BY JAMES DAVIDSON, LL.B., ACCI, FCCI
NELLIGAN O'BRIEN PAYNE, OTTAWA

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: : WHEN DOES MAINTENANCE INCLUDE A "CHANGE"?

Briggs v. Winnipeg Condominium Corp. No. 30 (February 14, 2007) (Manitoba Court of Queen's Bench)

Window replacement project required majority approval from owners, but not 80% approval (non substantial change)

The condominium corporation entered into a contract for replacement of the exterior windows and installation of new aluminum panels, at a total cost of just over $4,000,000. One of the owners asserted that the project involved a substantial change requiring an 80% vote of the unit owners.

The Court said that the essential purpose of the project fell within the definition of "maintenance". The existing windows were ancient and obsolete and were in the process of wearing out. The Court said: "The only way to preserve and prevent a decline in the condition of the windows is to replace them."

The Court noted, however, that the window replacement project did involve some "changes". The Court said: "One difficulty in this case is that the windows are not being replaced precisely as they were and there are some changes." Some of these changes were necessary in order to comply with new codes or standards. These were necessary aspects of the maintenance. The Court said: "[The windows] need to be replaced with better and more expensive windows in order to comply with the Building Code. There is no avoiding that. If [the condominium corporation] is to properly fulfill the statutory duty of maintenance that much is inevitable. However, I am not satisfied that all of the changes and improvements inevitably flow from the act of maintenance."

The Court accordingly found that certain changes went beyond "maintenance", and therefore required a vote of the owners. Those changes were as follows:

- change to tinted glass;
- change to the colour of the window panels;
- rigid insulation added as a backer for the panels; and
- new windows of a different type, style and quality.

("The number of panes is reduced; they are awning rather than sliding; they are dual rather than single pane; they have additional thermal features.")

The Court then considered whether or not these changes were "substantial" (requiring an 80% vote) or "non-substantial" (requiring a majority vote). The Court concluded that these were not "substantial" changes because the proposed work did not materially change the manner in which the common elements were used or enjoyed.

The Court accordingly ordered that the window replacement contract be approved by a majority vote of the unit owners.

[Editorial comment: I wonder why the Court ordered that the entire window replacement contract be subject to owner approval. It seems to me that the owners should only be called upon to approve the "changes" and the Board should otherwise be permitted to proceed with the purely "maintenance" aspects of the contract, without owner approval]

York Condominium Corp. No. 359 v. Solmica Chemical International Inc. (Ontario Superior Court) (May 4, 2005)

Window replacement project did not require owner involvement.

(Arbitrator's decision. Leave to appeal refused.)

One of the owners asserted that the Board did not have authority to replace the windows in the absence of a vote of the unit owners. The issue was whether the replacement of the windows was a repair or maintenance or, in the alternative, an addition, alteration or improvement. The issue was argued before an Arbitrator. The Arbitrator concluded that the window replacement fell within the mandate of the Board, and did not require owner involvement. Although the material used was not identical, it was reasonably close in quality to the original and therefore did not qualify as an "addition, alteration or improvement", pursuant to Section 97 (1) of the Condominium Act, 1998. In summary, the window replacement was considered to be purely maintenance.

One of the owners applied for leave to appeal the Arbitrator's Award. The Court refused the Application and the Arbitrator's Award was accordingly final.

[The one owner (Solmica) had refused to allow the windows of its unit to be replaced. The owner was required to allow the window replacement to proceed.]

ONTARIO CASES

Zafir v. York Condominium Corp. No. 632 (Superior Court) (February 23, 2007)

Before leaving for vacation, the owner turned off the shut-off valve on the pipe below the kitchen sink of the owners' unit (which all unit owners had been asked to do before leaving on vacation). While the owner was away, a leak emanated from the particular pipe, causing damage to the unit below. The condominium corporation had passed a By-law pursuant to Section 105(3) of the *Condominium Act*, 1998, which allowed the condominium corporation to add the cost of repairs, up to the deductible on the corporation's insurance policy, to the owner's common expenses where there was damage to another unit or common elements caused by an act or omission of the owner.

