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Condo Cases across Canada

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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.

THE HOT TOPIC: PROXY SOLICITATIONS MUST NOT BE MISLEADING

Kluwak v. Pasternak (Ontario Superior Court of Justice) (December 11, 2006)

[Editorial Note: This Court decision does not deal with a condominium corporation. It deals with a publicly traded real estate investment company. Nevertheless, I believe that the principles expressed in this decision have equal application in the condominium setting.]

Griffin is a publicly traded real estate investment company. Kluwak was one of a number of dissident shareholders who were concerned about Griffin's strategic direction and management. They waged a campaign to obtain proxy votes in order to oust the existing Board. The dissident group sent circulars to all shareholders, in order to solicit their proxy votes.

The dissident Group was able to obtain the votes required to change the Board. However, Pasternak (the incumbent director and Chairman of the Board, who chaired the AGM) rejected the proxy votes, on the basis of legal advice. The Corporation's lawyer advised that the proxy votes should be rejected because the circulars were misleading. As a result, the incumbent Board was re-elected.

Kluwak made application to Court to set aside the election and to have the proxies accepted.

The Court agreed that the circulars distributed by the dissident owners were misleading in many material respects. The circulars contained missing or misstated facts that would be considered important by a reasonable shareholder (in deciding how to vote). Therefore, the proxy votes were unreliable. However, the

Court said that the proper remedy would be to delay the election until there had been an opportunity to correct the misleading circulars. The Court said:
"I am concerned that management raised no concerns with the dissident proxy circular prior to the AGM… It was manifestly unfair to 'wait in the weeds' until the meeting itself to raise the objections. A better course would have been to request the dissidents to correct their circular and adjourn the AGM if necessary, or to apply to the Court for a determination of whether the proxy was materially misleading, and, if it was, to give an opportunity to the dissident group to correct it."

The Court accordingly declared that the election was invalid and ordered a new election to be held at a new AGM. The Court ordered that the AGM be held at a date that would give sufficient time for the dissident group to correct the material misstatements in the dissidents' proxy circular, and for management to amend its own management circular if desired, and have both disseminated to the shareholders. In the event of continuing disputes about the information disseminated to shareholders, the parties could return to the Court for further direction.

[Editorial Comment
The Relevance for Condominiums

These sorts of situations are not uncommon in the condominium setting. A group of owners may be unhappy with the incumbent Board and may send circulars to all owners as part of a campaign to gather proxy votes (in order to oust the Board). The Kluwak v. Pasternak decision tells us that careful steps may be required if the distributed circulars are considered misleading. In particular, steps should be taken, without delay, to correct the misleading statements. These steps could include the following:

- *The incumbent Board should contact the dissident group of owners, in order to point out the misleading statements, and to afford those owners an opportunity to correct those statements by way of further circulars to all owners.*
- *The incumbent Board may distribute its own "correcting circulars".*
- *In extreme cases, it may be appropriate to seek direction from the Courts.*

In the meantime, any election should be delayed until such time as all owners have received complete and accurate information as necessary to allow the owners to make proper, informed decisions about how to vote.]

ONTARIO CASES

Bahadoor v. York Condominium Corporation No. 82 (Ontario Superior Court of Justice) (December 4, 2006)

Mandate of administrator suspended

An administrator had been appointed to govern the affairs of the condominium corporation. See Condo Cases Across Canada, Issue No. 10, May 2005). During the administrator's mandate, a meeting of owners was held to elect a new board of directors. The owners also voted overwhelmingly in favour of terminating the mandate of the administrator. Following the meeting, some of the owners made application to the Court for an Order approving the election of the new board and discharging the administrator. The Court ordered that the mandate of the administrator be suspended and that governance of the condominium corporation should be turned over to the newly elected board on an interim basis, subject to further reporting requirements and Court review. The new board would have to satisfy the Court that it had established "realistic and achievable plans" to address the challenges faced by the condominium corporation. The Court would review such plans on January 31, 2007. At that time, the Court would decide whether or not to reinstate the administrator.

The Court said: "It is time for this new board to demonstrate that it can provide (realistic leadership for the condominium)".

[Editorial Comment: One factor that particularly impressed the Court was that the new board had secured advisory services of an experienced condominium manager. This helped persuade the Court that the newly elected board should be given a chance to take on control of the condominium corporation.]

