Issue No. 9

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: CONDOMINIUM CORPORATIONS RECOVERING COSTS

We are seeing more and more court decisions which confirm the rights of condominium corporations to recover costs, beyond the normal limits (for cost recovery) in Small Claims Court.

Case from Ontario

Chris Kidney v. Carleton Condominium Corporation No. 571 and 581 et al (Small Claims Court) (January 25, 2005)

Condominium Corporation entitled to recover all reasonable costs related to arrears of common expenses

The unit owner fell into arrears of common expenses. Notice of lien was sent to the owner. The owner then paid the arrears of condominium fees, but refused to pay the legal costs incurred by the condominium corporation. The corporation accordingly proceeded with registration of a lien, for recovery of the legal costs. The owner brought a claim in Small Claims Court, seeking recovery of all amounts under the lien.

The court found that the lien was properly registered, and that the owner was responsible for 100% of the condominium corporation's costs, including 100% of the corporation's costs related to defence of the claim in Small Claims Court. The court said that the owner was bound by condominium law to pay 100% of the costs and that the limitations respecting recovery of costs contained in the Small Claims Court rules and the *Courts of Justice Act* did not apply.

Eva Osvath v. Carleton Condominium Corporation No.237 et al (Small Claims Court) (January 11, 2005)

Condominium Corporation entitled to costs beyond limits in Small Claims Court rules

An owner in the condominium asserted numerous claims against the corporation related to alleged failures on the part of the corporation to fulfill its obligations. The claims also included claims for discrimination and harassment.

The court dismissed all of the claims. The court concluded that the litigation was "completely and utterly without merit". The court noted that "the defence of an unfounded law suit by an owner in a condominium against the Corporation creates a financial burden which must be borne by all other owners in the development". The court awarded the condominium corporation a counsel fee of $1,500.00 (an amount beyond the normal limits in Small Claims Court) in addition to all necessary disbursements. This award was made "with an attempt to obtain partial indemnification to the condominium corporation for its counsel's costs which will undoubtedly be passed on to all owners".

Cases from British Columbia

Drummond v. Strata Plan NW2654 (November 1, 2004)

"Adults only" Condominiums are legal in B.C.

The Strata Corporation's by-laws prohibited persons under 19 years of age from residing in a Strata lot for longer than 30 days. The court said that this by-law was valid and enforceable. The court's reasons included the following:

- B.C.'s *Human Rights Code* does not apply to these issues.
- Age and family status are prohibited grounds of discrimination in relation to tenants, but are not prohibited grounds of discrimination in relation to Strata owners' rights of occupancy.
- The age restriction by-law was a legitimate and justifiable restriction and its enforcement was not significantly oppressive.

Case from Ontario

Therefore, the court ordered that a person under 19 years of age could not occupy the Strata Lot.

However, the court exercised its discretion under the *Law and Equity Act* to reduce the fines which had been imposed by the Strata Corporation as a result of the breach.

Ernest Twin Ventures Ltd. (PP) V. Strata Plan LMS 3259 (B.C. Court of Appeal) (November 29, 2004)

Decision respecting common expenses upheld on appeal

This was an appeal from the Supreme Court decision rendered November 24, 2003. (see *Condo Cases Across Canada* – Issue No. 5).

The Supreme Court decision was upheld on appeal. The Court of Appeal's reasoning included the following:

• Regulation 6.4 (2) under the *Strata Property Act* provides that where an item of operating expense relates to or benefits one type of Strata lot exclusively, and that type is identified in the by-laws, the contribution for that item of expense is to be shared by the owners of that one type of strata lot alone. However, this only allows for a type of strata lot to be excluded from the contribution where the expense does not relate at all to that type of Strata Lot and provides no benefit whatsoever to that type of Strata Lot.

Cases from British Columbia

• The court also found that the approved budget was not significantly unfair.

