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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:

HAVE THE COURTS IN ALBERTA CHANGED THEIR POSITION RESPECTING RESPONSIBILITY FOR THE DEDUCTIBLE IN THE CASE OF AN INSURED EVENT UNDER A CONDOMINIUM CORPORATION'S PROPERTY INSURANCE POLICY?

ALBERTA CASE

Shivji v. Condominium Plan No. 012 2336 (Alberta Court of Queen's Bench) (September 20, 2007)

Condominium Corporation responsible for deductible

The owner's unit was damaged by water escaping from a burst pipe. The pipe burst because the thermostat for the unit had been set to zero by the tenant. The total damage was over $23,000, but this was below the $25,000 deductible for water damage on the condominium corporation's property insurance policy.

The Court said that the condominium corporation was responsible for the deductible loss because:

- The condominium corporation was obligated to place and maintain insurance on the units (other than improvements made to the units by the owners) against the risk of loss resulting from various perils, including water escape.
- This conclusion flows from Sections 27 and 47 of the *Condominium Property Act* and Section 61 of the *Condominium Property Act Regulation.*
- The condominium corporation accordingly covenanted to place and maintain such insurance on behalf of the owners. The corporation then made an economic decision to obtain insurance with a water damage deductible of $25,000, but this did not alter the corporation's insurance covenant.

[Editorial Notes:

a) I understand that this decision may be subject to appeal.

b) Even if there were a covenant to insure, this would surely have to be subject to a reasonable deductible. It seems to me that all parties would have to understand that the reasonable deductible would constitute "uninsured loss", falling outside any covenant to insure.

c) In this case, the by-laws of the condominium corporation did not render the owner and/or tenant responsible for the deductible. The question remains: Would such a by-law be upheld?

d) The Court does not appear to have considered the following question: Even if there is such a covenant to insure as between the condominium corporation and the owners, does this prevent the condominium corporation from seeking to recover the deductible from the tenants?]

OTHER ALBERTA CASE

Langager v. Condominium Plan No. 762 1302 (Alberta Court of Queen's Bench) (August 2, 2007)

Condominium Board had not acted unfairly in negotiations respecting extended deck

One of the penthouse units in this condominium included a roof-top patio. The roof-top patio had been extended by a previous owner of the unit (with permission of the Board). When the current owner, Langager, purchased the unit, she mistakenly assumed that she had acquired a permanent right to the entire extended deck. In fact, according to the Court, she had no more than a "revocable

license" to use the extended deck area.

Having discovered this legal limitation on her right to the extended deck area, the owner entered into negotiations with the condominium corporation with a view to coming to an agreement respecting her continued use of the entire extended deck area. The parties were not able to reach an agreement. Ms. Langager claimed that the Board's negotiations were oppressive (ie. unfairly prejudicial, or without fair regard, to her interests) because the Board had insisted that the agreement include an indemnification provision whereby Ms. Langager would be responsible to indemnify the condominium corporation against any expenses related to the extended deck area **as well as the original exclusive-use patio area**. Ms. Langager asserted that the indemnification provision should not apply to the original exclusive-use patio area and that this would be oppressive to her because no other owner in the condominium had similar obligations relating to their exclusive-use patio areas.

The Court dismissed Ms. Langager's claim. The Court said that there had been no oppression. The Court said that the Board's negotiations were reasonable. In all of the negotiations, it was clear that Ms. Langager's responsibilities would relate only to the extended deck area. If the suggested indemnification clause contained words which might be capable of another interpretation, Ms. Langager "merely had to point out to the Board the need for a small clarification of the wording in the indemnity clause and she did not do so. Instead she made significant changes to the agreement and watered down the indemnity clause to something almost unrecognizable."

The Court concluded that the failed negotiations were not the result of any oppression on the part of the Board.

