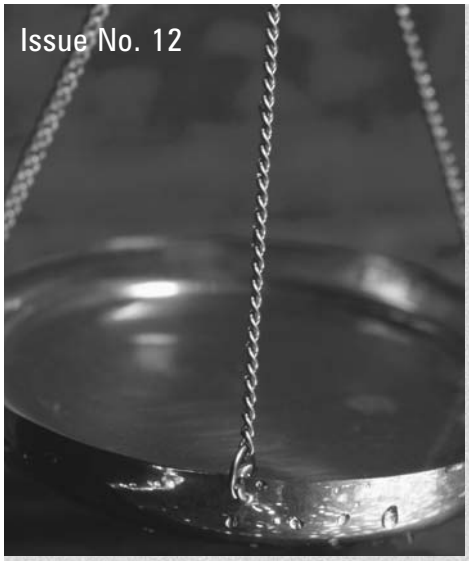

Condo Cases across Canada

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: UNIT MAINTENANCE – THE ROLE OF THE CONDOMINIUM CORPORATION

Metropolitan Toronto Condominium Corporation No. 545 *v.* **Beulah Stein, David Stein, Suzanne Drucker and Syed Rizwan Warsi [June 29, 2005]**

The condominium corporation made application to the Court for an Order granting the corporation entry (to residential units) in order to carry out mould remediation on fan coil units. The corporation relied on Section 117 of the *Condominium Act*, 1998, asserting that there existed an unsafe condition (namely, the risk of dispersal of dangerous mould, due to inadequate maintenance of the fan coil units).

The corporation argued that its experts had recommended a higher level (and more expensive method) of mould remediation than had been carried out by the respondent owners. The corporation had directed all owners to arrange for maintenance of their fan coil units in accordance with the recommendations of the corporation's experts. Most of the owners followed these directions, and also used the corporation's recommended contractor to carry out the work. Some of the owners (the respondents in the application) disagreed with the mould remediation procedure directed by the corporation. Those owners used a lower-level, less expensive procedure. They then refused the corporation's demand for access in order to arrange for the higher-level remediation (with the costs then to be added to the owners' common expenses). In the face of this refusal, the corporation brought its Court Application.

The Court ruled against the corporation.

The Court came to the following conclusions:

(a) The fan coil units were, at first instance, the responsibility of the owners. The corporation could intervene only if the corporation could prove that there was an unsafe condition. [The Court said that this was the test under both Sections 92 and 117 of the *Act*.]

(b) There was no evidence that the lower-level remediation did not effectively eliminate the mould risk.

(c) Mould in the fan coil unit of a particular apartment was a risk only to that one apartment. There was no evidence that the mould could move to other apartments.

(d) The corporation was obligated to fully and fairly consider all reasonable alternatives for the work. In this case, this included the less expensive method preferred by the owners.

(e) The corporation's professional advice did not clearly and absolutely refute the remediation method preferred by the owners.

[Editorial Note: In my view, this is a very important decision. As far as I can recall, this is the first reported decision dealing with the rights and responsibilities of condominium corporations relating to repair and maintenance obligations of the unit owners. In this case, the Court essentially says that the condominium corporation must very clearly prove that there is a risk of harm, if the condominium corporation is to intervene. Furthermore, the Court seems to be saying that the condominium corporation must prove that there is a risk of harm to other persons or properties (outside the unit).

I would not have been surprised to see the Court take another approach. In particular, I would not have been surprised to see the Court decide that condominium corporations must be very careful to protect the safety of all occupants of the building. (Certainly we have seen the Courts express these sorts of sentiments in relation to in-suite smoke detectors.) So, I would not have been surprised to see the Court decide that condominium corporations must take action if there is any doubt about the safety of any of the occupants (including all occupants of the same unit which contains the risk). In this case, the Court seems to be saying that the condominium corporation must clearly prove the existence of a risk and must also show that the risk is to persons or property outside of the particular unit.]

