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: IMPORTANT DECISION RESPECTING LIMITATION PERIODS IN ONTARIO

There have been some important recent decisions in British Columbia respecting the appointment of administrators to govern the affairs of "dysfunctional" Strata Corporations.

Aviawest Resort Club v. The Owners, Strata Plan LMS 1863 et al (December 13, 2005)

Appointment of administrator extended

An administrator had previously been appointed (by Court Order) to protect the interests of the minority owners. The court in this case was satisfied that "significant unfairness" still existed between the minority owners and the majority owners. In order to manage this continuing unfairness, the Court felt that it was necessary to extend the appointment of the administrator for a further year. The Court also noted that the administrator might well require the further assistance of the Court under Section 164 of the Strata Property Act, to remedy the significant unfairness. The Court therefore said that "the Court will consider such applications on behalf of the administrator so that he will obtain such documentation and directions that will be required to remedy the unfair matters cited by him that still exist".

[Editorial Note: In a previous decision dealing with the same Strata Corporation (see Condo Cases Across Canada, Part 11, August 2005), the B.C. Court of Appeal ruled that the powers of an appointed administrator could not overcome the voting rights of the Strata owners. However, in this subsequent decision, the Court appears to be saying that the powers of the administrator can be further extended by Court Order. In other words, although the general rule may be that an appointed administrator cannot avoid the voting rights of owners, it appears that a Court may grant any authority to the administrator (including authority of the owners) if necessary to remedy significant unfairness.]

Ranftl v. The Owners, Strata Plan VR 672 (December 19, 2005)

Powers of administrator expanded

The court had previously appointed an administrator to attend to some of the affairs of the Strata Corporation. One of the owners subsequently applied for an extension of the administrator's authority. The Court granted the application. The Court noted that the small Strata Corporation (6 Strata lots) was dysfunctional and ordered that the administrator's authority be expanded to include all of the powers and duties of the Strata council.

UPDATE ON ONTARIO PET DECISIONS

Niagara North Condominium Corporation No. 125 v. Waddington [(See Condo Cases Across Canada, Part 13 (February 2006)] (January 5, 2006)

Going to the Court of Appeal

In this case, both the landlord of a unit and the condominium corporation had been unsuccessful in their attempts to enforce a "No-Pets" provision in the condominium corporation's declaration. The condominium corporation has appealed to the Ontario Court of Appeal. The appeal is scheduled to be heard in the Fall of 2006.

Metropolitan Condominium Corporation No. 949 v. Staib [See Condo Cases Across Canada, Part 13 (February 2006)] (April 28, 2005 Ontario Superior Court) (November 25, 2005 Ontario Court of Appeal)

Supreme Court of Canada refuses leave to appeal

In this case, the Trial Court had declined to enforce a "No Pets" provision in a declaration in circumstances where the condominium corporation was deemed have been aware of the presence of a cat in a unit, but was too slow in taking steps to require the cat's removal. The decision was upheld by the Ontario Court of Appeal. The condominium corporation then sought leave to appeal to the Supreme Court of Canada. Leave to appeal was refused by the Supreme Court of Canada in April 2006, with costs awarded to the owner.

Other Ontario Cases

Simcoe Condominium Corporation No. 78 v. Simcoe Condominium Corporation Nos. 50, 52, 53, 56, 59, 63 and 64 (February 16, 2006) Superior Court Decision

Shared facilities committee has authority to make most decisions respecting shared facilities

This was an appeal from a decision of an arbitrator relating to the rights of the parties under the terms of a Shared Facilities Agreement governing certain shared recreational facilities, including a recreation center, a swimming pool, tennis courts and a marina. The key point of the dispute related to the authority of the shared facilities committee which was established under the terms of the Shared Facilities Agreement between the condominium corporations. One of the condominium corporations asserted that all of the committee's decisions required ratification by each condominium's board of directors. The arbitrator did not agree. The arbitrator held that the committee had the independent authority to manage the shared facilities.

