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: COURTS DO HAVE THE JURISDICTION TO ORDER SECTIONING IN B.C.

Chow v. The Owners, Strata Plan LMS 1277 (Supreme Court of B.C.) (February 28, 2006)

In this case, the strata corporation consisted of 17 townhouse strata lots and 33 apartment-style strata lots. There was a dispute between the owners of the townhouses and the apartments respecting cost-sharing. The townhouse owners made application under section 164 of the *Strata Property Act* for an order to create sections to represent the different interests of the apartment and townhouse owners.

The Court was satisfied that there was significant unfairness to the townhouse owners, and ordered the requested sectioning. The Court said that the unfairness could not reasonably be addressed without sectioning. The Court specifically declined to follow the findings in the case of Large v. Strata Plan 601 (in which the Court had held that the Court did not have inherent jurisdiction to make such sectioning orders). In the Chow case, the Court said that the ordering of sectioning does not fall under the "inherent jurisdiction" of the Court, but rather falls under the specific jurisdiction set out in section 164 of the *Strata Property Act* (to rectify significant unfairness within a Strata Corporation).

Ontario Cases

York Condominium Corporation No. 136 vs. Roth (August 25, 2006)

Court refuses to order sale of unit of unruly owner

The condominium corporation sought an order for the sale of the owner's unit, and an order restraining the owner from interfering with the operation of the condominium corporation and it's Board of Directors. The Court was not prepared, in this case, to order a sale of the unit. However, the Court did make the following orders:

• An order that the owner was to provide annually to the condominium corporation, in advance, a series of post-dated cheques;

• An order that the owner cease and desist from his "uncivil, improper and illegal conduct that violates the *Condominium Act* or the by-laws and rules of the condominium corporation".

[Editorial Note: I was interested to note that the Court did not consider the question of whether or not mandatory mediation applied to either of these claims for relief.]

York Region Vacant Land Condominium Corporation No. 968 v. Schickedanz Brothers Limited (Ontario Court of Appeal) (September 25, 2006)

In a common elements condominium corporation, a common expense sharing formula that allows potls to avoid contributions until they reach a certain level of development is not oppressive or prejudicial

This case dealt with common expense sharing in a common elements condominium corporation.

[A common elements condominium corporation contains common elements (in this case, a ring road) but no units. Parcels of land are "tied" to the common elements condominium corporation and these parcels are called "potls". The potls are responsible for the common expenses of the corporation.] In this case, the potls of the common elements condominium corporation included developed as well as undeveloped (or yet to be developed) lands. The developed potls included two vacant land condominium corporations. The vacant land condominium corporations objected to the cost-sharing formula in the Declaration for the common elements condominium corporation. They claimed that the formula was oppressive. The Declaration created a bifurcated expense formula which had the effect of saddling the developed lands with higher common expenses pending development of the other potls.

The Court noted that this formula clearly favoured the interests of Schickedanz (which held the undeveloped potls) at the expense of the other potls. However, the Court went on to say: "but in our view, it does not necessarily follow that this conduct was either oppressive or highly prejudicial. This formula was created before the unit holders [in the vacant land condominium corporations] purchased their property [ie. was fully disclosed to purchasers] and since the impugned provisions of the Declaration do not violate the *Act*, there can be no grounds for finding that Schickedanz acted oppressively."

Sauve v. Paglione (Small Claims Court) (September 7, 2006)

Small claims court properly authorized by Condominium Act to order production of records

The owner wished to organize a requisitioned meeting. For this purpose, the owner requested access to the corporation's record of owners' names and addresses. The corporation refused, citing privacy law.

The Court began by ruling that the requested record (the list of owners' names and addresses) does not fall within the exceptions set out in section 55(4) of the *Condominium Act*, 1998, and that the owner was accordingly entitled to examine that record.