Other Ontario Cases

Lewis *v.* Cantertrot Investment Ltd. [August 24, 2005]

Class action by condominium purchasers

The applicant sought certification of a class consisting of the purchasers of residential condominium units in the project which was developed, marketed and sold by the defendants. The Statement of Claim alleged that the Defendants had misrepresented the anticipated condominium fees. They asserted that information provided in the proposed condominium Declaration, the budget, and a sales flyer, was "inaccurate, false, deceptive, misleading" and deficient in material respects.

The defendants asserted that any liability could only relate to a deficit occurring in the first year of the condominium's operations, pursuant to s.75 of the *Condominium Act*. The Court evidently did not agree.

The court found that there were common issues among the members of the proposed class, and accordingly expressed a willingness to certify the class proceeding, subject to certain procedural issues (issues respecting calculation of damages) which the Court asked to be resolved before finally deciding the matter.

Rogers Cable Communications Inc. *v.* York Condominium Corp. No. 312 [September 26, 2005]

Rogers Agreement does not confer a right of first refusal

Rogers Cable Communications Inc. ("Rogers") asserted that the agreement between Rogers and the Condominium Corporation conferred upon Rogers the right (a right of first refusal) to enter into a bulk services agreement on terms comparable to those contained in any such offer received by the Condominium Corporation from another supplier. The Court found that Rogers' agreement did not confer any such right of first refusal. The Court found that the agreement only required that the Condominium Corporation delay entering into another agreement for a period of 10 days following notice to Rogers of the offer from the other supplier. After the 10-day delay, the Condominium Corporation was then free to enter into the agreement with the other supplier, if it so desired.

Citywide Lawn Care Ltd.*v.* London Condo Corp. [July 29, 2005]

No fundamental breach of snow removal contract

This small claims court judgment applied the Supreme Court of Canada's test that a fundamental breach of a contract must have the effect of depriving the other party of substantially the whole benefit that the parties intended under the contract. The Defendant Condominium Corporation had entered into a contract with a snow removal company. The Corporation terminated the contract without providing sixty days notice (as permitted under the contract) when the corporation felt that the snow removal company had not responded in a timely manner after a heavy snowfall.

The Court held that the company's failure to remove the snow on the dates in question did not constitute a fundamental breach, and therefore the contract continued. The appropriate remedy would have been for damages to be paid for the unperformed obligations, though the Corporation had not brought forward such a claim. The Court awarded the Plaintiff Snow Removal Contractor the equivalent in damages of the sixty-day notice period under the contract, plus prejudgment interest.

YCC No. 60 *v.* Smithers (September 27, 2005)

The following two cases were heard separately, but the decisions were rendered simultaneously.

"Determined" owner

In this application, the corporation was essentially seeking a number of Orders from the Court to restrain the respondent from engaging in certain behaviours which were alleged to be a breach of one of the corporation's rules. The rule in question prohibited owners from engaging in any noxious or offensive actions or activities which may be or may become a nuisance to other owners or occupants.

The behaviour in question involved commencing legal proceedings, allegations of dissemination of false and malicious information, pursuing claims of fraud with the police, abusive language to staff and members of the board of directors, engaging in "proxy fights", and requests for access to information. While the court held that some of the owner's behaviour could be described as rude and aggressive, the court accepted that the owner's intention was to pursue her legal rights. The Court therefore found that the behaviour constituted no breach of the rule. Furthermore, the court found that behaviour which affects non-owners and non- occupiers (i.e. board members acting in their official capacities) could not be the subject of a breach of the rule.

The court also dealt with the interpretation of the section of the former *Condominium Act* (now section 55) dealing with access to records. The court confirmed that, while an owner is entitled to review records, the owner is not entitled to "engage in an investigation and demand responses from Directors, Officers or managers". The Court said, in effect, that board members are not obligated to dialogue with owners.

Smithers *v.* YCC No. 60 (September 27, 2005)

This Application was commenced by the owner subsequent to the application described above. This owner sought to have all remuneration paid to Directors, Officers and the property manager, not approved by by-law, returned to the corporation. At the hearing, the owner's counsel limited the request to those payments made in 2000.

