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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: : B.C. CASES CONFIRM OWNER'S RESPONSIBILITY FOR CORPORATION'S INSURANCE DEDUCTIBLE EVEN IN THE ABSENCE OF NEGLIGENCE.

B.C. CASES

Strata Plan KA 1019 v. Keiran (British Columbia Supreme Court) (May 30, 2007)

Lower Court decision (respecting responsibility for deductible on Strata Corporation's insurance policy) upheld on appeal

The lower Court had decided that a Strata lot owner was responsible for damage falling within the deductible on the corporation's policy even in the absence of negligence. [See *Condo Cases Across Canada* – Part 16 – November, 2006].

On appeal, the decision was upheld.

Mari v. Strata Plan LMS 2835 (British Columbia Supreme Court) (May 30, 2007)

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

Water damage resulted from a faulty water level switch in the washer of the owner's unit. The Strata Corporation sought to recover the amount of $5,000.00 from the owner. This amount was the deductible payable by the Strata Corporation on its property insurance policy. [The balance of the repair was covered by the corporation's insurance.] The Strata Corporation was successful in Small Claims Court.

The Strata Corporation had passed a by-law respecting responsibility for the deductible. Under the terms of the by-law, the owners were obligated to pay the deductible whether or not there had been negligence on their part. The question was whether or not the by-law was consistent with Section 158 of the *Strata Property Act* which states that the Strata Corporation may sue an owner to recover the deductible portion of an insurance claim "if the owner is responsible for the loss or damage that gave rise to the claim".

The dispute originally went to Small Claims Court. The Small Claims Court found that the corporation's by-law was consistent with Section 158 of the *Act* in that owners could be "responsible" even though there had been no negligence or fault on their part.

On appeal, the Small Claim's Court decision was upheld. The Appeal Court said:

"I am satisfied that the legislation is clear and that no finding of negligence is required. The legislature used the term "responsible for" in Section 158(2) rather than terms such as "legally liable, liable, negligent". The choice of the term "responsible" provides the owners with the opportunity to allocate to a particular owner the costs of an insurance deductible in cases where an owner was thought to be responsible for a loss."

ONTARIO CASES

Peel Condominium Corp. No. 283 v. Genik (Ontario Superior Court) (June 27, 2007)

Owner ordered to remove satellite dish

The respondent owner had installed a satellite dish without consent of the Board. The Court found that the satellite dish contravened Section 98 of the *Condominium Act, 1998* and accordingly ordered that the satellite dish be removed. The Court also found that the satellite dish violated the corporation's Declaration and Rules.

The Court added the following: "This is not a situation in which mediation or arbitration is required. These are circumstances in which the evidence establishes a clear violation of the *Act*, the *Declaration and the Rules*."

The owner's primary argument was that a meeting of the condominium corporation (presumably to discuss satellite dishes) was to be held in the near future – so that consideration of removal of her satellite dish should be delayed until after the meeting. The Court said that this is "legally incorrect". The Court said: "There is nothing that can be done at any meeting of the condominium corporation that can change the fact (that the satellite dish was installed in violation of Section 98 of the *Act*), and such considerations are irrelevant."

Joseph Mikhail v. Essex Condominium Corp. No. 47 (Ontario Superior Court) (April 16, 2007)

Exclusive-use rights can't be transferred without an amendment to the Declaration

The applicant, Joseph Mikhail, was the President of the company that developed Essex Condominium Corporation No. 47. Under the terms of the Declaration (prepared and registered under the direction of Mr. Mikhail), 25 exclusive-use parking spaces were allocated to Unit 6, Level 3. When Unit 6, Level 3 was sold to a purchaser, the purchaser signed a document authorizing Mr. Mikhail "to take all necessary steps to remove (24 of the exclusive-use parking spaces) from the appurtenant common interest of Unit 6, Level 3".

Mr. Mikhail then applied to Court for an Order transferring control of the 24 parking spaces to him (in order to allow him to grant those parking spaces to other purchasers).

The Court dismissed the Application. The Court said that any change to the exclusive-use rights would require an Amendment to the Declaration, with the consent of the owners of 90% of the units, in accordance with Section 107 of the *Condominium Act, 1998*. There was no other basis upon which the exclusive use rights could be "transferred".

[Editorial Note: I note that the Court did not consider the possibility of an amendment to the Declaration by Court Order, pursuant to Section 109 of the Act.]

York Condominium Corp. No. 42 v. Hashmi (Ontario Superior Court) (May 29, 2007)

In Ontario, any borrowing requires a by-law

An Administrator had been appointed under Section 131 of the *Condominium Act, 1998*, to manage certain matters on behalf of the condominium corporation. This included arranging for certain required repairs. The Administrator wished to raise the necessary funds for the repairs by way of borrowing. However, a by-law to authorize the borrowing had not been confirmed by the owners. The administrator sought a declaration that no by-law was required. The Court held that the condominium corporation did not have the power to borrow in the absence of a borrowing by-law. The Court listed the following principles:

1. Any borrowing requires authorization in the form of a borrowing by-law.

2. Condominium corporations may borrow the amount necessary to fund expenditures included in the current year's budget provided this has been authorized by a general borrowing by-law.