BC CASES

McMillan v. Canada Mortgage and Housing Corporation (British Columbia) (October 1, 2007)

No basis for claim against CMHC (for a "leaky" condo)

The plaintiffs owned units in a condominium that had experienced problems with water leaks. They asserted a claim against CMHC on the following grounds: CMHC was aware of the design and construction errors that could lead to these sorts of leakage problems, and had a duty to prospective purchasers to take reasonable steps to ensure that their buildings were designed and constructed in a manner that would avoid such problems.

The Court dismissed the claim. The Court said that "the statutes under which (CMHC) exists and operates give it no regulatory responsibility with respect to the construction of housing in British Columbia. There is nothing in either the *CMHC Act* or the *Housing Act* which creates a duty of care on the CMHC to individual home owners."

Irene Rose Petersen v. Proline Management Ltd. (Supreme Court of British Columbia) (June 5, 2007)

Injury to strata lot owner

The Plaintiff, a strata lot owner, was injured when she fell over a 26-inch wall at the edge of the patio outside her condominium. On the other side of the wall, there was a drop of some 13 feet to a concrete stairwell, and the Plaintiff suffered serious injuries when she fell onto that stairwell. The Plaintiff had previously brought this unsafe condition to the attention of the strata corporation and its manager. [They were responsible for the maintenance and safety of the unsafe wall and railing.] However, the strata corporation and the manager failed to address the unsafe condition (the low wall) with reasonable haste.

The Court said that the Plaintiff was 50% responsible for her injuries because she was significantly impaired, due to alcohol, at the time of the fall – and she was well aware of the risks associated with the low wall.

In any event, the limitation period for asserting the claim had expired. There was no breach of fiduciary duty (which would have been subject to a longer limitation period). The claim was therefore out of time.

NOVA SCOTIA CASES

Lawlor v. Currie (Nova Scotia Small Claims Court) (September 26, 2007)

Breach of warranty claim succeeds

The purchaser of a condominium unit sued the vendor for breach of warranty flowing from statements contained in the *Agreement of Purchase and Sale* and the accompanying "property condition disclosure statement". The Court was satisfied that the agreement and accompanying disclosure statement effectively warranted that the property was in "sound" condition, and that no special assessments would be forthcoming.

After completion of the purchase, the condominium corporation levied a special assessment for window and siding work. The purchaser's share was just under $5,000. The Court awarded the purchaser judgement against the vendor (for the purchaser's share of the special assessment). In doing so, the Court also dealt with the following issues:

- Although the estoppel certificate issued by the condominium corporation referred to upcoming windows and siding work, the Court said that "a review of that document by the average reader would lead to a reasonable conclusion that nothing imminent was contemplated".
- The vendor asserted that any damages claim should be offset or reduced by the fact that the property would benefit from the betterment of the new siding and windows. In other words, the vendor argued that the purchaser, by virtue of the special assessment, was receiving an enhanced property. The Court rejected this argument. The Court said:

"Here, I do not think the evidence establishes that there is an enhanced value to the condominium unit because of the payment of the special assessment. I accept that theoretically the unit would have some intrinsically greater value as a result of new windows and siding as part of the common elements. However, what is unknown is whether there are other parts of the common elements which will have to be substantially repaired or replaced over the next few years and thus potentially attract further special assessments. It would be speculation for me to

try to engage in that kind of analysis. I would think to establish that there was an enhanced value would require expert evidence dealing with the reserve fund study and condition of the common elements. Unlike a case with a single dwelling, stand-alone house, there are simply too many variables in this situation to conclude that a deduction for a betterment is appropriate."

[Editorial note: I note that the condominium corporation was not made a party to the claim. If the estoppel certificate in fact did not properly disclose the risk of a special assessment, it seems to me that the condominium corporation would be a logical defendant. However, I'm not sure that I agree with the Court's view that the estoppel certificate did not provide such disclosure in this case.]