In this case, the Court found that there had been no "act or omission" on the part of the owner, and accordingly found that the deductible loss should not have been added to the owner's common expenses (and that the resulting condominium lien therefore should not have been registered).

The Court also offered the opinion that the by-law was valid and therefore would have applied if there had been an act or omission.

London Condominium Corp. No. 13 v. Awaraji (Ontario Court of Appeal) (February 21, 2007)

Owners ordered to remove satellite dishes

The Court of Appeal upheld the lower Court's Order requiring the owners to remove their satellite dishes. The satellite dishes in question contravened the declaration, by-laws and rules of the condominium corporation.

The condominium corporation had passed a rule referring to the permitted common television cable system (involving one dish on each block of units). The Court noted that the rule was aimed at preserving a uniform appearance and quality in the condominium complex, which the Court said was "a general purpose that appears to comply with Section 58 of the *Condominium Act*". The owners had asserted that their particular satellite dishes were hidden from onlookers and accordingly had no impact upon the appearance of the community. They accordingly argued that the application of the rule in their case would not meet the permitted purposes for rules, under Section 58 of the Condominium Act, 1998. The Court rejected this argument, because the owners had not adduced sufficient evidence to support the argument.

[Editorial Comment: Since the satellite dishes in question were not part of a common television cable system, they clearly contravened the Declaration. So, it seems to me that the Court did not really need to be concerned at all about the validity of the Rule.]

Niagara North Condominium Corporation No. 125 v. Waddington (Ontario Court of Appeal) (March 16, 2007)

Condominium corporation's appeal respecting "no pets" provision dismissed

After the landlord was unsuccessful in attempting to enforce a "no pets" provision in the condominium declaration, the condominium corporation was denied the right to bring its own application against the tenant. [See *Condo Cases Across Canada* – Part 13.]

The condominium corporation appealed to the Ontario Court of Appeal. The Appeal was dismissed, and the lower Court decision was affirmed, by the Court of Appeal.

The Court of Appeal said that the doctrine of abuse of process prevented the condominium corporation from bringing its own application against the tenant after the landlord's application had failed (despite the fact that the landlord had chosen not to appeal).

York Region Condominium Corporation No. 772 v. Lombard Canada Limited (Superior Court) (February 13, 2007)

Contractor's insurance gave coverage for damage resulting from contractor's negligence

The condominium corporation obtained Judgment against the general contractor of the condominium project, for damages resulting from the contractor's defective work. The contractor had supplied a defective de-watering system, which resulted in voids beneath the footings, leading to serious structural damage to one of the condominium homes.

Having obtained Judgment against the contractor, the condominium corporation then asserted a claim under Section 132(1) of the *Insurance Act* against the contractor's comprehensive liability insurer (for recovery of any amount for which the insurer was obligated to indemnify the contractor).

The Court found that the contractor's comprehensive liability insurance policy did provide coverage for the amounts owed by the contractor to the condominium corporation, and accordingly awarded Judgment in favour of the condominium corporation against the insurer.

[Editorial Comment: There is now a long line of Court decisions about coverage for building defects under contractors' comprehensive liability insurance policies. Each case will depend, it seems,

upon the particular policy wording, and upon the nature of the particular defect and the related damage.]

Bahadoor v. York Condominium Corp. No. 82 (Superior Court) (February 13, 2007)

Administrator discharged and election of new Board confirmed

The Court had previously ordered that the appointment of the administrator be suspended and that the newly-elected Board take over administration of the condominium on an interim basis, subject to further reporting requirements and Court review. [See *Condo Cases Across Canada* – Part 17.] The further reports were provided and the Court found that the new Board had formulated a workable plan for the condominium corporation. The administrator was accordingly discharged and the election of the new Board of directors confirmed.

The Court also addressed various accounts of the administrator. The administrator's Motion for approval of its final report and for an order releasing it from all claims was adjourned.

Peel Standard Condominium Corp. No.721 v. Derveni (Superior Court) (March 30, 2007)

Owners ordered to remove walkway

The owners had installed a walkway without the consent of the condominium Board.