The Court went on to consider whether or not the Small Claims Court truly has authority to order production of records as indicated in section 55(10) of the *Act.* The Court held that it can order production of records (i.e. the Small Claims Court can make this sort of "mandatory injunction order") in that section 55(10) of the Act is permitted by section 96(3) of the Courts of Justice Act.

The Court said, however, that it would not order production of the record until it had determined that the record had been withheld without reasonable excuse in accordance with Section 55 (10). This question would have to be decided at a trial.

Metropolitan Toronto Condominium Corporation No. 562 v. Froom (Ontario Court of Appeal) (August 18, 2006)

Dispute subject to mandatory mediation and arbitration

This was a dispute relating to the application of the condominium's pet rules. There was a question as to whether or not a release provided in 2003 was of relevance to the owner's failure to comply with the pet rules. The Court stated as follows:

"In our view, the interpretation of the 2003 Release and the compliance issue could not be separated, and together should have been submitted to the mediation and arbitration of the *Condominium Act* before the (condominium corporation) resorted to the Court."

Baliwalla v. York Condominium Corporation No. 438 (Small Claims Court) (May 31, 2006)

Special assessment too high

After levying a special assessment for certain restoration work, the condominium corporation discovered that the actual cost of the restoration work would be much lower. The Court said that the condominium corporation should not have transferred the special assessment funds into the reserve fund until the actual costs of the restoration had been confirmed. The condominium corporation was ordered to repay to the plaintiff owner the difference between the owner's share of the levied special assessment and a "correct" special assessment.

Little v. Metropolitan Toronto Condominium Corporation No. 50 (August 15, 2006)

A case about how the reserve fund can be used and about the 2/3 vote required for substantial changes

This case dealt with two issues:

1) Use of the reserve fund for certain additions/changes to the property;

2) The required procedures for obtaining a 2/3 vote for substantial changes.

The Court said that some types of additions or changes can properly be paid out of the reserve fund. In this case, the following expenses were approved as reserve fund expenses.

- Replacement of a 15-year-old security system with a modern system, including updated features such as new cameras and digital technology to record images;
- Replacement of old exercise equipment with modern equipment;
- Replacement of the existing canvas canopy with a modern canopy made of glass and granite;
- Addition of eavestroughs and a handicapped access;
- A portion of the costs for lobby renovations (the Board determined that the other portion of the costs constituted an improvement to be funded by way of operating surplus and a special assessment); and
- Design fees.

[Editorial Comment: The Court essentially confirmed that additions or changes can, in some cases, qualify as "major repair or replacements".]

With respect to the lobby renovations, the Board of the condominium corporation determined that a vote of owners was required. But, instead of holding a meeting duly called for the purpose of such a vote in accordance with section 97(5) of the *Act*, the Board sought ordinary approval at the AGM, and then gathered additional proxies following the AGM. Through this process, the Board gathered proxies of 2/3 of the owners, and determined that they were then entitled to proceed.

The Court held that, notwithstanding the fact that the Board had conducted itself in a manner that contravened section 97(5) of the *Act*, the Court would not issue an order for compliance. The Court declined such an order based on the following factors:

1. The changes were fully disclosed;

2. The required number of owners (2/3) did approve the renovations;

3. The decision at the AGM to delay the vote and solicit proxies was taken in good faith; and

4. The renovations were carried out in a fiscally responsible way, and created no deficiency in the reserve fund or the corporation's finances.

[Editorial Comment: So, the Court essentially decided that the imperfect procedures, followed by the Board in this case, were nevertheless "acceptable".]

Rita D'Alessandro v. Carleton Condominium Corporation No. 43 and Fitzsimmons Realty Services Inc. (September 29, 2006)

If a condominium corporation has no standard unit description, none of the units contain any "improvements"

A leak in a hot water pipe caused damage to the owner's hardwood flooring (which had been installed in place of the original carpeting)

The condominium corporation had not passed a "standard unit by-law", in order to establish a standard unit description. As a result, the Court held that the hard-

wood flooring did not constitute an "improvement". The Court therefore held that the condominium corporation was responsible to repair the hardwood flooring.