3. A specific by-law is required if the purpose of the proposed loan is to fund expenditures not included in the current year's budget.

This was the Court's interpretation of Sections 56(1)(e) and 56(3) of the *Condominium of Act, 1998.*

The Administrator had also argued that the Court had the power under Sub-section 131(4) of the Act to dispense with any such requirements for a by-law. The Court said: "I am sceptical that this provision provides the Court with such authority ….to direct a condominium corporation to take an act that it does not otherwise have the power to take". The Court went on to say that, even if the Court did have this power under Sub-section 131(4), the Court would not be prepared to exercise such discretion in this case. The Court said that borrowing clearly requires a by-law, approved by the unit owners, and "there is no basis for the Administrator's position that the scheme of the Act contemplates that the financial health of a condominium corporation is paramount and, where necessary, therefore, democracy shall succumb to professional administration".

Wentworth Condominium No. 12 v. Wentworth Condominium No. 59 (Ontario Superior Court) (July 6, 2007)

Storm sewers must be maintained and repaired by the Condominium Corporation served by the sewers

The storm waters of Wentworth Condominium Corporation No. 59 travel through a storm sewer system located on the land of Wentworth Condominium Corporation No. 12. There is a registered easement for this purpose. The Court was asked to decide who was responsible to maintain and repair the particular storm water system. The Court said that this obligation rested with Wentworth Condominium Corporation No. 59, the "beneficiary" of the storm sewer system.

The Court added that these "positive obligations" fell within one of the exceptions to the general rule that positive covenants do not "run with the land".

Baliwalla v. York Condominium Corp. No. 438 (Ontario Superior Court) (June 22, 2007)

Small Claims Court decision overturned

The Small Claims Court had ordered the condominium corporation to repay to the plaintiff owner the "excessive" portion of a special assessment. [See Condo Cases Across Canada – Parts 16, November, 2006]. On appeal, the decision of the Small Claims Court was reversed and the condominium corporation was awarded costs.

The Appeal Court said: "The Baliwallas were asking for a refund of the amount not used in the assessment for the major repairs. They had no right to do so, as subsection 84(2) makes it clear that any surplus, which includes the receipts in question, shall be applied either against future common expenses or paid into the Reserve Fund. The Board's authorization to have the surplus funds paid into the Reserve Fund prior to its fiscal year-end was reasonable in the circumstances of the case before it."

ALBERTA CASES

Maverick Equities Inc. v. Condominium Plan No. 942 2336 (Alberta Court of Queen's Bench) (May 15, 2007)

Corporation's Rules not valid

The condominium corporation had purported to enact Rules and Regulations by a simple majority vote at an annual general meeting. The Court held that the Rules and Regulations were not valid because Rules and Regulations could only be enacted or amended by by-law, which requires a special resolution (and then registration of the by-law).

OTHER B.C. CASES

Oldaker v. Strata Plan VR 1008 (British Columbia Supreme Court) (May 11, 2007)

Strata Corporation generally fulfilled its repair and maintenance obligations

One of the Strata owners sought a declaration that the respondent Strata Corporation was in breach of its duty to repair and maintain the common property.

The Court said that the Strata Corporation had generally fulfilled its obligations. The Court said that the corporation's repair and maintenance obligations are not strict duties. Rather, the corporation's obligation is to make reasonable efforts to perform its duties. The Court said that the corporation's duties are "tempered by reasonableness". The Court said: "Every Strata Corporation faced with problems of water ingress must rely upon and be guided by advice received from professionals. In this case, competent professionals were hired, albeit by the Administrator, and their recommendations were followed."

The Court did say, however, that the Strata Corporation had failed to meet its obligations in one respect. In particular, the Court said that the Strata Corporation should have obtained an expert assessment of the building envelope at an earlier date.

Strata Plan LMS 2940 v. Quick as A Wink Courier Service Ltd. (British Columbia Supreme Court) (June 29, 2007)

Strata Corporation entitled to extension of limitation period

The Strata Corporation had started a Court action one day after expiry of the applicable two-year limitation period. The delay was necessary in order for the Strata Corporation to fulfill the statutory requirement for a 3/4 vote to authorize the commencement of the action.

The Court granted an extension of the limitation period. The Court said that, under Section 6(4) of the *Limitation Act*, the limitation period does not begin to run until the Strata Corporation has a reasonable time to obtain the requisite 3/4 vote authorizing the action. The Court said: "What is a reasonable period of time will depend on all of the circumstances, including the number of owners, their proximity and their past practice of waiving notice to meetings. In the present case, I need not determine what would constitute a reasonable period of time because there is no doubt that it would be at least one day".