On appeal, the Court upheld the decision of the arbitrator, subject to the following proviso. The Court noted that certain decisions specifically required approval of each condominium corporation under the terms of the Shared Facilities Agreement. The Court therefore confirmed that the authority of the committee was subject to these specific restrictions contained in the Shared Facilities Agreement.

[Editorial Note: It seems to me that the committee's decision-making authority would also have to be subject to any provisions of the Condominium Act requiring the involvement of the owners of the units in the condominiums. In my view, the Shared Facilities Agreement would have to be subject to the rights of owners under the terms of the Condominium Act.]

The Court also varied the arbitrator's decision on costs. The Court said that the arbitration agreement between the parties stated that the total cost of the arbitration was to be divided equally among each of the seven participating parties.

Romano v. D'Onofrio (November 23, 2005)

Possible defamation at social club AGM

At a social club's AGM, the President allegedly made derogatory statements about one of the club members. The club member sued the club and the President for liable, slander and intentional infliction of mental suffering.

The Ontario Court of Appeal said that there was possible basis in law for such a claim and accordingly allowed the claim to proceed to trial.

[Editorial Note #1: In the editor's view, the same principles could apply to derogatory statements (about an owner) made by a condominium director at a condominium AGM (assuming such statements were false)].

[Editorial Note #2: The concept of qualified privilege may protect a condominium director, in some cases, from claims for defamation. 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, provided there is no malicious intent in the reporting. Having said the foregoing, I recommend the following: Wherever possible, it is best to avoid making false, derogatory statements about any owner.]

Peel Standard Condominium Corporation No. 668 v. Dayspring Phase I Ltd. (February 9, 2006)

Condo loan approved

Prior to the turnover meeting, the condominium corporation borrowed $1.7 million for the purpose of acquiring "equipment" to be part of the common elements.

Following turnover, the new board alleged that,

(a) the loan was *ultra vires.* (i.e. the condominium corporation did not have proper authority to borrow the money.)

(b) the loan and the equipment purchases were not properly disclosed to purchasers; or alternatively, the loan monies were not applied in the manner disclosed.

The new board accordingly asserted that the interests of the lender should rank below the interests of the condominium owners, and that the loan therefore should not have to be repaid.

The Court said that condominium corporations are creatures of statute. So, condominium corporations do not have the powers of a natural person. They can act only in accordance with the authority afforded by the Condominium Act and the corporation's governing documents. However, the Court said that in this case, the loan agreement was properly approved by the board and by a by-law of the condominium corporation. Therefore, the loan was properly arranged within the statutory authority of the corporation.

The Court also said that any weakness in the disclosure and any misapplication of the loan monies was not within the control of the lender. The Court therefore found that the lender was entitled to recover the loan monies from the condominium corporation.

[Editor's Note: As I read this decision, I found myself asking the following questions:

- *Was there any change to the common elements?*
- *Were the requirements of Section 97 of the Condominium Act all satisfied?]*

Metropolitan Toronto Condominium Corporation No. 678 v. First Royal Management Inc. (March 16, 2006)

Dispute respecting the sharing of costs related to a shared parking garage

This was an appeal from the trial judge's determination of the rights and responsibilities of the parties under a written "parking garage agreement". First Royal Management Inc. owns and operates a commercial underground parking garage below a residential condominium building. The condominium corporation made claim for recovery of expenses which it felt were owed to it under the terms of the parking garage agreement. The trial judge ordered that various amounts be paid to the condominium corporation. The condominium corporation felt, however, that additional amounts were owing and appealed for recovery of those additional amounts. The Ontario Court of Appeal upheld the trial judge's decision, and dismissed this appeal.

The garage owner also cross-appealed the decision of the trial judge, asserting that amounts owing before July 4, 1995 were statute-barred by the provisions of the Statute of Limitations. The Court of Appeal agreed and allowed this cross-appeal.