The question at issue was whether payments could lawfully be made without a by-law.

The court held that all payments made to Directors without a by-law having been passed were a contravention of section 28 of the *Condominium Act* (now section 56) and must be repaid. The court also held that even if these directors were paid "as officers", section 28(1)(c) (now 56(1)(d)) would apply and a by-law was still required.

While the court was not required to deal with the issue of past payments, the court did state that where historical payments were made in good faith, the court would not have required repayment. The Directors were, however, required to repay amounts received at a time when the Directors were aware of the need for a by-law.

British Columbia Cases

Dockside Brewing Co. *v.* **Strata Plan LMS 3837 [August 23, 2005]**

Strata Council Members did not act honestly and in good faith

The Strata Council Members had the Strata Corporation commence a lawsuit, and incur the resulting expenditure of approximately $200,000 in legal costs, without the required vote under the *Strata Property Act*. The lawsuit was part of a strategy to advance the interests of some, but not all, of the Strata owners. The Strata Council Members were acting in a conflict of interest, as they were part of the interested group.

The Strata Council members were found to have acted in bad faith. The Strata Council Members were ordered to repay to the Strata Corporation the legal fees of approximately $200,000.

Adibfar *v.* **Kaulius [October 18, 2005]**

One parking space missing

The real estate listing for the Strata lot stated that it included two parking stalls. In fact, the owner of the Strata lot was entitled only to one exclusive use parking space under the governing documents of the Strata Corporation. The purchaser was required to rent a second parking stall, at a cost of $20.00 per month. The Court found that the vendor was liable for the damages related to the missing parking stall.

Swagger Construction Ltd. *v.* **ING Insurance Co. of Canada [September, 2005]**

Claims against builders – insurance issues

Most builders carry general commercial liability insurance. This case dealt with the following question: Do these general commercial liability insurance policies cover claims against the builder for defective work or for damage resulting from the defective work? The Court held as follows:

The builder's insurance coverage will depend in each case upon the specific wording of the policy. However, general liability insurance policies, in virtually every case, do not provide insurance coverage for repair of the builder's defective work. Furthermore, general liability insurance policies, in most cases, do not provide coverage for consequential damages to the building. [An example would be damage due to water penetration as a result of defects in the building envelope.] General liability insurance policies in most cases do not provide coverage for consequential damage to any part of the builder's work (which would normally include consequential harm to any part of the building). Consequential harm to persons or to other property (not part of the builder's work) would, in most cases, be covered by such policies. Again, however, this will depend in each case upon the specific wording of the policy.

New Brunswick CCI... A step closer

A New Brunswick Chapter of CCI is a step closer to reality. Several National Board members met in September with interested condominium owners and professionals in Fredericton.

There were over 25 in attendance as Pat Cassidy, Deborah Howes and Charlie Oliver provided an overview on the benefits of CCI. The session was well received as was clearly evident by the enthusiastic response of all attendees.

New Brunswick has 2,500 condominium units in some 110 corporations. Leo-Guy LeBlanc, of Service New Brunswick, provided a detailed background of the Province's current legislation and the growing problems and difficulties being experienced there. Similar to all provinces in the past, existing first generation legislation simply cannot address the current challenges facing the condominium industry. While the objective of revised legislation is essential, the formation of the Provincial Chapter would provide a consolidated reference point for education, training, communication and influence to the realtors, lawyers, unit owners and all involved in the industry.

An organizing committee was formed with the task of moving membership to the level required for chapter status. National, as with the other provinces, maintains its commitment to work with the local members to enhance and promote proper awareness at all levels of condominium activity and support in the much needed legislative revisions.

Organized by Patsy Ernst of the National Board in conjunction with Judy Orr of Fredericton, we applaud those who attended and helped make this a most successful start on a Local Chapter.

We shall keep our readers informed as this transformation of condominium awareness continues.