Browning v. Halifax Condominium Corporation No. 6 (Nova Scotia Small Claims Court) (September 10, 2007)

Condominium Corporation not responsible for damage to unit

Damage was caused to a unit in the condominium, as a result of water penetration over many years. The condominium corporation had been aware of water penetration problems in various locations throughout the condominium, and was dealing with each of those problems on an individual basis, as permitted by the corporation's budgeting constraints. The condominium corporation had not investigated or developed a building-wide program to address all possible water penetration concerns. Instead, the corporation had "worked within the confines of its budget and tried to establish reasonable priorities". The corporation was not aware of the specific water penetration problems affecting the unit in question, until the resulting damage had been uncovered.

The Court said that the governing documents rendered the unit owner responsible for repairs to the unit "after damage", unless the repairs were "necessitated by the negligence of the corporation". The corporation was not strictly liable to ensure that the common elements were operating effectively. The corporation's obligation was to "respond reasonably to problems as they arise", and "be alive to future problems in order to avoid preventable damage". The condominium corporation had met these obligations in this case. There was no negligence, and therefore no liability, on the part of the condominium corporation. The Court said: "there is no basis to say that the panic button ought to have been pushed and more urgent and expensive repairs undertaken."

ONTARIO CASES

Darby et al v. Lorchrist Properties Ltd. and Waterloo Standard Condominium Corporation No. 424 (Ontario Superior Court of Justice) (July 25, 2007)

Court grants appointment of an inspector and administrator

Owners of units in the condominium made Application for the appointment of an inspector and administrator. This requested order was granted. The Court's reasons for granting the order included the following:

- Representatives of the builder, Lorchrist, remained on the Board and retained control of the condominium corporation. The builder had not arranged for election of additional directors as required by the *Condominium Act, 1998*.
- There were numerous, very serious building defects. Furthermore, there was an immediate threat that owners would be required to vacate their units as a result of some of the defects.
- The condominium corporation had levied special assessments against all owners, in order to cover costs which were properly the responsibility of the builder.
- There was no evidence of a bank account for a reserve fund.
- There also appeared to be other discrepancies in the financial records of the condominium corporation.

Seawright v. Municipal Property Assessment Corporation, Region No. 15 (Ontario Assessments Review Board) (August 3, 2007)

Home office not separately assessed as commercial property for realty tax purposes

The question in this case was whether or not home office space within a residence should be treated as commercial space or residential space for purposes of realty assessments (and resulting realty taxes).

The Ontario Assessment Review Board held that the home office space is a "use for residential purposes" as envisioned under the *Assessment Act.* The Board said:

"The Board is persuaded by the complainant's argument that the 'home office' is a use for residential purposes on the basis that the 'home office' space is used solely for the benefit of residents of the house; that no revenue producing activity takes place in the space; that non-resident employees, clients, deliveries and sales people are discouraged from coming to the space; and finally, that the 'home office' space has no separate entrance, signage or visitor parking."

[Editorial note: I believe that this decision may be of interest to many condominium owners, because many residential condominiums contain such "home offices". Quite apart from the realty assessment and taxation issues, questions may also be raised about whether or not such a "home office" is permitted by the governing documents of the condominium. Many zoning by-laws permit "home occupations" in residential zones. In order to qualify as a "home occupation", a home business must meet certain strict criteria. If those criteria are met, there may be a good argument that the home business or "home office" is part and parcel of the residential use or, for example, is part and parcel of the "single family dwelling" (and therefore does not contravene any prohibition of commercial uses which may be contained in the governing documents of the condominium).

This decision illustrates similar thinking for assessment purposes.]

Walia Properties Ltd. v. York Condominium Corporation No. 478 (Ontario Superior Court of Justice) (August 7, 2007)

Removal of commercial unit owners from the Board "unfairly prejudicial"

The condominium contains 60 residential units and 30 commercial units. The own-

ers of the commercial units are required to contribute to the common expenses at a higher level. The commercial owners complained that they were paying an unfair proportion of the common expenses. They also complained that they were effectively "ousted" from the condominium's Board, with the result that they had no right to participate in the decision-making processes of the condominium.