Costs of the appeal were awarded to the garage owner.

Alberta Cases

The Owners Condominium Plan No. 8221011 v. 775601 Alberta Ltd. and Doug Dueck (September 27, 2004)

Condominium corporation granted Certificate of *lis pendens* against unit

The condominium corporation had started a lawsuit against the Defendants. The lawsuit included claims for the following:

- Recovery of unpaid condominium fees;
- Recovery of proceeds from alleged improper sales of parking stalls;
- A declaration that the common meeting room was part of the common property.

The condominium corporation also obtained and registered a certificate of lis pendens against a unit owned by the Defendants. *[A certificate of lis pendens against a parcel of land (such as a condominium unit) is appropriate in cases where the Plaintiff has commenced a lawsuit which claims an interest in that parcel of land.]*

The Defendants challenged the validity of the certificate of lis pendens. The question for the Court was: If the Plaintiff's claims are successful, would the Plaintiff then have an interest in the unit? The Court's answer was "yes" and the Court therefore refused to discharge the certificate of lis pendens.

Condominium Plan No. 0020701 v. Investplan Properties Inc. (April 4, 2006)

Class Action by Condo Corporation

According to Section 25(3) of the *Condominium Property Act*, a condominium corporation has authority to sue for and in respect of any damage or injury to the common property. However, there is uncertainty in the law as to the extent of the corporation's rights to sue in relation to the common property. In particular, the courts have said that a condominium corporation cannot pursue claims for misrepresentation in respect of the common property, because such claims are considered "individual" as opposed to "corporate".

British Columbia Cases

In this case, the condominium corporation wished to assert both "corporate" and "individual" claims and accordingly sought certification to advance the "individual" claims in a class action (the class consisting of all persons who purchased a unit in the condominium from the developer). The Court granted the class action certification. The Court said that it was most efficient, and not unfair, to deal with all of the claims in a single action. Furthermore, the fact that the condominium corporation was not a member of the class was not fatal to the application. The condominium corporation met the requirements of Section 2 (4) of the *Class Proceedings Act* in that regard.

Extra Gift Exchange Inc. v. Chung (March 31, 2006)

Restitution for material supplied to condominium corporation, even though no agreement

The condominium corporation decided to put on an event to celebrate the Chinese New Year and to run a public night market. One of the directors supplied labour and materials for the night market. The Court found, however, that the condominium corporation had not entered into any contract for supply of this work and materials. Even so, the Court said that the director was entitled to restitution. The Court's decision included the following:

"The restitution to which I conclude the Plaintiffs are entitled would not afford them a profit; it would do no more then reimburse their reasonable costs of supplying the materials." [The Plaintiffs were awarded no amount for their labour.]

Strata Plan LMS 307 v. Krusozki (April 6, 2006)

Sale of Strata Lot properly authorized

The owner appealed the lower Court decision ordering the sale of the owner's Strata lot. The owner asserted that the special levy was not approved by a proper vote and also asserted that a further vote was required to authorize the registration of the lien and the application for the sale of the Strata lot.

The Court of Appeal dismissed the appeal. The court said that the vote authorizing the special levy was properly held and also stated that "once the owners had passed, by majority of those present, the resolution to impose the levy on all Strata lot owners, it was not necessary for another vote to be taken" to authorize registration of the lien or the filing of a petition in Supreme Court pursuant to Section 177(1) of the Strata Property Act (for a sale of the Strata lot).

Chow v. Strata Plan LMS 1277 (February 28, 2006)

Court orders sectioning to address unfairness

The Strata Corporation contained two types of Strata lots: town houses and apartments. In order to rectify significant unfairness in the cost-sharing between these two types of Strata lots, the Court granted the petition of the townhouse owners for sectioning of the apartment and townhouse Strata lots. The Order was granted pursuant to Section 164 of the *Strata Property Act.*