – Part 9*.] The Court refused to grant the extension "because the grounds of appeal put forward do not show any prospect of success". The Court awarded the Condominium Corporation costs beyond the normal costs awarded to a successful party. In doing so, the Court noted that the expense of the litigation "would be passed on to the unit owners at the condominium to the extent that it is not paid by Ms. Osvath".

Webb v. Metro Toronto Condominium Corporation No. 973 (December 2004)

New bulk television service did not trigger Section 22 of the *Act*

The condominium corporation entered into a new Bulk Service Television Agreement, to replace an existing bulk service agreement. The court said that this change from one bulk service agreement to another involved the use of the existing network, at no additional cost to the condominium corporation, and therefore was not a "network upgrade". The court therefore held that Section 22 of the *Act* did not apply and the condominium corporation was entitled to enter into the new contract without delivering any notice pursuant to Section 97 of the *Act*. Furthermore, the board did not elect to treat the changes as substantial and therefore a two-thirds vote was not required.

British Columbia Cases

Aviawest Resort Club v. Strata Plan LMS1863 (May 2005)

Administrator can't be granted powers beyond powers of corporation

An administrator was appointed under section 174 of the *Strata Property Act* to exercise the powers and duties of the strata corporation. However, the powers of the administrator could not exceed the powers of the strata corporation. Therefore, if the strata corporation could not act without a resolution of the strata members, the administrator similarly could not act without such a resolution. The order appointing the administrator could not state otherwise

Alberta Cases

Condominium Plan No. 822 2630 v. Danray Alberta Ltd., Danny Taran et al (June 2005)

Breach of fiduciary duties by 100% owner

The condominium project was constructed in 1982. In 1988, the Defendant Danray acquired all of the units and operated them as a rental project. In 1994, Danray was approached by two Edmonton realtors who proposed that Danray sell the entire project to a numbered company and the realtors would in turn market the condominium units to individual purchasers. Danray and the realtors entered into the sale agreement in January 1994. The project was then marketed to individual purchasers, with the sale to the realtors closing in 1998.

The principal of Danray, Mr. Danny Taran, was appointed as a Director of the condominium corporation in 1994.

The new owners of the condominium (the individual purchasers) sued Danray and Taran for failure to properly maintain the project and for failure to establish an adequate contingency reserve fund (during the period prior to the individual transfers).

The Court said that Mr. Taran and Danray had fiduciary obligations to the new purchasers. The Court also said that Mr. Taran and Danray could be considered the "developer" for purposes of the *Condominium Property Act*, notwithstanding the intermediate sale to the numbered company. Accordingly, they were liable to the purchasers for any damages flowing from a breach of their fiduciary duties.

Owners Condominium Corporation No. 0111505 v. Anders (June 2005)

Court refuses to deal with "internal matter"

The Condominium Corporation commenced a Court action against one of the Directors, Janice Anders, for alleged "improper conduct" on her part. The Condominium Corporation sought an order for various relief, including the following:

i) An order directing that the Respondent, Janice Anders, cease and desist conducting herself improperly;

ii) An order removing the Respondent Janice Anders from the Board;

iii) An order preventing a scheduled meeting of the owners from taking place.

The Court considered this to be an "internal matter" which should be resolved at a meeting of the owners of the condominium. The Court said that "there is no need to seek court intervention to resolve what is clearly an internal matter. The application before the court is ill conceived. The Court is not prepared to intervene."

The court also said that Ms. Anders should not have been put to the cost of retaining legal counsel to respond to the Court application. The Condominium Corporation was ordered to pay her costs on a full indemnity basis.

Quebec Cases

Copropriété du Square St-David I v. Réjean Chevalier (July 2005)

Owner ordered to stop renovations

The syndicate sought an injunction to stop one of the owners from carrying out a renovation in his apartment, together with an order allowing the syndicate to inspect the work. The by-laws of the syndicate required that an owner obtain permission from the Board before proceeding with any kind of renovations. The owner had not obtained permission.

The Court granted the orders requested by the syndicate.