The Court said: "While there does not appear to be anything unsafe or unattractive about the walkway and while it may be very useful to unit owners, nevertheless it contravenes the *Declaration* and the *Act* [because consent of the Board was not obtained] and must be removed."

The owners were ordered to remove the concrete walkway and to restore the common elements to their original condition.

QUEBEC CASE

Gagné c. Syndicat de copropriété Condominium L'Escale (Superior Court of Quebec) (April 12, 2007)

Meeting procedures, although imperfect, found to be acceptable

Owner's claim for defamation against President dismissed.

Mrs. Gagné sued the Syndicat for defamation and to have the annual general meetings held between 2004 and 2007 cancelled (including cancellation of the decisions taken during those meetings). The Court looked into the procedures followed during the meetings and found that they fell short of the requirements imposed under the Civil Code of Quebec as well as the requirements set out in the declaration. The Court also noted, however, that this had been the case since the Syndicat was established in 1983 and that it had been done in good faith and with the assent of all co-owners, in an attempt to keep costs to a minimum. The plaintiff had participated willingly in these meetings and had in fact been secretary of the Syndicat. She had, until recently, never complained of the anomalies of procedure. The Court reviewed the evidence produced and came to the conclusion that the plaintiff was not able to overturn the procedures of the Syndicat, even if they fell short of the requirements of the Code and the declaration, because it would be of greater detriment to the Syndicat than benefit. Since no interests had been injured in the process, the Court declined to cancel the general meetings or to revoke any of the decisions made during those meetings.

With respect to the claim of defamation, the events complained of happened over the phone in a private conversation between the plaintiff and the president of the board. It was the plaintiff who had then broadcast these events at an annual meeting five years later. Not only was the claim outside the limitation period, it also failed to address the issue that defamation does not occur in a private relationship; the person making the defamatory statements must also broadcast such statements to an audience.

MANITOBA CASE

Reeves v. Globe (Manitoba Residential Tenancies Officer) (February 7, 2007)

Landlord's rule prohibiting smoking found to be reasonable and enforceable

A Manitoba Residential Tenancies Officer considered whether or not a landlord's rule prohibiting smoking complied with the requirements of the *Manitoba Residential Tenancies Act*.

The Residential Tenancies Officer held that the rule was properly designed to promote safety, comfort or welfare of persons working or residing in the residential complex, in that it was designed to prevent various ill-effects and risks of smoking and second-hand smoke. The Residential Tenancies Officer also said that the rule was fair because it did not require that existing tenants stop smoking. [Existing tenants were "grandfathered".] Furthermore, the rule was very clear, and new tenants would also be fully aware of the new rule before they entered into a tenancy.

The rule was accordingly found to be valid and enforceable under Manitoba's Residential Tenancies law.

[Editorial comment: Although this is a decision about a "no smoking" rule in the landlord and tenant context, it seems to me that many of the same factors would be considered in relation to such a rule passed by a condominium corporation or strata corporation in many jurisdictions across Canada. Condominium rules prohibiting smoking in the units may soon be put to the test.]

B.C. CASES

Browne v. Strata Plan 582 (Supreme Court) (February 14, 2007)

Strata Corporation authorized to levy special assessment

The building was experiencing water penetration due to defects in the envelope. Owners could not agree upon the necessary remediation. One independent expert recommended repairs estimated at about $1.8 million. The Strata Corporation obtained a second opinion that questioned that approach and offered a less expensive alternative. The Strata Corporation did not want to be forced to proceed with the "$1.8 million option".

Because of the disagreement, the owners had not given the necessary voting approval to any special assessment.

The Court did not decide on the necessary special assessment. Instead, the Court authorized the Strata Corporation to issue a special assessment in an amount "not exceeding" $1.8 million. This would then allow the Strata Corporation to consider all of the expert reports and exercise its discretion about the appropriate repair strategy. The Court said: "In performing its obligation (to repair and maintain the common elements) the Strata Corporation must have regard to the observations and recommendations contained in both of the (expert reports)."