[Editorial Comment: This case was decided under section 89 of the Condominium Act 1998 (relating to uninsured damage). In my view, the case should perhaps have been decided under section 99 of the Act (relating to insured damage). However, the key feature of the decision, in any event, was that improvements do not exist unless the corporation has created standard unit descriptions.]

British Columbia Cases

Strata Plan KA 1019 v. Keiran (August 2, 2006)

Owner responsible for loss falling within deductible on Strata Corporation's insurance policy

Water damage was caused to the defendant's strata unit by the failure of a coupling within the wall of the unit. There was no negligence and there was no common property damage. The damage was determined to relate to a loss insured under the strata corporation's insurance policy. However, the loss fell below the $10,000 deductible on the policy.

Although the by-laws of the strata corporation require that the corporation arrange insurance covering this type of loss, the by-laws do not impose any maximum deductible. The Court said: "presumably the council has decided on the amount of $10,000 or the insurers have imposed it". The Court accordingly held that it was proper for the corporation to negotiate such a deductible.

Since this was damage to the strata unit, the strata lot owner was responsible for the damage not covered by the corporation's insurance (i.e., falling within the deductible). The Court found, however, that the owner's insurance policy provided coverage for this loss. Therefore, the Court held that the owner's insurer should cover all of the loss apart from the $500 deductible on the owner's insurance policy. The owner was required to pay that $500 deductible.

Hutka v. Aitchison (July 31, 2006)

Current owner entitled to special assessment refund

Owners had paid a special assessment (into a special fund). One of the strata lots was then sold. After the sale had been completed, the strata corporation issued a refund (to all owners) of a portion of the special assessment. The question was: Who should receive the refund for the particular strata lot? The previous owner or the current owner? The agreement of purchase and sale was silent on the issue.

The Court said that the current owner was entitled to the refund, in the absence of any agreement to the contrary. The risks of any benefit or loss relating to the building defects, which were the subject of the special assessment, fell upon the current owners, not the past owners. So, the current owners should be entitled to any refund.

Alberta Cases

Leo Regehr, Elfie Regehr and Evelyn Schmidt v. Camrose Crown Care Corporation (April 26, 2006)

Voting rights determined by *Condominium Property Act*

The voting rights in a condominium are determined under section 26(2) of the *Condominium Property Act*. By virtue of section 80(1) of the *Act*, occupancy agreements between the plaintiff and the defendant could not change those voting rights.

934859 Alberta Ltd. v. Condominium Corporation No. 031 2180 (July 28, 2006)

Condominium corporation failed to allocate expenses fairly

In this case, the by-laws of the condominium corporation allow the corporation to allocate expenses, costs or charges in an equitable manner determined by the Board, if the allocation would be inequitable on the basis of unit factors. The applicant owner asked for an order declaring that the condominium corporation had conducted itself improperly, as defined by section 67(1) of the *Condominium Property Act*, or had conducted the business and affairs of the corporation in an oppressive or unfairly prejudicial manner, in that the Board had failed to make an equitable allocation of expenses. The Court agreed with the applicant, and granted the order. The Court ordered the Board to reallocate the costs of utilities and also to charge only the second floor owners with janitorial expenses and the expenses for security.

Note, however, that the Court also said that in general, structural repairs of common property, and also maintenance of the elevator, are important to the entire building and should therefore be shared by all owners based upon unit factors.

Murkute v. Owners Condominium Plan 8210034 (Alberta Court of Appeal) (October 30, 2006)

Slip and fall claim dismissed

The condominium corporation is the occupier of the common property and is accordingly liable for any damage resulting from failure to take reasonable steps to keep the common property reasonably safe. In this case, however, the condominium corporation had not been negligent in the discharge of these duties. The plaintiff's slip and fall claim was dismissed.