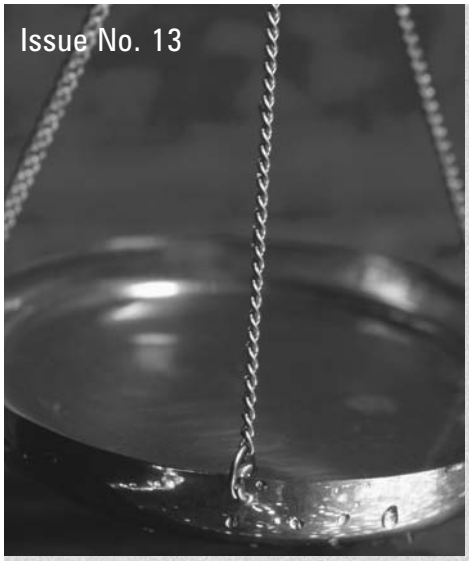

Condo Cases across Canada

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.

By James Davidson, LL.B., ACCI
Nelligan O'Brien Payne, Ottawa

THE HOT TOPIC: IMPORTANT DECISION RESPECTING LIMITATION PERIODS IN ONTARIO

York Condominium Corporation No. 382 v. Jay-M Holdings Ltd. [January 20, 2006]

Ontario's new *Limitation Act* came into force on January 1, 2004. In addition to broadly revising the law of limitations in Ontario (the new limitation period for most claims is now two years from the date the claim is discovered or ought to be discovered), the new *Limitations Act* also introduced a fifteen- year "ultimate limitation" provision. Under this provision, "no proceeding shall be commenced in respect of any claim after the fifteenth anniversary of the date on which the act or omission on which the claim is based took place."

So, for instance, this means that claims with respect to building defects must be commenced within fifteen years from the date of the design/construction of the building. However, the key question is as follows: How does this new "15-year ultimate limitation" apply to buildings built (i.e. mistakes made) prior to the arrival of the new *Limitations Act?* In the case of **York Condominium Corporation No. 382 v. Jay-M Holdings Ltd.**, the Court was asked to decide this question. In that case, the condominium building was constructed in 1977-78. In May of 2004, the condominium corporation discovered that the demising walls were not fire rated. The condominium corporation commenced an action against the builder and the municipality in 2005.

The Court found that the claim was barred because of the fifteen-year ultimate limitation. In other words, the Court found that the ultimate limitation period applied and had expired fifteen years after the date of construction of the building.

Editorial comment: In my view, respectfully expressed, this case was wrongly decided. [Hopefully this decision will be overturned by the Court of Appeal.]

In my view, the transition provisions contained in Section 24(5) of the new Limitations Act confirm that the ultimate limitation does not apply in the manner indicated by this decision. Section 24(5) of the new Limitations Act states as follows:

"(5) If the former limitation period did not expire before the effective date and if a limitation period under this Act would apply were the claim based on an act or omission that took place on or after the effective date, the following rules apply:

1. *If the claim was not discovered before the effective date, **this Act** applies as if the act or omission had taken place on the effective date. (emphasis added)*
2. *If the claim was discovered before the effective date, the former limitation period applies."*

Therefore, I believe that the result is as follows. If the claim was discovered before the arrival of the new Act (the "effective date"), the new 15-year ultimate limitation period does not apply. If the claim was discovered after the arrival of the new Act, the date of the act or omission is deemed to be January 1, 2004 – so that the 15-year ultimate limitation period runs from January 1, 2004.

In my view, the transition provisions are designed to preserve existing rights while phasing in the introduction of the new regime to ensure that plaintiffs don't suddenly lose rights (on January 1, 2004) that they previously enjoyed.

Other Ontario Cases

Amoah v. York Condominium Corp. No. 42 [November 15, 2005]

Corporation's lien rights confirmed

The condominium corporation had levied a special assessment, with payments to be made quarterly. The owner alleged that he had made the payments. The corporation denied that he had made the payments. The Court concluded that the owner failed to provide proper proof that he had made the payments. Therefore the corporation's lien was proper.

The Court also said that the condominium corporation was entitled to apply payments received from the owner to whatever month it decided, including the first month owing. Finally, the Court said that the condominium corporation was not obligated to accept partial payments and was not obligated to discharge the lien until it was paid in full.

Niagara North Condominium Corporation No. 125 v. Waddington [January 5, 2006]

After landlord unsuccessful in attempt to enforce "no-pets" provision in declaration, condominium corporation was denied right to bring its own application against tenant.

The respondent tenant has two cats. The declaration of the condominium corporation contains a "no pets" provision. The landlord previously failed on an application for an order that the cats be removed. [See Condo Cases Across Canada – Part 10]

The condominium corporation then brought its own application against the tenant – seeking an order for removal of the cats. The Court refused to hear the application. The Court said:

- The condominium corporation "knew all the particulars of the first application"
- The condominium corporation "never asked to be joined" in the first application
- "Although technically this may not be res judicata, as the applicant is a different party, the issues are identical. In these circumstances proceeding with the application would be an abuse of process."

This decision is under appeal.

Follow up: Smithers v. YCC No. 60 [Divisional Court] (February 24, 2003) [Also summarized in Part 2 of Condo Cases Across Canada]

By-law not required for remuneration to officer or agent

The lower Court held that all payments to Directors (even payments made to the Directors "as officers") must be authorized by a by-law. [See Condo Cases Across Canada – Part No. 12]

On appeal, the Divisional Court held that the *Condominium Act* "permits the Board to remunerate an officer or an agent without a by-law". The Divisional Court said, however, that the Board must make very clear the capacity (director or officer or agent) in which the remuneration is being paid and received.