Pham v. Strata Plan NW 2003 (Supreme Court) (April 18, 2007)

Landlord responsible for damage caused by "grow op" operation carried out in landlord's unit

A marijuana grow op operation, carried out in one of the apartments, caused significant damage to the building. After a number of notices to the landlord, the Strata Corporation carried out the necessary repairs, at a total cost of approximately $106,000. The Strata Corporation then demanded payment from the landlord, and the landlord refused to pay.

The Court held as follows:

- The landlord was responsible for the damages. "The damage emanated from her apartment. Either she did it or she rented the apartment, contrary to the bylaws of the Strata Corporation, to tenants who caused the damage. She benefited form the work done by [the Strata Corporation]."
- The Strata Corporation's insurance obligations did not affect the Court's decision. The Court said: "There is no evidence that [the Strata Corporation] could have recovered anything by suing the insurance company."
- The Strata Corporation had received a complaint and had given proper notice to the landlord, all in accordance with Section 135 of the *Strata Property Act.*

[Editorial Comment: The Court did not rule on the validity of the lien registered by the Strata Corporation.]

Smith v. Strata Plan LMS 1821 (Supreme Court) (March 23, 2007)

Court orders change to unit entitlements to reflect actual habitable areas

In this Strata Corporation, 30 of the total 78 units had basements, and the basements were finished, habitable areas. The Schedule of Unit Entitlements, submitted by the developer, purported to allocate unit entitlements based on the habitable area of each unit. However, the Schedule contained an error in that it did not include the basement areas of the 30 units that had basements.

The owners agreed that the Schedule required amendment, but could not agree on the appropriate amendment. Ultimately, a committee of owners proposed a new "formula" for allocating unit entitlements, which calculated each unit's share based on 100% of the main floor area, 75% of the second floor area and 50% of any basement area. This formula was unanimously recommended by the committee as a compromise solution, and was then supported by about 90% of the owners.

An amendment to the Schedule required either the unanimous agreement of the owners or a court order pursuant to Section 246 of the *Strata Property Act.* Since unanimous approval had not been obtained, an application was made to Court. The question the Court was asked to decide, was as follows: Could the Court amend the Schedule of Unit Entitlements to reflect the formula recommended by the committee and accepted by about 90% of the owners? The Court's answer was "no". The Court said:

"The options open to the Court under Section 246(7) and (8) are to amend the Schedule to accurately reflect the habitable areas of the units or the leave it unamended. The Court has no jurisdiction under Section 246 to amend the Schedule on any other basis."

The Court accordingly decided to amend the *Schedule of Unit Entitlements* to reflect the actual habitable areas of all of the units (i.e., to include the basements in the calculations).

Finally the Court said that Section 164 of the *Strata Property Act* did not confer jurisdiction on the Court to amend the Schedule, because amendments to the Schedule are specifically addressed by Section 246 of the *Act.*

ALBERTA CASE

Graham v. Shannon Estates Villas Condominium Corp. (Court of Queen's Bench) (March 27, 2007)

Board unreasonably refused to grant consent to owner's proposed common element modification

One of the owners asked to install a stairway from his rear deck to the ground level, in order to allow a safety exit in the event that he was unable to use the front entrance to escape. The distance from deck to ground was approximately 1.5 meters.

The owner obtained a Court order allowing him to proceed with the proposed installation of the stairway. The owner then made an application for building permit, and received a building permit to proceed with his "stairway proposal". Subsequently, the condominium corporation passed a new "stair policy", stating that newly constructed stairs must be attached directly to the existing deck and be parallel to the owner's unit. The President of the condominium corporation said that the new policy "was intended to ensure high-quality construction standards, consistency with other stairways in the complex and overall aesthetics of the condominium complex". The owner's stairway proposal was not completely consistent with the new stair policy.

The Court said that the new stair policy did not apply to this owner. The Court considered the owner's design to be reasonably consistent with the other existing stairs, even though it might not be in strict compliance with the new policy. The Court accordingly held that the condominium corporation had unreasonably refused its consent, in this particular case, for purposes of Section 33(e) of the *Condominium Property Act.* The owner was authorized to proceed with his stairway proposal.