Poole v. Strata Plan VR 2506 (December 6, 2004)

Strata owner permitted to use entire roof of Strata Corporation building

The owner and the Strata Corporation had assumed that the owner was entitled to the exclusive use of the entire roof of the building. The owner had accordingly treated the entire roof area as being for the owner's exclusive use. However, it was recently discovered that a portion of the roof was not legally contained within the owner's exclusive use area.

Given the history, the equities favoured an arrangement under which the owner would have non-permanent right to use the additional area. The Court accordingly ordered that the Strata Corporation grant to the owner a 30-year lease of the non-designated area, for which the owner would pay $1,200.00 per year. At the same time, the owner was ordered to remove sufficient improvements (from the roof area) so as to bring the load on the roof to within safe levels.

Strata Plan VR19 v. Collins (December 31, 2004)

Enforcement of By-law prohibiting hard flooring

According to s. 135(1) of the *Strata Property Act*, the Strata Corporation must not

a) impose a fine against a person,

b) require a person to pay the cost of remedying a contravention, or

c) deny a person the use of a recreational facility,

for a contravention of a by-law or rule unless the Strata Corporation has

d) received a complaint about the contravention,

e) given the owner or tenant the particulars of the complaint in writing, and a reasonable opportunity to answer the complaint, including a hearing if requested by the owner or tenant, and

f) if the person is a tenant, given notice of the complaint to the person's landlord.

The Strata Corporation had passed a by-law stating that all floors of Strata lots on the second and third floors must have wall-to-wall carpeting, with the exceptions of kitchens and bathrooms and the first five feet of an entry hallway.

The Court confirmed that this by-law is valid and enforceable. The Court said that "it is within the rights of the Strata Corporation to pass and enforce any by-law that it sees fit as long as that by-law does not contravene the *Act*, the *Human Rights Code*, or any other enactment or law."

One of the owners had installed laminate flooring, in contravention of the by-law. There had been no resulting complaints about noise. Even so, the court said:

"However, if s. 135(1)(d) refers to a complaint about the contravention itself, then the Strata council can be taken to have made the complaint themselves and thus the Strata Corporation's actions would be in accordance with s. 135(1) (d)."

The Court accordingly ordered that the owner remove the laminate flooring at the owner's expense. However, the Strata Corporation had not complied with s. 135 (1)(e) of the *Act* (giving the owner an opportunity for a hearing). This did not prevent the Strata Corporation from remedying the by-law contravention at the owner's expense, but it did prevent the Strata Corporation from requiring the owner to pay the costs of the enforcement proceeding. Therefore, the Strata Corporation was required to bare its own costs of the proceeding.

Cases from Alberta

Condominium Plan 9421549 v. Main Street Developments Ltd. (December 31, 2004)

A helpful decision respecting limitation periods

Alberta's new *Limitations Act* came into force on March 1, 1999. The act includes a general limitation period of two years which runs from the date on which the claimant first knew, or in the circumstances, ought to have known:

a) That the injury for which the claimant seeks a remedial order had occurred;

b) That the injury was attributable to conduct of the defendant; and

c) That the injury, assuming liability on the part of the defendant, warrants bringing a proceeding."

In this case, the court conducted an analysis of these tests in seeking to determine whether or not the limitation period had expired. In the course of doing so, the court made the following statements:

- "I agree with the Plaintiff that the search for defendants is suspended until the plaintiff knows or ought to know that the injury 'warrants bringing a proceeding' and that this assessment involves a consideration of the seriousness of the injury."

- "It is not every nick, bump, bruise, failing or deficiency that warrants action. Thankfully, we Canadians are still reasonably tolerant and non litigious. The question of whether an injury warrants proceedings is not strictly an issue of fault, nor even potential economic gain. What warrants proceedings embraces a consideration of the extent of the injury in comparison to the economics of prospective action. This assessment involves a blended objective/subjective analysis."