The commercial owners made application for oppression remedies under Section 135 of the *Condominium Act, 1998.*

The Court declined to grant any relief with respect to the common expense contributions. The Court said that, even if the contributions were unfair, there was no oppressive or prejudicial conduct in regard to the common expense contributions which are set out in the Declaration.

The Court was, however, prepared to grant relief in relation to the removal of the commercial owners from the Board.

The original by-laws of the corporation stated that two of the directors were to be elected by the residential unit owners, two of the directors were to be elected by the commercial unit owners, and one director was to be elected by all unit owners. The by-laws also stated that "the vote of each member or mortgagee shall be equal to four votes per residential unit and seven votes for commercial unit". The purpose of these provisions was to ensure that the commercial owners had an equal say in the management of the corporation.

However, the *Condominium Act* clearly limits all voting to "one vote per unit". In reliance upon this and using the majority position of the residential unit owners, the residential unit owners took steps to remove the two commercial unit owners from the Board. The Court said that this conduct was unfairly prejudicial to, and unfairly disregarded, the interests of the commercial unit owners.

The Court said that the best way to balance the interests of the commercial and residential unit owners in terms of representation on the Board was to enforce the following provisions of the original by-law:

- Two directors would be elected by the residential unit owners;
- Two directors would be elected by the commercial unit owners;
- A fifth director would be elected by all unit owners.

The Court said that "the enforcement of this by-law would likely restore the commercial owners' participation on the Board and thereby remove the oppression they have suffered. In my view, this is the least intrusive and most appropriate remedy in the circumstances of this case."

[Editorial note: I agree that representation on the Board can be guaranteed to a minority ownership group, either in the by-laws or in the declaration. However, I also ask the following questions: Is it logical to assume that the interests of the residential unit owners are necessarily divergent from the interests of the commercial unit owners? Does it necessarily follow that the residential unit owners, by pursuing their interests, will cause harm or oppression to the commercial unit owners? Isn't it true that many condominiums contain different sub-sets of owners?]

London Condominium Corp. No. 13 v. Awaraji (Supreme Court of Canada) (August 23, 2007)

Owners ordered to remove satellite dishes – Application for leave to appeal to the Supreme Court of Canada dismissed.

The trial judge had ordered the removal of the residents' satellite dishes. The residents appealed to the Ontario Court of Appeal, and the Appeal was dismissed. (The Court of Appeal upheld the decision of the trial judge.) [See *Condo Cases Across Canada* – Part 18 – May 2007]

The residents then brought application for leave to appeal to the Supreme Court of Canada. This application was also dismissed.

MANITOBA CASE

Richard E. Olschewski v. 520 Portage Avenue Ltd. (Court of Queen's Bench of Manitoba) (September 6, 2007)

Purchaser of condominium unit entitled to abatement of purchase price, because actual square footage smaller than advertised

When the plaintiff agreed to purchase his condominium unit, the unit was shown as having 1,824 square feet. However, it appeared that this square footage was based on the following assumptions:

- The balcony should be included as part of the unit;
- The open space on the second level of the unit should be included in the square footage calculation; and
- The boundaries of the unit should be treated as the centre line of the dividing stud walls between units and the outer face of the exterior wall.

The Court said that the actual square footage of the unit was approximately 1,500 square feet, based upon the following:

- The balcony should not be treated as part of the unit (because it was not part of the unit as shown on the registered condominium plan).
- The open space on the second level should not be treated as part of the unit square footage.
- The unit boundaries (for purpose of calculating the square footage of the unit) should be the unit boundaries shown on the registered condominium plan (and described in the condominium declaration).

As a result, the purchaser was entitled to an appropriate abatement or reduction of the purchase price.

QUEBEC CASE

Syndicat des copropriétaires condominium Le Commandeur v. Gosselin, [2007] J.Q. no. 10924

Owner ordered to remove hardwood flooring

The owner had installed hardwood flooring in contravention of a rule of the Syndicate. The owner challenged the validity of the rule, without success. The Court ordered removal of the hardwood flooring.

Hardwood flooring installed prior to the creation of the Rule was allowed to remain.