[Correction: In Part 12 of CCAC, I incorrectly noted the date of the lower Court decision in this case as September 27, 2005. The lower Court decision was actually rendered September 27, 2001. My apologies to our readers.]

Metropolitan Toronto Condominium Corporation No. 949 v. Staib [April 28, 2005 Ontario Superior Court] [November 25, 2005 Ontario Court of Appeal]

"No pets" provision in declaration not enforced where condominium corporation has been too slow in taking enforcement action

The corporation's declaration contained a "no pets" provision. One of the owners had a cat, and the Court concluded that the condominium corporation would have to have known about the cat for many years.

Although such "no pet" provisions in a

condominium declaration are generally enforceable, the Court declined to enforce the provision in this case because of the corporation's delay and because the owner had been compromised by the delay. [The cat had become too old to move to another home. It had become "unadoptable".]

The decision was upheld by the Court of Appeal.

The condominium corporation is seeking leave to appeal to the Supreme Court of Canada.

York Region Condominium Corporation No. 968 v. Schickendanz Bros. Ltd. [December 15, 2005]

Clause purporting to delay common expenses not valid

This case involved a common elements condominium corporation comprising a "ring road" serving numerous abutting parcels of land. Many of the abutting parcels (the "POTL's") had not yet been developed. The Declaration contained an exclusionary clause, stating that common expense contributions of the undeveloped POTL's was delayed until "at least fifty percent of the dwellings in such Future Residential POTL become developed dwellings".

The Court said that this exclusionary clause was contrary to Sections 7(5) and 84(3) of the *Condominium Act* and was accordingly not valid (notwithstanding the fact that all purchasers had been aware of the exclusionary clause).

This case is under appeal.

Alberta Cases

Owners: Condominium Plan No. 942 2336 v. Jeremy Chai Professional Corp. [November 9, 2005]

Alleged "brothel" found not to breach corporation by-law

This case involved a commercial condominium – a strip mall. The condominium corporation was concerned about the business operated out of one of the units. In particular, the condominium corporation alleged that the business was operating as an illegal brothel. There was evidence that the business was advertised as a massage parlour but that customers were expressly or impliedly solicited for sex once they arrived in one of the private massage rooms. This business was alleged to be "injurious to the reputation of the project", and accordingly in violation of a by-law of the condominium corporation.

The Court disagreed. The Court said that the activities in the unit were not proven to be illegal, nor were they determined to be injurious to the reputation of the project.

British Columbia Cases

Strata Plan VIS 4534 v. Seedtree Water Utility Co. [January 13, 2006]

Strata owners jointly liable for judgment against corporation

In British Columbia, all strata owners in the strata corporation are jointly liable to a judgment creditor of the strata corporation. [Section 166 of the *Strata Property Act*.]

In this case, the Plaintiff had obtained judgement against the Strata Corporation and sought to execute against a Strata Lot. The Court said:

"The judgment is secured in full against each strata lot. As among themselves, the owners are each only liable for their proportionate shares but the judgment creditor is entitled to payment in full before releasing any charge" (i.e. before releasing any strata lot from execution under the judgment).

Valana v. Law [December 13, 2005]

Jurisdiction of Small Claims Court in matter involving strata property issues

In this case, the claimant sued the defendant for damages allegedly arising from injuries suffered by the claimant's dog as a result of an attack by the defendant's dog. The defendant asserted a third party claim against the strata corporation, alleging that the strata corporation was negligent in the maintenance and design of the fence between the defendant's limited common property (where the attacking dog was being kept) and the general common property (where the attacked dog was being walked).

The question was whether or not such a claim could be asserted against the strata corporation in Small Claims Court.

The Court said that the claim could be asserted in Small Claims Court. The Court said this claim did not fall within the range of lawsuits (set out in Sections 164 and 165 of the *Strata Property Act*) respecting which the Supreme Court is given exclusive jurisdiction.

CCI Addresses

CCI-National
#310-2175 Sheppard Ave. E.
Toronto, ON M2J 1W8
Tel.: (416) 491-6216
FAX: (416) 491-1670
E-mail: cci.national@taylorenterprises.com
Website: www.cci.ca

CCI-Vancouver
Email: contact@ccivancouver.com
Website: www.cci.ca/Vancouver

CCI-North Alberta Chapter
Email: info@cci-north.ab.ca
Website: www.cci-north.ab.ca

CCI-South Alberta Chapter
Email: info@cci-south.ab.ca
Website: www.cci-south.ab.ca

CI-North Saskatchewan
Email: chetan@suncorp.ca

CCI-South Saskatchewan
Email: cci@accesscomm.ca
Website: www.cci.ca/ssc

CCI-Manitoba
Email: ccimanitoba@hotmail.com
Website: www.cci.ca/Manitoba

CCI-Toronto & Area
Email: cci.toronto@taylorenterprises.com
Website: www.ccitoronto.org

CCI-Huronia
Email: ccihuronia@rogers.com
Website: www.cci.ca/Huronia

CCI-London & Area
Email: ccisw@cci-sw.on.ca
Website: www.cci-sw.on.ca

CCI-Ottawa
Email: cciottawa@magma.ca
Website: www.cci.ca/ottawa

CCI-Golden Horseshoe
Email: email@ghccci.org
Website: www.ghccci.org

CCI-Windsor-Essex County
Email: amthielk@clarkslaw.com
Website: www.cci.ca/Windsor

CCI-Northwestern Ontario
Email: ccinorthontario@shaw.ca

CCI-Nova Scotia
Email: info@cciatlantic.ca
Website: www.cciatlantic.ca

CCI-Newfoundland & Labrador
Email: mbutt@martek.ca