- "In my view, it would have been reasonable to consider the following matters: the extent of the damage, the cost of remedying the damage, the likelihood of success, the cost of proceedings, the likely time necessary to achieve success, the time to be personally expended by the Board's members in pursuing action, the willingness of the individual owners to finance the litigation, the complexity of the potential litigation, whether the entire costs of the proceedings would have to be paid up front, and whether all or a portion of the litigation could be undertaken by contingency arrangement. No doubt, there are other matters which it might have been reasonable to consider in this case. However, the foregoing is representative of the kind of issues that a cost benefit analysis might reasonably encompass in this Plaintiff's circumstances."

*[*Editorial Note: In my view, this concept – determining that a proceeding is warranted – is a key ingredient in the discovery of a claim, for purposes of any limitation period that is triggered by the discoverability principle. This decision also lists some helpful factors for determining when a proceeding is warranted.]*

Other Cases from Ontario

Gregory John Bell v. Carleton Condominium Corporation No. 70 (Small Claims Court) (December 16, 2004)

Court deals with owner's right to review records

The plaintiff, an owner in the condominium, had a number of complaints about the condominium corporation's handling of the owner's request for access to records.

At the initial hearing, the court ruled that an owner cannot be held responsible for costs incurred by the condominium corporation in arranging for access to the records. An owner can only be held responsible for costs respecting the copying of records.

In a second hearing, the court confirmed the following:

- Before an owner reviews the records, it is appropriate for the condominium corporation to edit the records by deleting items (listed in section 55(4) of the *Condominium Act*) which the owner is not entitled to see.

- The Small Claims Court does not have jurisdiction to grant relief under section 130 of the *Condominium Act* (the appointment of an inspector) or section 135 of the *Condominium Act* (the oppression remedy). Applications under those sections must be made to a justice of the Superior Court of Justice.

Cases from Québec

Dufour c. Syndicat des copropriétaires du Domaine de l'avenir, Phase II (25 novembre 2004)

Syndicat liable for owner's mistake (when owner performing work for Syndicat)

The Syndicat was required to complete work to all of the balconies in the complex. At two meetings of the owners, the work was approved by all owners except the Plaintiff. The Plaintiff refused to pay his share of the special assessment for the work, and sued the Syndicat for damages (including recovery of his portion of the reserve fund related to this work). The Plaintiff argued that work to the balconies could have been avoided if adequate maintenance had been completed. The Plaintiff also argued that, by completing the work to the balconies, the Syndicat changed the nature/use of the balconies. The Syndicat counterclaimed for payment of the special assessment.

The Court found that there really was no significant visual change as a result of the repair, and that there was no foundation for the Plaintiff's argument concerning a change to the nature/use of the balconies. After significant analysis of the declaration and the *Quebec Civil Code*, the Court held that the Syndicat was responsible for the work to the balconies. Furthermore, the Court found that there was no particular prejudice to this owner's exclusive balcony as a result of this work, the vote of the owners was proper, there was no decrease in property value, and the owner was not entitled to recover his "share" of the reserve fund related to these repairs. The Plaintiff's claim was dismissed, and the Plaintiff was ordered to pay the full amount of the special assessment to the Syndicat.

Rompré c. Syndicat des copropriétaires du 469 boulevard Iberville, Repentigny (16 novembre 2004)

Owner ordered to pay special assessment

The Syndicat was held to be responsible for damages incurred by an owner, Mrs. Rompré, as a result of Mrs. Rompré tripping over a watering hose placed on the property by one of the other owners. The Syndicat was ordered to pay to Mrs. Rompré $28,262.71.

One of the essential questions in this case was whether the Syndicat was liable, in negligence, for actions of owners, when the owners in question were helping out the superintendent, who was on sick leave. The Court held that the owners who were completing work "on behalf of the superintendent" could be considered agents of the Syndicat. Therefore, the Syndicat was answerable for Mrs. Rompré's damages.