York Condominium Corporation No. 382 v. Jay-M Holdings Ltd. (Ontario Court of Appeal) (January 29, 2007)

Limitation period had not expired

The condominium corporation appealed from an Order dismissing its building deficiency action on the grounds that the limitation period under Ontario's new *Limitations Act* had expired. The lower Court had said that the ultimate 15-year limitation, under the *Limitations Act,* had expired.

The Court of Appeal reversed the lower Court decision. The Order dismissing the action was set aside. The Court of Appeal said that if the basis for claim was not discovered until after January 1, 2004 (the date of arrival of the new *Limitations Act*), but the act or omission took place before that date, the 15-year new ultimate limitation period started to run on January 1, 2004.

Metropolitan Toronto Condominium Corporation No. 551 v. Adam (Ontario Superior Court of Justice) (December 5, 2006)

Owner's numerous demands not considered oppressive. Owner not required to disclose reasons for requesting information.

An owner, Mani Adam, had made various requests for records and also had numerous communications with the condominium corporation about various issues. Mr. Adam felt that that the condominium corporation had not properly responded to his requests to see records, and as a result he had brought a claim in Small Claims Court, seeking a penalty of $500 from the condominium corporation (pursuant to Section 55 of the *Condominium Act, 1998)*. The condominium corporation felt that Mr. Adam's numerous requests and demands were "oppressive".

The parties were able to reach an agreement respecting certain matters which the Court described as a "protocol pursuant to which the parties would exercise their rights and fulfill their respective obligations as condominium unit owner and condominium corporation".

However, the Court was asked to rule on three issues respecting which the parties could not reach agreement:

1. The condominium corporation sought an order prohibiting Mr. Adam from communicating with the condominium's directors except by letter.
2. The condominium corporation sought an order prohibiting Mr. Adam from communicating with third parties concerning the condominium.
3. Mr. Adam sought an order that he be permitted to make copies of condominium documents using his own scanner.

The Court declined to make any of these orders.

The Court's decision included the following:

- Although Mr. Adam's behaviour was annoying and at times ill mannered, and although his suggestions were sometimes unreasonable, his conduct was not oppressive.
- The condominium corporation's actions were also not oppressive.
- The photocopying charges demanded by the condominium corporation were "de minimus" (too small to be of concern to the Court).
- The right of Mr. Adam to see the corporation's records – i.e. whether or not the condominium corporation had failed to meet those rights – would be determined by the Small Claims Court. [However, the Court did say this much:

A condominium corporation cannot require the person to disclose his reasons for requesting information or for seeking to see the records.] [Editorial comment: According to Section 55(3) of the *Condominium Act, 1998*, condominium owners may inspect the corporation's records (apart from records listed in Section 55(4)) "for all purposes reasonably related to the purposes of this *Act*". Therefore, it seems to me that the purposes or reasons for the desired inspection are relevant and that the condominium corporation should accordingly be able to ask the owner to disclose those purposes.]

ALBERTA CASES

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

Condominium Corporation fulfilled its duty as occupier

The Trial Court had dismissed the plaintiff's claim for damages due to a slip and fall while on the common elements of the condominium corporation. The Court of Appeal affirmed the trial Court decision.

The Court of Appeal confirmed that the condominium corporation was occupier of the common elements and accordingly owed a duty to take reasonable care to see that persons using the common elements were reasonably safe. The Court of Appeal said that the condominium corporation had reasonably fulfilled its responsibility by contracting with a competent maintenance firm to keep the common areas free from ice and snow. The Court found that the contracting firm had reasonably discharged its duties. That being the case, the condominium corporation could not be found negligent, and there was no need to consider the application of Section 11(1) of the *Occupier's Liability Act.*

Condominium No. 822 2630 v. Danray Alberta Ltd. (Alberta Court of Appeal) (January 22, 2007)

Court of Appeal finds no breach of fiduciary duties

The Trial Court decision (see Condo Cases Across Canada, Issue No.11, August 2005) was reversed by the Alberta Court of Appeal. The Court of Appeal found that there was no breach of fiduciary duty by Danray Alberta Limited or Danny Taran. The Court's reasons were as follows:

- Neither Danray nor Taran could be considered owner-developers, and therefore they did not owe the fiduciary duties that come with such a role.
- There was, in any event, no statutory duty to establish a reserve fund. In the absence of a statutory requirement, an owner/developer does not owe a fiduciary obligation to establish a reserve fund sufficient to pay future capital replacements.
- The individual purchasers had bought on an "as it stands" basis. They were advised of the correct amount in the reserve fund and there was no basis for any understanding that Danray or Taran would act on their behalf in ensuring that the reserve fund was adequate.
- Taran did not breach his fiduciary obligations to the corporation as a director. He acted honestly and in good faith, while on the board, and there was no statutory obligation on him to maintain a reserve fund. Furthermore, Taran was not in a conflict of interest.
- Newco was the beneficial owner of the property and was the party actually selling the condominiums to the public. If any fiduciary duty could be owed, it was owed by Newco.

Condominium Plan 0122336 v. Shivji et al (Provincial Court of Alberta) (January 10, 2007)

Condominium corporation obligation to arrange insurance does not render corporation responsible for deductible

Damage was caused to two units in the condominium because of water escape from a frozen pipe. The pipe had frozen because the tenants in one of the units had negligently turned the thermostat down to "zero". The corporation had arranged insurance but the amount of the damage was below the insurance deductible of $25,000.

The Court said that the condominium corporation had properly fulfilled its insurance responsibilities. The deductible was not unreasonable. The question was: Who was responsible for the deductible? The Court said: "A determination must flow from the by-laws". In this case, the by-laws were silent as to responsibility for the deductible.

However, under the terms of the by-laws, the owners were responsible for repairs to the units. Therefore, the owners were responsible for any required repairs falling within the deductible. The Court said that the condominium corporation is not an "insurer for the deductible", unless the by-laws so provide.

Condominium Corporation No. 9813678 v. Statesman Corp. (Alberta Court of Queen's Bench) (December 7, 2006)

No waiver of subrogation against developer unit owner (for steps taken in capacity as a contractor)

The condominium buildings were damaged by fire. The damage was covered by insurance. The insurer then sought to assert a subrogated claim against the developer, based upon the allegation that the cause of the fire was negligence associated with the use of a propane torch by an employee of a waterproofing company subcontracted by the developer to provide construction services.

The insurance policy included waivers of subrogation against various entities including the unit owners. The developer owned units and accordingly asserted that it was entitled to the benefit of the waivers of subrogation.

The Court said that the reference to condominium unit owners, in the waivers of subrogation, did not include the developer "in its capacity as a contractor". Condominium corporations were capable of bringing actions against owners in the condominium. Therefore the insurer could assert a subrogated claim, unless this was prevented by a waiver of subrogation. In this case, the waiver of subrogation did not apply to the developer in its role as a contractor and the developer also was not an insured under the policy in relation to its construction activities.

BC CASES

Strata Plan VR 2000 v. Grabarczyk (British Columbia Supreme Court) (January 23, 2007)

Owner in breach of noise by-laws. But fines reduced.

The Court found that the respondent owner had contravened the strata corporation's noise by-law by deliberately and repeatedly making loud noises highly disruptive to another owner. The Court did not find the respondent's explanations to be believable.

The fines claimed by the condominium corporation were reduced because the Court found that many of the respondent's contraventions of the noise by-law were separate or distinct contraventions – as opposed to "continuing" contraventions within the meaning of Section 134(3) of the *Strata Properties Act*. The Court accordingly found that many of the fines had not been properly imposed because the respondent had not received particulars of the complaint in writing and a reasonable opportunity to answer the complaint before the fine was imposed.

Sauve v. McKeage (B.C. Supreme Court) (May 24, 2006)

Truck not "stored" on Strata Lot. But No costs awarded to strata corporation because case of "public interest"

The plaintiff and the defendant are owners of adjoining strata lots. The statutory building scheme prevented trucks over 1/2 ton from being "stored" on a lot other than in an enclosed garage or other suitable enclosed space. The defendant was employed by an electrical utility company. His duties included a call schedule which required that he park a large truck (more than 1/2 ton) in the driveway of his strata lot for eight weeks per year.

The Court found that this did not constitute "storage" of the truck and accordingly did not offend the building scheme. The Court also found that the truck did not constitute a nuisance.

Although the strata corporation was also included as a respondent to the application, the Court declined to award any costs to the strata corporation because "this case approaches a public interest kind of a case, where the interest of the plaintiff is not solely limited to her private interest but can be seen as representative of the interests of others".